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Instructor's Manual
Chapter 2, Sources of the Law

Key Terms

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Learning Objectives

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After reading this chapter, students should be able to accomplish the following 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. 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.

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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

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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 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

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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.

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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.

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B. The Dualities within the Law

- 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 Ordinary Approach: This is a type of judicial review that adheres to the idea that, in statutory and constitutional interpretation, a judge must always focus on them every day, common sense meaning of the words in the statute under scrutiny.
- The Literalist Approach: Literal textualism is a form of statutory interpretation that empowers a judge to move outside the ordinary meaning of the words in a statute by adding additional definitions from outside sources and by deconstructing the grammatical structure of the phrases and sentences that make up the statute.
- 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.

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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

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- 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 U.S. 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 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.
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- 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 (and state governors) can act on his own without having to resort to the somewhat cumbersome process of going through Congress (or in the case of the governor the state legislature).

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.

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- 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:
  - 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 are 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

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- 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

- 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.

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- 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.

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.

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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

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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.
  - 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.

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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

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- 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.
- A **Deep State** (AKA, the Administrative State, a Secret State, the Double Government, Parapolitcs, and Deep Politics) is a loosely organized group of provocateurs located within the bureaucracy who oppose the president and their administration and who work together (sometimes deliberately and sometimes just by happenstance) using guerrilla tactics to undermine and weaken the authority, the reputation, and the agenda of the president.

Background Information

A. Cross-Cultural Notes

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.

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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.

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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 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.

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C. State Variations

1. California's constitution has been amended over 500 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

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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

Terms

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.

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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. (Note: In June 2022, the Supreme Court overturned Roe v. Wade holding that there is no longer a federal constitutional right to an abortion. Going forward, abortion rights will be determined by states, unless Congress acts.)

   (Note: In June 2022, the Supreme Court overturned *Roe v. Wade* holding, in part, that the Court in *Roe* had misapplied the process of judicial review by using cases that were fundamentally different from the proposed right to an abortion, and that, in fact, no right to an abortion had ever existed in the U.S. Constitution. Going forward, abortion rights will be determined by the states, unless the Constitution is amended to include a federal right to an abortion.)

Teaching Tips and Additional Resources

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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 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

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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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