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Answer Key-BLUCCA/15/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. As is demonstrated in the case *Ziglar v. Abbasi* the United States Supreme court will approach the issue of national security efforts that infringe on individual constitutional rights as a balancing test. In the *Ziglar* case the court [majority at least] indicated that security outweighed freedom. They indicated that conditions after September 11, 2001 created a unique environment that allowed the government to infringe on individuals' constitutional protections. Based off the *Ziglar* decision it would be fair to say that the government could impose actions that infringe on individual constitutional protections in the interest of national security but there must be (1) a unique environment caused by a national tragedy and (2) a real ongoing threat for more loss of life. Presumably the number of lives lost or threaten does not change the analysis. But the analysis does require a plural threaten, meaning a single act of murder does not constitute and environment for the government to hinder the rights of individuals.
3. In the *Ziglar* case the majority indicated that the Government had to succeed in a balancing test to infringe on the rights of individuals in order to protect other citizens. In that case the majority, four justices, found the test was met. But the majority was clear that in applying a balancing test there would be times when national security interests would not be enough to infringe on individual constitutional rights. In 1980 the federal government apologized and compensated those individuals of Japanese heritage who were interned during World War 2. The government had decided that though the environment following the surprise bombing at Pearl Harbor was truly scary it did not on a balancing test justify the seizure and confinement of Americans based on their national origin.

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4. Going back to our Anglo-Saxon roots, the United States has generally held that political leaders could not be held civilly liable for their actions while serving in government. Of course, political leaders are still liable for their actions in criminal cases. But as to if a national leader is held to a 'higher' standard than the average citizen the answer is no. In fact, based on recent case law (see *Nixon v. Fitzgerald]* the President cannot be sued for damages for actions done while in office. In the *Ziglar* case the Supreme Court refused to allow for an individual to sue for personal damages against high ranking executive officials for actions taken while executing their duties. Our court system is not currently enforcing a higher standard on political leaders, as regard to ethics, than the average citizen.
5. The concept of a social contract that is articulated in the Magna Carta and later in the United States Declaration of Independence seems to hint at inalienable rights that are promised and cannot legally be breached by a government. But the recent case law in the United States, like the *Ziglar* case, seems to point to an interpretation of the social contract being breakable for the common good. In *Ziglar* the court applied a balancing test to permit the government the right to infringe on rights promised to individuals.

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

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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. Nonjudgmentalism is the philosophy that prevents judgments attached to ethical decisions. Nonjudgmentalism preaches tolerance over the concept of 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 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,

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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

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

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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 Administrative Procedures Act ("APA") and the Regulatory Flexibility Act both instruct federal agencies on their role in promulgating and enforcing regulations. The APA gives agencies a procedure on how to create or update regulations while the Regulatory Flexibility Act creates certain actions an agency must follow in order to pass new rules. In the case of President Trump's executive order elminiating the 'Dreamer' program, many State Attorney Generals claim that the failure to not allow public comment and analyze the associated risks of the elimination of the program violated the APA and the Regulatory Flexibility Act.

3. The 'Failure to Act' priniciple contents that where Congress choses not to address an issue, the President and the executive branch can address the issue. That Congress inaction can be seen as tantamount to a waiver of its power over the issue. In the area of immigrantion, some believe that since Congress has not passed immigrantion reform, thus 'failed to act', President Obama was empowered to issue an executive order creating the Dreamer program.

4. The doctrine of 'separation of powers' articulates that each branch of the government has unique and distinct powers that should not infringe on the powers of the other branches. In the case of the Dreamer progrsm, some have made a

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legal argument that former President Obama violated the separation of powers by issuing an executive order on immigration, which is an area that is reserved for regulation by the Congress.

5. Prosecutorial discretion is the primicipal the government can chose what cases to presecute or not. In certain circumstances due to resources or because of principal the government may not chose to charge an individual that has been detained for a crime. In the case of former President Obama, some people believed he violated the principal of prosectuorial discretion by issuing an executive order on Dreamers. Those individuals believe that prosecutorial discretion is a decision made at the local level not at the highest governmental level and is not a means to change the overall law.

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

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law are to promote justice and harmony.

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

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after the ratification of the Constitution by the original thirteen states. Other 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. An executive order is a device in which the chief executive (ie. President) can act on this own without having to go through the cumbersome process of going through the legislative branch. The power of the executive to issue executive orders can be found in both a constitution and in legislative enactments.

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.

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

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differ as to what the legislature had in mind when it wrote the statute. Also, legislators 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. A 'deep state' is a loosely organized group of provocateurs located within the government bureaucracy who oppose the President. Some people feel that in the current American political system there are individuals that work within the government that are actively working to defeat the current United States President.

Cases for Analysis

1. The attorneys for Neagle are likely to prevail. The United States Supreme Court has indicated that President (and those under him) may use powers not found expressly in the Constitution. In a similar case *In Re Neagle* the Supreme Court held in 1890 that though the Constitution doesn't give the President the power to create US Marshalls, their creation was necessary for the government to run effectively thus the President had the power.

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2. President George W. Bush would rely on the presidential theory of inherent executive power. Under this theory the President has unlimited power and the President acts as 'steward' of the federal government. President Bush would likely also point to the legislative limited power of the office of president. Congress had authorized war after September 11, 2001 but had not addressed the treatment of the captured combatants. Under this theory since Congress did not act, the President could act to ensure the area was addressed.

3. The Bill of Rights to the United States Constitution protects individuals from the actions of government – Statte or Federal. No State can break the promises of protection the Bill of Rights promises citizens of the United States. The process of amending the Constitution is one that takes years and is challenging. Thus amending the Constition is not something done to create modern interpretation of constitional protections. Part of the role of Common Law is to have judges interpret the impact of laws and the Constitution with modern culture.

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

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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

ANSWER KEY

Chapter 3 The Judicial Process and Cyberprocedure

Opening Case Questions

1. Subject matter jurisidiction arises in federal district court either through litigation of matters that are federal questions or through litigation invovling a diversity of citizenship.
2. In an instance where there is a question of the application of law in a federal district court, the federal law would be applied first. State law

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Chapter 2
Sources of the Law

Key Terms

Administrative law (p. 50)
Article II executive order (p. 42)
Articles of Confederation (p. 35)
Binding precedent (p. 48)
Code (p. 45)
Code of Federal Regulations (CFR) (p. 52)
Common law (p. 48)
Constitution (p. 35)
Constitutional law (p. 35)
Cyber-commerce (p. 47)
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Statutory executive order (p. 42)
Statutory interpretation (p. 49)
Textualism (p. 33)
Titles (p. 45)
Uniform Commercial Code (UCC) (p. 46)

Learning Objectives

After reading this chapter, students should be able to accomplish the following objectives:
1. List the objectives of the law.

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2. Clarify the duality of the law.
3. Outline the content of the U.S. Constitution.
4. Define and explain the use of executive orders.
5. Explain the role of statutory law in the legal system.
6. Defend the need to set up a system of uniform laws.
7. Describe how the principle of stare decisis provides stability within the law.
8. Differentiate between statutory interpretation and judicial review.
9. Account for the legislature's need to establish administrative agencies.
10. Clarify the nature of the deep state within the American political and legal system.

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 U.S. 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.

2-3 Executive Orders

An executive order is a device by which the president can act on his own without having to resort to the somewhat cumbersome process of going through Congress. A proclamation is an executive order that addresses the public at large. An order is aimed at a subdivision within the executive branch. A memorandum is simply a suggestion issued by the president to part of the executive branch.

2-4 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

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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 Uniform Law Commission (ULC) was founded to write these uniform laws.

2-5 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.

2-6 Administrative Regulations

Federal administrative agencies administer statutes enacted by Congress in specific areas, such as commerce, communication, aviation, labor relations, and working conditions. 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. To help small entities deal with bureaucratic red tape, Congress passed the Regulatory Flexibility Act.

Chapter Outline

I. 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.

A. The Law as a Balancing Act

- The law should be viewed as a delicate balancing act.
- Generally, the objectives of harmony, stability, and justice are kept in mind; but the law is not perfect as it is made by people.

B. The Dualities within the Law

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- Balancing of rights and duties is part of the law's fundamental nature.
- The legal system is shaped by several dualities which include the following.
  - Balance between the spirit and the letter of the law.
  - Balance between legal words and their interpretation.
  - Balance between abstract principles and concrete situations.
- Duality also exists in the way a decision is intended and the way it is actually executed.
- The Textualist Approach: In general, the idea behind **textualism** (also called **originalism**) is for judges and attorneys to look at constitutions and statutes as literary works or as verbal icons that stand as separately created artifacts that must be judged, much like a poem or a short story, by its words and its words alone.
- The Pragmatic Approach: **Pragmatism** involves an approach by judges that considers the consequences of a decision to be the single most important guideline in the development of that decision.

II. Constitutional Law

- **Constitution** is the fundamental law of a nation.
- The body of law that makes up the study of the constitution is called **constitutional law**.

A. The Articles of Confederation

- The first constitution was known as the **Articles of Confederation**.
- The Articles of Confederation had certain weaknesses.
  - United States in Congress, as the national legislature was known under the Articles, could not impose taxes or tariffs.
  - Limitations on the national government such as all delegates to the Congress were appointed by the state legislatures and served at their pleasure.
  - The states retained the power to issue their own currency.

B. Reengineering the Articles

- Madison attempted to provide for a strong central government.
- The Constitution itself 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

- The Constitution of the United States is based on two fundamental principles that were supported by many of the delegates to the convention in Philadelphia.
  - Those two fundamental principles promote a separation of national powers among

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three distinct branches of government: the executive branch, the legislative branch, and the judicial branch.
    - They also promote a checks and balances system that allows each branch to oversee the operation of the other two branches.
- The articles of the Constitution establish the organization of the national government.
- The amendments change provisions in the original articles and add ideas that the Framers did not include in the articles.
- The first three of the seven articles distribute the power of the government among the legislative, executive, and judicial branches.
- Structurally, the Bill of Rights should have been part of the original Constitution, probably as Article V; however, from a political and a pragmatic perspective, this was not advisable.
- Outside of the Bill of Rights, the Constitution has been amended only 17 times.

D. State Constitutions and State Law

- Each state in the union adopts its own constitution.
- **Preemption** is the process by which the courts decide that a federal statute must take precedence over a state statute.

III. Executive Orders

- An **executive order** is a device by which the president can act on his own without having to resort to the somewhat cumbersome process of going through Congress.

A. Types of Executive Orders

- A **proclamation** is an executive order that addresses the public at large, while an **order** is one that is a mandatory directive aimed at a subdivision within the executive branch.
- A **memorandum** is simply a suggestion issued by the president to an area of the executive branch, indicating how he would prefer that area to use its power.
- An executive order that is based on presidential authority as it appears in the Constitution is referred to as an **Article II executive order**.
- An executive order issued under the authority of a congressional enactment is called a **statutory executive order**.
- **Hybrid executive orders** are issued using both constitutional and statutory authority.

B. Theories of Presidential Power

- Two core theories have been proposed concerning the nature of presidential power:

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  - Inherent executive power
  - Delegated executive power
- Two intermediate theories have also been promoted to provide a sort of compromise between the two core theories:
  - Interstitial executive power
  - Legislatively limited power

C. Challenges to Executive Orders

- Executive orders can be challenged in the Courts.
  - A challenger must demonstrate to the satisfaction of the court that he, she, they, or it has standing to sue.
  - The challenger must also demonstrate that there is sufficient grounds for bringing the suit.
  - To prove that it has **standing to sue**, a plaintiff—that is, the party initiating the lawsuit—must demonstrate that it will suffer direct injuries should the executive order remain in effect.

IV. Statutory Law

- Laws passed by a legislature are known as **statutes**.

A. Codes and Titles

- A code is a compilation of all the statutes of a particular state or the federal government.
- In general, codes are subdivided into titles, which are groupings of statutes that deal with a particular area of the law.

B. Uniform Laws

- Because many different statutes are passed each year by the 50 state legislatures, statutory law differs from state to state.
  - This lack of consistency can cause problems when legal matters cross state boundaries.
- The Uniform Law Commission (ULC) which is also called The National Conference of Commissioners on Uniform State Laws (NCCUSL) was founded to write these uniform laws.

C. The Uniform Commercial Code

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- The most significant development in uniform state legislation has been the **Uniform Commercial Code** (UCC).
- The UCC is a unified set of statutes designed to govern almost all commercial transactions.
- The UCC has been adjusted by various states, and not all states decide to accept the suggested amendments that come from the ULC from time to time.

D. Cyber-Law Statutes

- Cyber-commerce is the term applied to all cyber-transactions.
- The ULC has created several new uniform laws in the area of e-commerce.
    - The Uniform Computer Information Transactions Act (UCITA) is designed to deal directly with cyber-contracts that involve the sale or licensing of digital information.
    - The Uniform Electronic Transactions Act points out those principles that should be used in every state to make certain that cyber-contracts are enforceable.

V. Court Decisions

A. Common Law

- The term *common law* comes from the attempts of early English kings to establish a body of law that all the courts in the kingdom would hold in common.
- **Common law** is the body of previously recorded legal decisions made by the courts in specific cases.
    - The process of relying on these previously recorded legal decisions is called *stare decisis.*
- The legal system of the United States, except Louisiana, is rooted in the common law of England.
- Over time, English common law has been eroded in the United States by the passing of state statutes and court decisions that better meet the needs of today's society.
    - Parts of the common law as practiced in England still exist in the laws of the United States today.
- Today's judges still 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 precedent: is precedent that a court must follow.
    - Persuasive precedent: precedent that a court is free to follow or ignore.
- Generally, whether a precedent is binding or persuasive is determined by the court's location.

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B. Statutory Interpretation

- Court decisions may make law through the interpretation of statutes.
- **Statutory interpretation** is the process by which the courts analyze those aspects of a statute that are unclear or ambiguous or not anticipated at the time the legislature passed the statute.
- In interpreting a statute, a court looks to a variety of sources including the legislative history of the statute and the old statute that the new statute replaced, if any.
- Naturally, the court also must review any binding precedent that interprets that statute.

C. Judicial Review

- Courts may make law 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 compare it with the Constitution.
- Because the Constitution is the supreme law of the land, the Constitution always rules, and the statute, regulation, or action is ruled unconstitutional.
- Naturally, in exercising the power of judicial review, the court also must review any binding precedent involved in the constitutional issue.
- The final word on issues of constitutionality rests with the U.S. Supreme Court.

VI. Administrative Regulations

A. Administrative Agencies

- Federal administrative agencies administer statutes enacted by Congress in specific areas such as communication, aviation, labor relations, working conditions, and so on.
- Similarly, agencies have been designated by the states to supervise intrastate activities.
    - These agencies create rules, regulate and supervise, and render decisions that have the force of law.
- Decrees and decisions of agencies are known as **administrative law**.
- Most agencies can be placed in one of two categories:
    - Executive agencies: Those that are directly under the control of the president.
    - Independent agencies: Those that are not actually within the executive branch but, instead, act on their own authority.
- Agencies have a great deal of leeway in making their own regulations, in enforcing their regulations, and in judging when people follow or break those regulations.

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- They also often have the power to mete out punishments for those found guilty of violating a regulation or set of regulations.

B. Administrative Procedures Act

- Congress passed the Administrative Procedures Act to regulate how administrative agencies of the federal government establish rules.
- Similarly, most states have adopted a uniform law known as the Model State Administrative Procedures Act.
- Under the Administrative Procedures Act and the Model State Administrative Procedures Act, an administrative agency planning new regulations must notify the affected parties and hold hearings to allow those parties to express their views.

C. The Regulatory Flexibility Act

- The goal of the act is not to give special treatment to small organizations, but to make sure that they get equal or nearly equal treatment in the marketplace.
- The Regulatory Flexibility Act (RFA) places an obligation on federal agencies within the bureaucracy to evaluate the effect that new regulations will have on these small institutions.

D. The *Federal Register* and the Code of Federal Regulations

- ***The Federal Register*** is a publication that produces a daily compilation of new regulations issued by federal administrative agencies.
- Once a rule is finalized, it is included in the ***Code of Federal Regulations (CFR)***, which is updated each year.

E. The Deep State: Dangers and Remedies

- The chapter deals with the sources of the law and the relationships that exist among the executive branch, the legislative branch, the judicial branch, and the regulatory agencies.
- One problem with such a study is that it talks in terms of abstract, broadly fashioned elements.

Background Information

A. Cross-Cultural Notes

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1. Legal systems in many Latin American countries have been shaped by the colonial history of the region. Countries such as Brazil, Mexico, Venezuela, and Argentina 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 Honoré, *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 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).

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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 supermajority vote of nine states.

3. 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.

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

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 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

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

Related Case

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 that 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.

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 BBC's website: 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 website: 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 to National Archives' website: 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 U.S. House of Representatives' website: https://www.house.gov/the-house-explained/the-legislative-process.

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

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http://fall.law.fsu.edu/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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