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Chapter 2
Sources of the Law

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II. Learning Objectives

1. List the objectives of the law.
2. Clarify the duality of the law.
3. Outline the content of the U.S. Constitution.
4. Explain several central constitutional principles and powers.
5. Explain the role of statutory law in the legal system.
6. Defend the need to set up a system of uniform laws.
7. State the role of common law in the legal system.
8. Describe how the principle of *stare decisis* provides stability within the law.
9. Differentiate between statutory interpretation and judicial review.
10. Account for the legislature's need to establish administrative agencies.

III. Major Concepts

2-1 The Purpose and Operation of the Law

The law consists of rules of conduct established by the government to maintain harmony, stability, and justice within a society. Ideally, the primary objectives of the law are to promote harmony, stability, and justice. In everyday life, the balance is not easy to maintain. The law or, more properly, the entire legal framework consists of a series of dualities that must be resolved somehow.

2-2 Constitutional Law

A constitution is the basic law of a nation or state. The United States Constitution provides the organization of the national government. Each state also has a constitution that determines the state's governmental structure. The body of law that forms a constitution and its interpretation is known as constitutional law.

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2-3 Statutory Law

The laws passed by a legislature are known as statutes. At the federal level, these are the laws made by Congress and signed by the president. At the state level, statutes are enacted by state legislatures. Statutes must be arranged, cataloged, and indexed for easy reference by compiling state and federal codes. Because many different statutes are passed each year by the 50 state legislatures, there are important differences in state statutory law throughout the nation. One solution to the problem of inconsistent statutory law is for the legislatures of all the states to adopt the same statutes. The National Conference of Commissioners on Uniform State Laws (NCCUSL) was founded to write these uniform laws.

2-4 Court Decisions

Courts make law through common law, the interpretation of statutes, and judicial review. Common law is the body of previously recorded legal decisions made by the courts in specific cases. Statutory interpretation is the process by which the courts analyze those aspects of a statute that are unclear or ambiguous or that were not anticipated at the time that the legislature passed the statute, and judicial review is the process by which the courts determine the constitutionality of various legislative statutes, administrative regulations, or executive actions.

2-5 Administrative Regulations

Federal administrative agencies administer statutes enacted by Congress in specific areas, such as commerce, communication, aviation, labor relations, and working conditions. Similar agencies have been designated by the states to supervise intrastate activities. These agencies create rules, regulate and supervise, and render decisions. To help prevent any conflict of interest that could arise from these overlapping responsibilities, Congress passed the federal Administrative Procedures Act. Similarly, most states have adopted a uniform law known as the Model State Administrative Procedures Act.

IV. Outline

I. The Purpose and Operation of the Law (2-1)
   A. The Law as a Balancing Act
      1. The law is often a balancing act.
      2. Generally, the objectives of order, stability and justice are kept in mind; but the law is not perfect.
   B. The Dualities within the Law
      1. Balancing is part of the law's fundamental nature.
      2. The legal system is shaped by several dualities.
         a. The spirit versus the letter of the law is an obvious duality.
         b. The written word versus its interpretation is a duality addressing ambiguity.
         c. The abstract versus the concrete involves application of a principle to a concrete issue.

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d. The uncertainty principle involves duality between the way a decision is intended and the way it is actually executed.

II. Constitutional Law (2-2)
  A. The Articles of Confederation
    1. The first constitution was known as the Articles of Confederation.
    2. The Articles of Confederation had certain weaknesses.
      a. The Congress could not impose taxes.
      b. All delegates to Congress were appointed by state legislatures.
      c. The states retained the power to issue their own currency.
  B. Reengineering the Articles
    1. Madison attempted to provide for a strong central government.
    2. The Constitution displays a general structural orientation toward insulating the leadership of the new republic from the influence of the people.
  C. The Structure of the United States Constitution
    1. The first fundamental principle supports a separation of nation powers among three distinct branches of government, the executive branch, the legislative branch, and the judicial branch.
    2. The second fundamental principle supports a system of checks and balances that allows each branch to oversee the operation of the other two branches.
    3. The articles of the Constitution establish the organization of the national government.
    4. The amendments change provisions in the original articles and add ideas that the framers did not include in the articles.
    5. Structurally, the Bill of Rights should have been part of the original Constitution, but from a political and pragmatic perspective, that was not advisable.
    6. Outside the Bill of Rights, the Constitution has been amended 17 times.
  D. State Law, Supremacy, Preemption, and Devolution
    1. Each state adopts its own constitution.
    2. Preemption is the process by which the courts decide that a federal statute must take precedence over a state statute.
    3. Devolution occurs when the courts redefine a right and shift the obligation to enforce a right from an upper-level authority to a lower one.

III. Statutory Law (2-3)
  A. Codes and Titles
    1. Codes are compilations of all the statutes of a particular state or the federal government.
    2. Codes are generally further subdivided into titles which are often then subdivided into chapters and sections.
  B. Uniform Laws
    1. Statutory law differs from state to state which can cause problems.
    2. The National Conference of Commissions on Uniform State Laws (NCCUSL) was founded to write uniform laws.
  C. The Uniform Commercial Code
    1. The UCC is the most significant development in uniform state law.
    2. The UCC is designed to govern almost all commercial transactions.
    3. It has not been uniformly adopted by all states.
  D. Cyber-Law Statutes

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1. Cyber-commerce is the term applied to all cyber-transactions.
2. The NCCUSL has created several new uniform laws in the area of e-commerce.
   a. The Uniform Computer Information Transaction Act deals with contracts that involve the sale or licensing of digital information.
   b. The Uniform Electronic Transactions Act points out principles which should be used to make certain cyber-contracts are enforceable.

IV. Court Decisions (2-4)

A. Common Law

1. The term common law comes from attempts of early English kings to establish a body of law that all courts in the kingdom would hold in common.
2. Common law is the body of previously recorded legal decisions.
3. The process of relying on previous legal decisions is called *stare decisis.*
4. The legal system of the U.S., except for Louisiana, is rooted in the common law of England.
5. Over time, English common law has been eroded in the U.S. by passing of statutes and court decisions; but parts of the common law as practiced in England still exist in the laws of the U.S.
6. Today's judges still rely on precedent which is a model law that a court can follow when facing a similar situation.
   a. One type of precedent is binding precedent.
   b. A second type of precedent is persuasive precedent.
   c. Generally, whether a precedent is binding or persuasive is determined by the court's location.

B. Statutory Interpretation

1. Court decisions may make law through the interpretation of statutes.
2. Statutory interpretation is the process by which courts analyze aspects of a statute that are unclear, ambiguous, or unanticipated when the statute was passed.
3. In interpreting a statute, the court looks, for example, at the legislative history of the statute; the old statute that the new statute replaced, if any; and binding precedent interpreting the statute.

C. Judicial Review

1. Courts may make law through judicial review.
2. Judicial review is the process of determining the constitutionality of legislative statutes, administrative regulations, or executive actions.
3. In exercising the power of judicial review, a court will compare the statute, regulation, or action with the Constitution.
4. The U.S. Constitution is the supreme law of the land; therefore, any inconsistent statute, regulation, or action is unconstitutional.
5. In exercising judicial review, the court must review binding precedent.
6. The final word on issues of constitutionality lies with the U.S. Supreme Court.

V. Administrative Regulations (2-5)

A. Administrative Agencies

1. Federal administrative agencies administer statutes enacted by Congress in specific areas.
2. States have designated agencies to supervise intrastate activities.

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3. Agencies create rules, regulate and supervise, and render decisions that have the force of law.
4. Decrees and decisions of agencies are known as administrative law.

B. Administrative Procedures Act
1. Congress passed the Administrative Procedures Act to regulate federal agencies.
2. Most states have adopted the Model State Administrative Procedures Act to regulate state agencies.
3. The Administrative Procedures Act and the Model State Administrative Procedures Act provide for notification to affected parties, hearings, and judicial review.

C. The Federal Register and the Code of Federal Regulations
1. New regulations issued by federal administrative agencies are published in the Federal Register.
2. When a rule is finalized, it appears in the Code of Federal Regulations.

D. The Legal Ecosystem
1. It is helpful to consider the legal ecosystem in terms of a complex adaptive system.
2. A complex adaptive system (CAS) is a network of interacting conditions that reinforce one another while at the same time adjust to change from agents outside and inside the system.

V. Background Information

A. Cross-Cultural Notes

1. Legal systems in many Latin American countries have been shaped by the colonial history of the region. Since gaining independence, Brazil, Mexico, Venezuela, and Argentina, for example, have each retained a strong centralized government that is molded after colonial rule. Claiming to be democratic, these governments, like their colonial predecessors, often disregard or change the law when it becomes inconvenient.

2. Unlike the United States Constitution, the British Constitution cannot be found in a single document. Rather, it is based upon a group of implicit traditions that arise from a number of diverse laws.

3. The separation of governmental powers into the legislative, executive, and judicial branches marks a key difference between the American and British legal systems. In Britain, the Prime Minister is a part of the Parliament. Should the Prime Minister lose the official support of the House of Commons, he or she must leave office. This is not true of the President. See Tony Honore. *About Law: An Introduction* (Oxford: Clarendon Press 1995), p. 31.

4. Sweden was the first country to establish the office of *ombudsman,* a nonpartisan agency appointed by the *Rikstag* (parliament) that protects people from illegal or incompetent abuses of power by government officials and agencies. The office of ombudsman initiates its own investigation and responds to citizens' complaints. It ordinarily resolves problems through a

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combination of persuasion and publicity; however, it sometimes uses its authority to press charges.

5. One of the medieval common law's most important contributions to modern times is the concept of the supremacy of law. Under common law, no ruler or government agency had the authority to overturn the decisions of the past, thus limiting their powers. Today, economics and social justice are protected by courts that look to precedent rather than solely to statutes.

B. Historical Notes

1. Only eight times in its entire history has the United States Senate exercised its authority under the Constitution and actually removed public officials from office. Those seven officials are: John Pickering, a district court judge (1804); West Humphreys, district court judge (1862); Robert Archbald, commerce court judge (1912–13); Halsted Ritter, district court judge (1936); Harry Claiborne, district court judge (1986); Alcee Hastings, district court judge (1989); Walter Nixon, Jr., district court judge (1989); and Thomas Porteous Jr., district court judge (2010).

2. Article XI of the Articles of Confederation provided for the direct admission of Canada to the confederation. Congress retained control over the admission of any other colony by requiring a super majority vote of nine states.

4. One of the medieval common law's most important contributions to modern times is the concept of the supremacy of law. Under common law, no ruler or government agency had the authority to overturn the decisions of the past, thus limiting their powers. Today, economics and social justice are protected by courts that look to precedent rather than solely to statutes.

C. State Variations

1. California's constitution has been amended over 480 times. The constitution of several states along with other state laws may be found at https://www.law.cornell.edu/statutes.html. https://www.law.cornell.edu/statutes.html.

2. Nebraska is the only state with a unicameral (one-house) legislature. An effort in Minesota advocating that the state adopt a unicameral legislature has to date been unsuccessful. The Minnesota Legislative Reference Library has information on the effort at http://www.leg.state.mn.us/lrl/issues/issues.aspx?issue=uni.

D. Quotations

1. From what has been said, it is manifest, that this provision must be of a character calculated to prevent any one interest, or combination of interests, from using the

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powers of government to aggrandize itself at the expense of the others. "This, too, can be accomplished only in one way, and that is, by such an organism of the government—and, if necessary for the purpose, of the community also,—as will, by dividing and distributing the powers of government, give to each division or interest, through its appropriate organ, either a concurrent voice in making and executing the laws, or a veto on their execution."

—John C. Calhoun. "A Disquisition on Government." In *Philosophy in America: From The Puritans to James*.

2. Our Constitution is an experiment, as all life is an experiment.

—Oliver Wendell Holmes (1841–1935), Supreme Court Justice

VI. Terms

1. The word *code* comes from the Latin *codex*, referring to the trunk of a tree. In ancient times, laws were carved into wooden tablets made from tree trunks.

VII. Related Cases

1. The Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), used previous decisions to find the constitutional right to privacy involving the right to abortions. First the Court decided a person has a right to choose whom to marry, then it ruled on a person's right to birth control, then a person's right to procreate. From this precedent, the Court found the right to privacy.

VIII. Teaching Tips and Additional Resources

1. Additional information from the U.S. Department of Health & Human Services regarding the Affordable Care Act can be found at http://www.hhs.gov/healthcare/rights/.

2. Information regarding the *Magna Carta*, referenced in the text in relation to the principles involved with the British system of government can be found on the website of the BBC at http://www.bbc.co.uk/history/british/middle_ages/magna_01.shtml.

3. For information regarding the powers of the U.S. Senate, go to its official web site at http://www.senate.gov/pagelayout/history/one_item_and_teasers/powers.htm. Click on the "origins & development" tab for further information.

4. For additional information regarding the U.S. Constitution and its background including information on the Declaration of Independence and the Bill of Rights, go

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to the site of the National Archives at http://www.archives.gov/exhibits/charters/charters.html.

5. Go to http://www.uscourts.gov/Home.aspx for detailed information regarding the federal court system.

6. Additional information regarding how laws are made can be found by clicking on the tab "the legislative process" on the web site for the U.S. House of Representatives at http://www.house.gov/content/learn/officers_and_organizations/.

7. For further information regarding the U.S. Code and the ability to search the Code, go to http://uscode.house.gov/.

8. Florida State University sponsors an administrative procedure database archive available at http://www.law.fsu.edu/library/admin/.

9. A very practical work on the U.S. Constitution is *The Constitution of the United States with the Declaration of Independence and the Articles of Confederation* by R. B. Bernstein (New York: Barnes and Noble, 2002). Another book that discusses such concepts as the separation of powers in its original form is *The Second Treatise of Government by John Locke* (Mineola, NY: Dover 2002).

10. Have students write a short paper about the advantages and disadvantages of separating federal and state statutes. Encourage students to explore topics such as the uniformity of federal law and the responsiveness of state legislation.

11. Discuss with students the political argument over activist versus strict constructionist judges. Divide the class into two groups and then ask them to prepare a debate based on the following question: Should judges follow the letter of the law or should they be free to make law from the bench?

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Answer Key-BLUCCA/14/e

PART 1 ETHICS, LAW, AND THE JUDICIAL SYSTEM

Chapter 1 Ethics, Social Responsibility, and the Law

Opening Case Questions

1. Whether the quantification of non-monetary experiences is fair to those of us who cannot afford to pay for the privilege of "being first in line" depends upon the ethical theory that the learner has adopted after reading the chapter. If the learner has adopted the market value ethics of the philosophy of neoliberalism, then, "yes," the richest among us have somehow "earned" the right to be first in line. The point of the study of market value ethics is to demonstrate the negative aspects of this philosophy (actually trend would be a better word, precisely because it reflects a loss of the traditional value of justice. If the learner has adopted social contract ethics then, "maybe" or "it depends" is probably the right answer. If a social contract favors the rich then, yes, the richest people have "earned" the right to be first in line. However, if a social contract favors justice, then, "no," the richest among us have not "earned" the right to be first in line. So, again the response is maybe" or "it depends." If the learner has adopted utilitarian ethics then, "no," allowing the richest among us to grab the first place in line will, in the long run, destroy the greatest good for the greatest number, if only because the greatest number generally reflects those among us who are not the richest. If the learner applies rational ethics then the basic principle of injustice would declare that letting certain people go first because they can "buy" their way to the front of the line is unethical.

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2. Since the right to pursue happiness promised in the Declaration of Independence does not guarantee the success of that pursuit, whether those of us who succeed should be encouraged to enjoy that success by sitting in a skybox depends upon the ethical theory that the learner has adopted after reading the chapter. If the learner has adopted the market value ethics of the philosophy of neoliberalism, then, "yes," the richest among us have somehow "earned" the right to sit in the skyboxes. If the learner has adopted social contract ethics then, "maybe" or "it depends" is probably the right answer. If a social contract favor the rich then, yes, the richest have "earned" the right to sit in those skyboxes, but if your social contract favors justice, then, "no," richest among us have not "earned" that right to sit in the skybox. If the learner applies rational ethics then the basic principle of injustice would declare that letting certain people "buy" their way into the skyboxes is unethical.
3. The Federal Communications Commission is justified in imposing an antidiscrimination rule on ISPs if we are really talking about an anti-discrimination law. However, the use of the phrase "unreasonable discrimination" in the regulation places that conclusion in doubt.
4. Both the FCC and those opposed to the FCC's anti-discrimination rule claim to support net neutrality because they are using (1) different definitions of discrimination and (2) different ethical theories to make their judgments.
5. Yes. Market morality differs significantly from every other theory that we have studied in this chapter because market value ethics uses quantification as the way to measure the difference between right and wrong. In essence then market value

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ethics has co-opted a term and a measurement technique that belongs to economics and finance and tried to turn it into a way to measure the nature of good and evil.

Questions for Review and Discussion

1. The law is a set of rules made by the government to promote stability, harmony, and justice. Morality involves the values that are the foundation for moral decision making. Ethics is a way to figure out what those values might be.

2. Positive law theory states that the law comes from social institutions. Natural law theory says that the law comes from God. Negative rights theory says that human rights are created by human beings to allow them to engage in despicable behavior with immunity.

3. Market value ethics uses quantification as the primary tool for determining value and, therefore, for determining whether an action is right or wrong.

4. Social contract theory holds that right and wrong are imposed by principles created by the social agreement.

5. The steps in applying utilitarianism are: (1) state the action to be evaluated in non-emotional and general terms; (2) determine the people affected by the action; (3) determine the good and bad consequences; (4) consider all alternatives and (5) come to a conclusion about the ethical nature of the action.

6. Rational ethics is an objective theory that says that ethical values can be determined by applying reason.

7. Many of the misunderstandings about moral decisions within the world today exist because people do not understand the dual nature of international morality. The twentieth century philosopher, Max Weber explains the problem in his essay, "Politics as

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a Vocation." In that essay, Weber argues that, often people make the error of assuming that political morality and personal morality are identical. Instead, Weber proposes a dual system of morality represented by the "ethic of ultimate ends" and the "ethic of responsibility." The "ethic of ultimate ends" must be practiced by individuals while the "ethic of responsibility" must be practiced by national leaders.

8. Corporations owe society a level of responsibility because the government has granted them certain legal advantages.

9. Our society needs law and the legal system to give it structure, harmony, predictability, and justice.

10. The law and ethics can sometimes benefit from anarchy, but only when what emerges from that period of anarchy is a system supported by legal and ethical harmony. When the forces of human energy and justice are harnessed properly such harmony may result. Energy is found in a society that manages to redirect the collective human will toward the welfare of the entire species, instead of toward individual or corporate survival measured only by monetary gain. Justice is present when all people are treated equally based on an intangible quality, like fairness, that has nothing to do with money.

Cases for Analysis

Special Directions to the Instructor: It is virtually impossible to predict the wide variety of answers that students will provide for the ethical cases outlined at the end of Chapter 1. Therefore, the instructor should not be looking for “right” and “wrong” answers in the conventional sense. Instead, the instructor should look to see that the ethical theories are applied correctly and consistently.

END CHAPTER ONE

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ANSWER KEY

Chapter 2 Sources of the Law

Opening Case Questions

1. Both the Establishment Clause and the Free Exercise Clause are inclued in the First Amendment to the Constitution. The difference between the two clauses can be explained by looking at the responsibility of and the limitations placed upon the federal government in relation to religion. The Establisment Clause prevents the federal government from making any law that creates a government-run religion, while the Free Exercise Clause forbids the government interference in the people's right to believe and practice what they want to believe and practice in relation to God provided those practices do not endanger others.

2. The Catholic paintiffs, including the Archdiocese of Washington, D.C., along with a Archbishop Carroll High School, the Catholic Charities of Washington, the Catholic University of America, and the Consortium of Catholic Academies, among others, argue that the HHS mandate limits their ability to fully practice their religious beliefs. This position places their case within the boundaries of the Feee Exercise clause.

3. The test for determining whether an institution is "religious enough" to qualify for First Amendment protection says that an institution is religious (or "religious enough," if you will) if its primary mission is to promote a particular set of religious beliefs and if it employs and aids mostly people of that denomination.

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4. The government applies the test for determining if an institution is "religious enough" to qualify for First Amendment protection. No matter which branch is entangled within the case---executive, judiciary, or legislative---the government is going to make this determination. Or to say it another, perhaps more direct way, the government establishes whether an institution is a religious institution.

5. A religious institution should ot be judged in this manner because, determining whether an isntitution is religious enough forces the government to make religious judgments and, therefore to respect (or, perhaps, at times, disrespect) an establishement of religion, which violates the Establishment Clause. So in trying to uphold the Free Exercise Clause the government violates the Establishment Clause—not a very good idea.

A QUESTION OF ETHICS

The NCCUSL and a Lesson in Ethics

Special Directions to the Instructor: It is extremely difficult (impossible?) for an instructor to predict with confidence the wide variety of answers that students will provide for the ethical question asked in the *Question of Ethics* feature in this chapter. Therefore, the instructor should not look for "right" or "wrong" answers in the conventional sense. Instead, the instructor should examine the responses provided by the learners to see if the ethical theories are applied correctly and consistently.

Questions for Review and Discussion

1. The law consists of rules of conduct established by the government to maintain harmony, stability, and justice within a society. Ideally, the two primary objectives of the law are to promote justice and harmony.

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2. In his study *Law and History*, Anthony Chase explains that the legal system is shaped by several dualities, each of which is essential to the law's success. These dualities include the balance between the spirit and the letter of the law, between legal words and their interpretation, and between abstract principles and concrete situations. This balancing act also comes into play in the application of the Uncertainty Principle to the law.

3. The articles establish the organization of the national government. The first three of the seven articles distribute the power of the government among the legislative, executive, and judicial branches. Article I establishes Congress as the legislative (statute-making) branch of the government. Article II gives the executive power to the President, and Article III gives judicial power to the Supreme Court and other courts established by Congress. Article IV explains the relationships among the states, while Article V outlines the methods for amending the Constitution. Article VI establishes the U.S. Constitution, federal laws, and treaties as the supreme law of the land. Finally, Article VII outlines how the original thirteen states would go about ratifying the new Constitution. The amendments change provisions in the original articles and add ideas that the founding fathers did not include in those articles. The amendments to the Constitution establish the rights that belong to the people, change some of the provisions in the original articles, and add ideas that the Founding Fathers did not include in those articles. Thus, the amendments are attempts to "fine-tune" the Constitution and to update its provisions to meet the demands of a changing socioeconomic structure. The U.S. Constitution has twenty-six amendments. The first ten make up the Bill of Rights and were added soon after the ratification of the Constitution by the original thirteen states. Other

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amendments that secure the rights of the people include the Thirteenth, which abolished slavery; the Fourteenth which guaranteed equal protection of the law and due process; the Fifteenth, which guaranteed voting rights; the Nineteenth, which extended voting rights to women; the Twenty-fourth, which outlawed poll taxes, and the Twenty-sixth, which extended the right to vote to eighteen-year-old citizens.

4. Preemption is the process by which the courts decide that a federal statute takes precedence over a state statute. The doctrine of devolution is the process by which the courts redefine a right and transfer the power to enforce that right from a higher to a lower legal authority.

5. The laws passed by a legislature are known as statutes. At the federal level these are the laws made by Congress and signed by the President. At the state level, statutes are enacted by state legislatures such as the Ohio General Assembly or the Oregon Legislative Assembly. Many statutes prohibit certain activities. Most criminal statutes are prohibitive statutes. Other statutes demand the performance of some action. Some statutes, such as those which create governmental holidays or which name the state flower, simply declare something.

6. Because many different statutes are passed each year by the fifty state legislatures, there are important differences in state statutory law throughout the nation. This lack of similarity can cause problems when people from different states must deal with one another. One solution to the problem is the creation of uniform state laws. The National Conference of Commissioners on Uniform State Laws (NCCUSL) was founded to write these uniform laws.

7. The term “common law” comes from the attempts of the early English kings to

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establish a body of law that all the courts in the kingdom would hold in common. At that time judges were sent out to the towns and villages of the kingdom with instructions to settle all disputes in as consistent a manner as possible. The judges maintained this consistency by relying on previous legal decisions whenever they faced a similar set of circumstances. In this way they began to establish this body of common law. As the process continued, judges began to write down their decisions and to share their decisions with other judges. This body of recorded decisions became known as the common law.

8. The process of relying on these previous decisions is known as *stare decisis* ("let the decision stand"). The past decisions themselves are called precedents. Although today's judges do not ride around on horseback, they do make decisions in the same way as their counterparts from the Middle Ages. They rely on precedent according to the principle of *stare decisis.* A precedent is a model case that a court can follow when facing a similar situation. There are two types of precedent, binding and persuasive. Binding precedent is a previous case that a certain court must follow. Persuasive precedent is precedent that a court is free to follow or to ignore. Generally, whether a precedent is binding or persuasive is determined by the court's location. For instance, decisions made by the Ohio Supreme Court would be binding on all Ohio state courts but persuasive for courts in all other states' courts.

9. A second way that court decisions operate to make law is in the interpretation of statutes. When legislators enact a new statute, they cannot predict how people will react to the new law. Nor can they foresee all the ramifications and implications of that new statute. Thus, when two or more parties have a dispute that impacts a statute, they may differ as to what the legislature had in mind when it wrote the statute. Also, legislators

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may leave gaps in the language of a statute. Those gaps must be filled by someone. The job of reacting to unforeseen circumstances and filling in the gaps falls to the courts. As a result a judge may be called upon to determine how a certain statute should be interpreted. A third way that courts make law is through judicial review. Judicial review is the process of determining the constitutionality of various legislative statutes, administrative regulations, or executive actions. In exercising the power of judicial review, a court will look at the statute, regulation, or action and will compare it with the Constitution. If the two are compatible, no problem exists. However, if they are not compatible, one of the two must be declared void. Since the Constitution is the supreme law of the land, the Constitution always rules, and the statute, regulation, or action must be ruled unconstitutional.

10. Neither legislators nor judges can deal with all aspects of today's society. Moreover, legislators are generalists. They know a little about a lot, but are rarely experts in all areas over which they have power. Since legislators are generalists, and because today's problems are so complex, statutory law created by the legislators is very limited in what it can do. To broaden the power of statutory law, legislators delegate their power to others. They do this when they create administrative agencies.

Cases for Analysis

1. The Fourth Amendment of the United States Constitution applies to this case because the Supreme Court has decided that the Due Process and Equal Protection Clauses of the Fourteenth Amendment require the state governments to protect the rights guaranteed by the Bill of Rights. States may add rights and expand the protection given by those rights, but cannot cut back on or eliminate rights. The Constitution should not be

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amended to include modern technological advances like smartphones because the Constitution is designed to be flexible enough to allow for such advances. Also, the legal system itself, as a complex adaptive system, generally reacts to such changes, albeit, in a slow and deliberate manner.

2. In this case the paintiff, the United Church of Christ, argues that the amendment to the North Carolina Constitution limits their ability to fully practice their religious beliefs. This position places their case within the boundaries of the Feee Exercise Clause. The First Amendment of the United States Constitution applies to this case because the Supreme Court has decided that the Due Process and Equal Protection Clauses of the Fourteenth Amendment require the state governments to protect the rights guaranteed by the Bill of Rights. Whether the U.S. Consitution should be amended to include protection for any kind of marriage (traditional or non-traditional) is an open ended question. Therefore, the instructor should accepy all well reasoned answers.

3. In this case the paintiffs, two citizens of the town of Greece, argue that the town council as an arm of the local government is clearly adding (establishing?) a religious ceremony to a governmental meeting, that is open to all citizens, even non-religious citizens. This position places their case within the boundaries of the Establishment Clause. Whether the prayer should be stopped is an open ended question because stopping the prayer violates the Free Exercise Clause. Therefore, the instructor should accepy all well reasoned answers. On the other hand, those learners who see the violation of the Free Exercise Clause should receive extra cedit for doing so.

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4. In interpreting a statute, courts look to a variety of sources. These sources include the legislative history of the statute and the old statute that the new statute replaced, if any. The court must also review any binding precedent that interprets that statute, because the court must rely upon previous cases when engaged in statutory interpretation, just as it does when deciding questions of common law.

5. The lower federal courts do have the authority to determine the constitutionality of federal statutes. This authority would extend to an interpretation of the Civil Rights Act. The United States Supreme Court has ultimate authority in determining the constitutionality of any state or federal statute, including the Civil Rights Act. The United States Supreme Court upheld the constitutionality of the statute. Since so many of the hotel's guests came from out of state, the hotel was engaged in interstate commerce and, thus, was under the regulatory power of Congress, as granted in Article I, Section 8, Clause 3 of the Constitution.

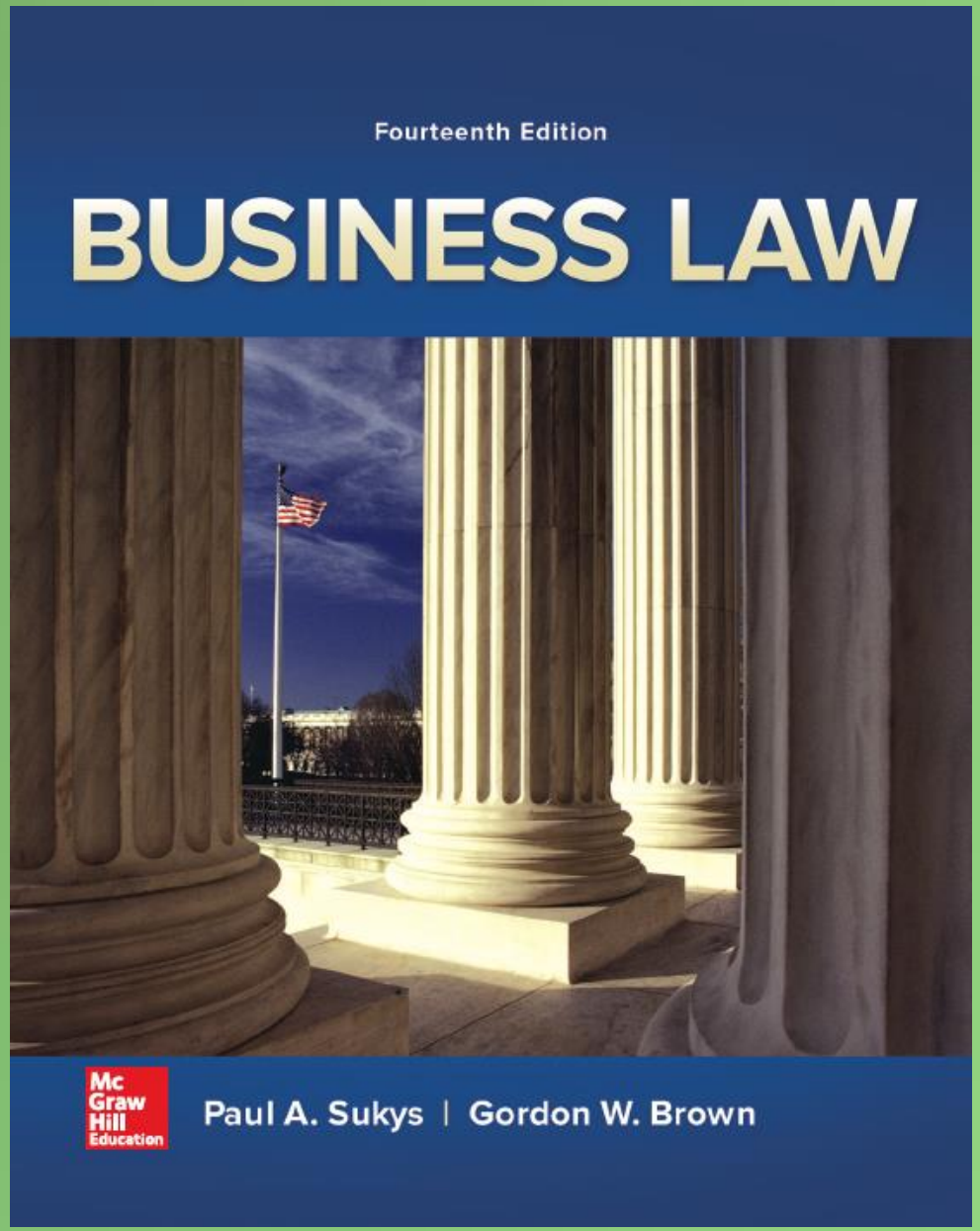
END CHAPTER TWO

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Sources of the Law

Chapter 2



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Learning Objectives

1. List the objectives of the law.
2. Clarify the duality of the law.
3. Outline the content of the U.S. Constitution.
4. Explain several central constitutional principles and powers.
5. Explain the role of statutory law in the legal system.

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Learning Objectives

6. Defend the need to set up a system of uniform laws.
7. State the role of common law in the legal system.
8. Describe how the principle of stare decisis provides stability within the law.
9. Differentiate between statutory interpretation and judicial review.
10. Account for the legislature's need to establish administrative agencies.

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The Law as a Balancing Act

- One person's rights are enforced while another's are not
- Because the law is made by people, it is not perfect
- Legislators and judges bring their own limitations into the process

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Dualities within the Law

- The legal system is shaped by several dualities:
  - Balance between the spirit and the letter of the law
  - Between words versus interpretation
  - Between abstract principles and concrete situations
  - Between intent and result

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The Spirit and the Letter of the Law

- A person who follows the “spirit” of the law has found its actual intent, while one who is tied to the “letter” of the law has missed its true meaning.

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Words versus Interpretation

- Because words are often ambiguous, the language of the law can become a hindrance rather than a help in the execution of the law.
- It is sometimes necessary to manipulate the language in order to uncover the actual intent of the lawmakers and to apply that intent in a consistent and fair fashion

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Constitutional Law

- **Constitution**
  - fundamental law of a nation
- **Constitutional law**
  - body of law that makes up a constitution and its interpretation

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Constitutional Law

- **Articles of Confederation**
  - created to hold together a fragile coalition of states, each of which was determined to maintain its own independent existence
  - primary weakness was that United States in Congress could not impose taxes or tariffs

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Principles of the U.S. Constitution

- Separation of national powers among three distinct branches of government

- System of checks and balances that allows each branch to oversee the operation of the other two branches

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Question

What part of the Constitution changes provisions in the original articles?

- Bill of Rites
- Change policy
- Amendments
- Articles

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Structure of the U.S. Constitution

- **Articles**
  - establish the organization of the national government
- **Amendments**
  - change provisions in the original articles
  - add ideas that the framers did not include in those articles

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Articles of the U.S. Constitution

Table 2-1 Articles of the U.S. Constitution

Articles	Content
Article I	Establishes the legislative branch of the federal government (the Congress) Defines the duties and powers of each house Outlines how Congress must conduct its business Lists legislative powers granted to Congress Lists powers denied to Congress Lists powers denied to the states
Article II	Gives executive power and responsibilities to the president Outlines the president's term of office, qualifications, and manner of election Identifies the president as commander in chief Gives the president power to make treaties
Article III	Establishes the Supreme Court and authorizes the establishment of other federal courts Provides for trial by jury for crimes Defines treason against the United States
Article IV	Defines interstate relations Sets up the full faith and credit clause obligating each state to recognize the public acts and proceedings of other states Provides for extradition of those accused of crimes in other states
Article V	Outlines the method of amending the Constitution
Article VI	Establishes the Constitution, federal laws, and federal treaties as the supreme law of the land
Article VII	Provides for the original ratification of the Constitution

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Amendments to the U.S. Constitution

Table 2-2 Amendments to the U.S. Constitution

The Bill of Rights		Pre–Civil War Amendments	Civil War Amendments	Progressive Amendments	Depression-Era Amendments	Modern Amendments
Amendment I Freedom of religion, speech, press, assembly	*Amendment VI* Procedures allowed in criminal cases	*Amendment XI* Lawsuits against the states	*Amendment XIII* Slavery is abolished	*Amendment XVI* The income tax is established	*Amendment XX* Terms of president, vice president, senators and representatives altered	*Amendment XXII* President's terms limited to two
Amendment II The right to bear arms and set up a militia	*Amendment VII* Jury trials in common law cases guaranteed	*Amendment XII** President and vice president elected together	*Amendment XIV* Equal protection of the law, due process, citizenship	*Amendment XVII* Senators elected by direct election	*Amendment XXI* Prohibition repealed	*Amendment XXIII* Washington, DC gets electors
Amendment III The quartering of soldiers in homes is prohibited	*Amendment VIII* Bill of Rights guaranteed, cruel and unusual punishment prohibited		*Amendment XV*† Voting rights guaranteed	*Amendment XVIII*‡ Prohibition established		*Amendment XXIV* Poll taxes outlawed
Amendment IV Search and seizure by probable cause	*Amendment IX* People retain other rights			*Amendment XIX* Women given right to vote		*Amendment XXV* Disability of the president; vacancies in the vice presidency
Amendment V Grand juries, double jeopardy, self-incrimination, due process, and eminent domain	*Amendment X* Powers reserved to states					*Amendment XXVI* Vote extended to 18-year-olds
						Amendment XXVII Congress prevented from voting itself instant pay raises

*Altered somewhat by the 20th Amendment. †Voting age changed by 26th Amendment. ‡Repealed by 21st Amendment.

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State Law

- Each state in the union adopts its own constitution
- A state constitution establishes the state's government
- It sets down principles to guide the state government in making state laws and conducting state business

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The Principle of Supremacy

- A basic principle of constitutional law is that the U.S. Constitution is the supreme law of the land
- All other laws must be in line with constitutional principles

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Preemption

- **Preemption**
  - the process by which the courts decide that a federal statute must take precedence over a state statute.

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Devolution

- **Devolution**
  - occurs when the courts redefine a right and shift the obligation to enforce that right from an upper level authority to a lower one

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Statutory Law

- **Statutes**
  - Laws passed by a legislature
- At the federal level, statutes are the laws made by Congress and signed by the president
- At the state level, statutes are enacted by state legislatures

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Codes and Titles

- **Code**
  - a compilation of all the statutes of a particular state or the federal government
- **Titles**
  - groupings of statutes that deal with a particular area of the law

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Uniform Laws

- Statutory law differs from state to state
- One solution to the problem of inconsistent statutory law is for all the state legislatures to adopt the same statutes
- The National Conference of Commissioners on Uniform State Laws (NCCUSL) was founded to write these uniform laws

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Question

Which unified set of statutes is designed to govern almost all commercial transactions?

A. Uniform Business Code
B. Commercial Code of Regulations
C. Uniform Commercial Code
D. Unified Business Regulations

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The Uniform Commercial Code

- **Uniform Commercial Code (UCC)**
  - a unified set of statutes designed to govern almost all commercial transactions
  - helps parties involved in commercial transactions prepare their contracts

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Electronic Law Statutes

- **Cyber-commerce**
  - term applied to all cyber-transactions
- The NCCUSL has responded to this challenge by creating several new uniform laws
  - Uniform Computer Information Transactions Act, Uniform Electronic Transactions Act

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Court Decisions

- Common law
- Interpretation of statutes
- Judicial review

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Common Law

- **Common law**
  - the body of previously recorded legal decisions made by the courts in specific cases.
- **Stare decisis (let the decision stand)**
  - process of relying on these previously recorded legal decisions
- **Precedents**
  - The previously recorded legal decisions

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Question

Which precedent is a court free to follow or ignore?

A. Persuasive precedent
B. Binding precedent
C. Required precedent
D. Credible precedent

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Common Law

- **Binding precedent**
  - precedent that a court must follow.
- **Persuasive precedent**
  - precedent that a court is free to follow or ignore.

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Statutory Interpretation

- **Statutory interpretation**
  - the process by which the courts analyze those aspects of a statute that are unclear or ambiguous or that were not anticipated at the time the legislature passed the statute

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Question

What is the process of determining the constitutionality of various legislative statutes, administrative regulations, or executive actions?

A. Official review
B. Legal review
C. Judicial assessment
D. Judicial review

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Judicial Review

- **Judicial review**
  - the process of determining the constitutionality of various legislative statutes, administrative regulations, or executive actions

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Administrative Regulations

- **Administrative agencies**
  - create rules, regulate and supervise, and render decisions that have the force of law
- **Administrative law**
  - agencies' decrees and decisions

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Question

What publication produces a daily compilation of new regulations issued by federal agencies?

A. Federal Register
B. Washington Post
C. Federal Post
D. Register of Federal Rules and Regulations

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The Federal Register and the Code of Federal Regulations

- **Federal Register**
  - a publication that produces a daily compilation of new regulations issued by federal administrative agencies

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