

1.4: Sources of Law

Basic Classifications of Law

Where does law come from? How do individuals and businesses know right from wrong? Not all actions that are considered “wrong” or inappropriate are violations of the law. They simply may represent social norms. So what is the difference? There are two types of rules in our society—social norms and laws.

Social norms are the informal rules that govern behavior in certain groups, cultures, and societies. Social norms and cultural expectations may be violated with negative social or professional consequences for doing so. However, no legal repercussions follow violating social norms alone.

Violations of law are different. Violating the law carries penalties, such as civil liability, fines, or loss of liberty. While it is optional to conform to social customs, people are compelled to obey the law under threat of penalty.

Laws are generally classified as public law or private law. **Public law** applies to everyone as a group (hence, the public), as opposed to an individual party. It is law that has been created by a legitimate authority with the power to create law, and it applies to the people within its jurisdiction. In the United States, the lawmaking authority itself is also subject to those laws, because no one is “above” the law. If the law is violated, penalties may be levied against violators. Examples of public law include constitutions, criminal laws, and administrative laws. For example, if someone steals items from a store, the thief is violating public law. He committed the crime of theft which affects the community as a whole (not just the store owners), and the crime is defined in public legislation.

Private law is law that is binding on individual parties, their properties, and their relationships. For instance, parties to a contract are involved in a private law agreement. The terms of the contract apply to the parties of the contract but not anyone else. If the parties have a contract dispute, the terms of the contract and the remedy for breach will apply only to the parties of the contract. In addition to contracts, other examples of private law include tort and property laws. For example, if someone installs an industrial smoker on his property and the smoke creates a dense haze in the neighbor’s yard, there may be a violation of private law because the smoke is interfering with the neighbor’s right to peacefully enjoy one’s property.

Laws are also classified as civil or criminal. **Civil law** is usually brought by a private party (referred to as a **plaintiff**) against another private party (referred to as a **defendant**). For example, one company decides to sue another for breach of contract. Or a customer sues a business when injured by the company’s product. Most laws affecting businesses are civil.

Criminal law involves a governmental decision to prosecute someone (referred to as a **defendant**) for violating a criminal statute. If someone breaks a criminal law, he or she could lose their freedom (i.e. be sent to prison) or lose their life (i.e. if convicted of a capital offense). In a civil action, no one is sent to prison. Usually, liability results in the loss of property such as money or assets.

Table 1.4.1 Civil and Criminal Law Comparisons

	Civil	Criminal
Source of Law	statute or common law	statutes defining crimes
Who files the case?	business or individual suffering harm (referred to as the plaintiff)	the government (e.g., District Attorney/prosecutor)
Burden of Proof	preponderance of the evidence (i.e., the credible evidence presented is convincing enough to determine that the plaintiff's claim is more likely than not to be true)	beyond a reasonable doubt (i.e., the credible evidence presented is so convincing that no doubt about the defendant's guilt is rational)
Remedy	damages, injunction, specific performance	punishment (e.g. fine or imprisonment)
Purpose	provide compensation or private relief	protect society

Additionally, some laws are substantive and some laws are procedural. **Substantive laws** define the rights and obligations of an individual, entity, or government in a particular community, including types of conduct, liability, and remedies. For example, if someone drives 50 miles per hour 40-mile-per-hour zone, they have broken the substantive rule of law governing the speed

limit. If the driver accidentally hits and harms another vehicle or person, the substantive rule of law governing negligence (i.e., harm caused unintentionally) determines what needs to be proven for the injured party to receive a remedy awarded in court in a lawsuit.

Procedural laws, on the other hand, prescribe the legal steps, processes, and rules enforcing the law and managing court proceedings, such as lawsuits, rules of evidence, when someone's constitutional rights are violated, etc. Relating to the examples above, procedural law governs how and what gets decided in court related to the speeding ticket, including whether the driver is entitled to a hearing before a judge, whether they have a right to be represented by legal counsel, whether the hearing takes place within a certain amount of time after the ticket was issued, and what type of evidence can be presented are procedural law issues. Likewise, in a lawsuit for negligence, procedural laws govern the methods and stages of conducting lawsuits.

Sources of Law

In the United States, our laws come primarily from:

- Federal and state constitutions;
- Statutory law from Congress, the state legislatures, and local legislative bodies;
- Common law from federal and state appellate courts;
- Administrative law (rules and regulations) from government agencies;
- Treaties and conventions; and
- Executive orders.



Figure 1.4.1 *Sources of Law in the United States* by LawShelf. (See the [transcript](#).)

Constitutions

Federal/National

The most fundamental law in the [United States is the US Constitution](#), which is the supreme law of the nation. Any law that conflicts with it is void. The Constitution serves three important functions. First, it establishes the structure of our national government and identifies the powers of the legislative, executive, and judicial branches. Second, it defines the boundaries of each branch's authority and creates "checks" on each branch by the other branches. For example, the president is the commander-in-chief of the armed forces, but does not have the power to declare war. That duty falls to Congress. And, third, the Constitution guarantees civil liberties and individual rights.

The power granted to the federal government by the Constitution is limited. Any powers not expressly granted to the federal government by the Constitution are reserved to the states. This means that if the Constitution does not give the federal government power over a particular area, then the states regulate it.

The first ten amendments to the Constitution are known as the **Bill of Rights**. Despite the limited power granted to the federal government by the Constitution, the Bill of Rights protects certain individual civil rights and liberties from governmental interference. These rights include the freedom of speech and religion, the right to bear arms, and the rights of individuals who are suspected and accused of crimes. We will discuss the US Constitution more in [Chapter 5](#).

One Federal Government

United States Constitution

- Establishes limited federal government
- Protects states' power
- Guarantees liberty of citizens



Congress

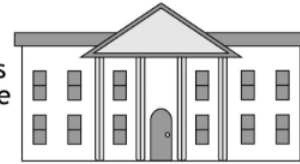
- Passes statutes
- Ratifies treaties
- Creates administrative agencies



Legislative Branch

President

- Proposes statutes
- Signs or vetoes statutes
- Oversees administrative agencies



Executive Branch

Federal Courts

- Interpret statutes
- Create (limited) federal common law
- Review the constitutionality of statutes and other legal acts



Judicial Branch

Administrative Agencies

- Oversee day-to-day application of law in dozens of commercial and other areas

Figure 1.4.2: Separation of powers of the federal government. (CC BY 4.0; [Source](#))

State

In the United States, each state also has its own constitution, which serves essentially the same function for the state government as the US Constitution serves for the federal government. Specifically, state constitutions establish limits of state government power, establish the organization and duties of the different branches of government at the state level, and protect fundamental rights of state citizens.

✓ State Constitution Examples

Compare the [US Constitution](#) with the [Wisconsin Constitution](#) and the [Illinois Constitution](#).

This dual system of government in the United States is called **federalism**, which is a governance structure whereby the federal government and the state governments coexist through a shared power scheme.

50 State Governments

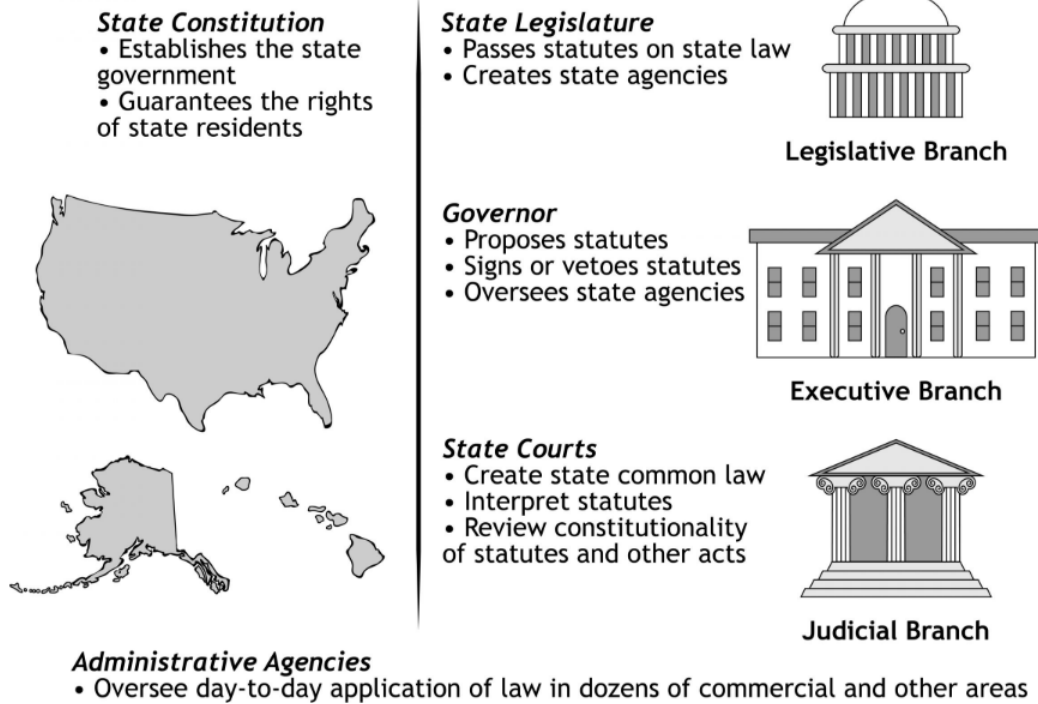


Figure 1.4.3: Separation of powers of state governments. (CC BY 4.0; [Source](#))

Statutes

Both federal and state **statutes** are laws created by a legislative body. Congress is the federal legislative body, and each state also has its own legislative body. Almost all statutes are created by the same method. An idea for a new law is proposed in the legislature. This proposal is called a **bill**. The [House of Representatives](#) and [Senate](#) independently vote on a bill. If the majority of both chambers approves it, the bill is sent to the president or governor for approval. If the president or governor signs the bill, then it becomes a statute.

✓ Federal and State Statutes

- See the [United States Code](#) (i.e., the federal statutes).
- See the [Wisconsin Statutes](#).

Ordinances

While statutes are a function of the federal and state governments, **ordinances** are a function of local governments (e.g., counties, cities, and townships). A state constitution typically authorizes various forms of local governments to create or adopt ordinances. Like federal and state legislatures pass statutes, local government lawmaking bodies pass ordinances. Examples of ordinances include building codes, zoning laws, and misdemeanors such as jaywalking.

✎ Sidebar

Mequon, Wisconsin has an ordinance permitting licenses to people who manufacture or sell food only if they are of "good moral character.")

Common Law

Binding legal principles also come from the courts. When appellate courts decide a case, they may interpret and apply legal principles in a way that are binding on lower courts in the future. The process of applying a prior appellate decision to a case is called **precedent**. Simply put, precedent is when judges use past decisions to guide them. The benefit of precedent is that it makes the law predictable and furthers the rule of law by applying legal principles to the greater community, not just the parties to a

lawsuit. Businesses value common law systems because they reduce the cost of business. For example, if a business is unsure of how its contract rights will be applied by the court, it can understand its rights by learning how courts interpreted similar contract provisions in past lawsuits. This allows businesses to assess their risks, determine their liability, and make rational business decisions without the expense of litigation.

Administrative Rules and Regulations

Administrative law is the collection of rules and decisions made by agencies to fill in particular details missing from constitutions and statutes. For example, the [Internal Revenue Service](#) (IRS) is the federal agency responsible for collecting national taxes and administering the Internal Revenue Code enacted by Congress. All businesses and individuals must follow the IRS rules and regulations about how to report, file, and pay applicable taxes that Congress levies. Congress passes statute defining “what” taxes need to be paid. The IRS adopts the rules about “how” those taxes are paid.

In the United States, many of the day-to-day regulation of businesses is done by administrative agencies. These agencies are created by the legislature to implement and enforce a particular statute. Agencies often report to the executive branch, but some are run by independent commissions. Legislative bodies give agencies the power to create rules and regulations that individuals and businesses must follow to comply with the statute. For example, the [Environmental Protection Agency](#) (EPA) was created to implement and enforce the [Clean Air Act](#) and the [Clean Water Act](#).

Treaties and Conventions

A **treaty** is a binding agreement between two nations. A **convention** is a binding agreement among a group of nations. In the US, a treaty or convention is generally negotiated by the executive branch. To be binding, the US Constitution requires the Senate to ratify treaties by a two-thirds vote. Once ratified, a treaty becomes part of federal law with the same weight and effect as a statute passed by the entire Congress. Therefore, treaties and conventions have equal standing as statutes in US law.

Executive Orders

[Article II, Section 1](#) of the US Constitution gives the president the power to “take care that the laws be faithfully executed.” Under this power, the president may issue **executive orders** requiring officials in the executive branch to perform their duties in a particular manner. State governors have the same authority under state constitutions. Although they are not laws that apply directly to individuals and businesses, executive orders are important legal documents because they direct the government’s enforcement efforts.

Table 1.4.2 *Hierarchy of Sources of Law*

Priority	Source	Comment
1	Constitutions	Exist at both federal and state levels
2 (tie)	Statutes	Laws passed by the federal or state legislatures
2 (tie)	Treaties and Conventions	International agreements that have the same standing as statutes
4	Judicial Opinions	Court interpretation and application of constitutions, statutes, treaties, agency regulations, and executive orders
5	Agency Regulations	Rules and regulations adopted by administrative agencies at the federal, state, or local level
6	Executive Orders	Guidance from the president or governor to executive branch officials about how to perform their duty

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