

1.2: Sources of Law

Learning Objectives

- Differentiate between social customs and law.
- Become familiar with primary sources of law in the United States.
- Understand the difference between public law and private law.
- Understand the relationship between state and federal systems of government.

Hyperlink: Supreme Court Friezes

<http://www.supremecourt.gov/about/north&southwalls.pdf>

Along the north and south walls of the Great Hall at the U.S. Supreme Court, friezes representing the great lawgivers in history are carved in marble. Among them are Hammurabi, Moses, Solomon, Draco, Confucius, Muhammad, Napoleon, and one American. Click the link to find out who he is.

Where does the law come from? How do you know right from wrong? Certainly, your caretakers taught you right from wrong when you were a child. Your teachers, community elders, and other people who were in the position to help shape your ideas about appropriate manners of behavior also influenced your understanding of which behaviors are acceptable and which are not. Additionally, employers often have very firm ideas about how their employees should comport themselves. Those ideas may be conveyed through employers' codes of ethics, employee handbooks, or organizational cultures.

Of course, actions that are considered “wrong” and inappropriate behavior are not violations of the law. They simply may represent social norms. For example, it is generally not acceptable to ask strangers about their income. It is not illegal to do such a thing, but it is considered impolite. Imagine that you are interviewing for a position that you really want. Can you imagine yourself asking your potential employer how much money he or she makes? It would not be illegal for the employer to refuse to hire you based on your lack of social skills. However, it would be illegal for the employer not to hire you based solely on your race.

So what is the difference? One type of “right from wrong” is based on societal norms and cultural expectations. The other type of “right from wrong” is based on a source recognized as a holding legitimate authority to make, and enforce, law within our society. These are two types of rules in our society—social norms and laws.

A Question of Ethics

In January 2010, Haiti, the poorest country in the Western Hemisphere, was struck by a massive earthquake that killed tens of thousands—maybe even hundreds of thousands—of people. Rescue workers rushed to remove survivors from the rubble, but in the days following the earthquake, thousands of people wandered the streets without food or shelter. Some instances of looting and violence occurred as survivors grew desperate for sustenance.

In the meantime, Royal Caribbean operated a cruise line that made a regular stop at Haiti, at a private beach where it had previously spent millions of dollars in improvements to ensure that the vacationers on its cruise ships would enjoy themselves during their overnight stops. Within a week of the disaster, Royal Caribbean was seeking to assure its customers that the stop in Haiti was not unethical. It pointed out that bringing tourist dollars to Haiti was actually an ethical thing to do, despite the thousands of dying and injured just a short distance away.

If you were scheduled to begin a vacation on a Royal Caribbean cruise ship that docked at its private beach during the week following the earthquake, would you go? If you decided to go, how would your friends and family react to your choice? If Royal Caribbean was not legally required to issue refunds for non-refundable tickets, should it be willing to issue refunds anyhow?

Social customs may be violated on pain of embarrassment or ostracism. Someone may choose to ignore social customs, but there are usually negative social or professional consequences to doing so. A person who violates social customs may be said to be a boor, or people may try to avoid that person because his or her actions and comments make others uncomfortable. However, no legal repercussions follow violating social customs.

Violations of law are different. Violating the law carries penalties, such as liability or loss of liberty, depending on the type of violation. While we may generally decide whether or not to conform to social customs, we are compelled to obey the law under threat of penalty.

Law can generally be classified as public law or private law. Public law applies to everyone. It is law that has been created by some legitimate authority with the power to create law, and it has been “handed down” 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 can be levied against the violator. These penalties are also “handed down” from some recognized source of authority, like the judiciary. Of course, people in the United States may participate in many law-creating activities. For instance, they may vote in elections for legislators, who, in turn, create legislation. Likewise, if people have a legal claim, their case may be heard by the judiciary.

It’s important to note, however, that not all law is public law. Private law is typically understood to be law that is binding on specific parties. 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 to anyone else. If the parties have a contract dispute, they will be able to use dispute-resolution methods to resolve it. This is because both parties of the contract recognize the judiciary as a legitimate authority that can resolve the contract dispute. However, regardless of the resolution, the terms of the contract and the remedy for breach will apply only to the parties of the contract and not to everyone else.

Additionally, some law is procedural and some law is substantive. Procedural law describes the legal rules that must be followed. In other words, it details the process or rules that are legally required. For instance, the U.S. government must generally obtain a warrant before searching someone’s private home. If the process of obtaining the warrant is ignored or performed illegally, then procedural law has been violated. Substantive law refers to the actual substance of the law or the merits of the claim, case, or action. Substantive law embodies the ideas of legal rights and duties and is captured by our different sources of law, like statutes, the Constitution, or common law.

Sources of Law

In the United States, our laws come primarily from the U.S. Constitution and the state constitutions; from statutory law from Congress, the state legislatures, and local legislative bodies; from common law; and from administrative rules and regulations. Executive orders and treaties are also important sources of law. These are all primary sources of law. As is true in any democracy, U.S. law reflects the will of the people who vote for representatives to make the law. In this way, U.S. law is also a reflection of public policy.

Secondary sources of law include restatements of the law, law review and journal articles, uniform codes, and treatises. These sources are created by legal scholars rather than by a recognized, legitimate law-creating authority. However, these sources are read by and often influence those who are in the position to create law. Members of the judiciary, for example, may consult a restatement of law or law-review articles when making decisions. Likewise, state legislatures often adopt whole or parts of uniform acts, such as the Uniform Commercial Code (UCC). When a body of secondary law is formally adopted by a legitimate lawmaking authority, then it becomes primary law. In this example, adoption of the UCC by a state legislature transforms the UCC from a secondary source of law (a model code) to a primary source of law in that state—namely, a statute.

 Hyperlink: The U.S. Constitution

http://www.archives.gov/exhibits/charters/constitution_transcript.html

Read the U.S. Constitution at this link.

The U.S. Constitution created the structure of our federal government. Among other things, it sets forth the three branches—the legislative, executive, and judicial branches.

It provides organizational and procedural requirements, defines the boundaries of each branch’s jurisdiction, and creates “checks” on each branch by the other branches. For example, look at “Hyperlink: The U.S. Constitution”. As you can see, in Article II, Section 2 the president is the commander in chief of the several armed forces, but he does not have the power to declare war. That duty falls to Congress.

The first ten amendments to the U.S. Constitution are known as the Bill of Rights. Some of the Founding Fathers did not believe that a Bill of Rights was necessary because the power granted to the federal government created by the U.S. Constitution was

expressly limited. Any powers not expressly granted to the federal government by the U.S. Constitution are reserved to the states. This means that if the U.S. Constitution does not state that one of the federal branches of government has jurisdiction over a particular area, then that area falls to the states to regulate.

Despite the limited power granted to the federal government by the U.S. Constitution, as a condition of ratification, many states insisted on a written Bill of Rights that preserved certain individual civil rights and liberties. Today, business entities that are treated as legal persons under the law, such as corporations, enjoy many of these rights and liberties, just as if they were natural human beings.

Each state also has its own constitution, and those constitutions serve essentially the same function for each individual state government as the U.S. Constitution serves for the federal government. Specifically, they establish the limits of government power, create protections for fundamental rights, and establish the organization and duties of the different branches of government at the state level.

This dual system of government present 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. State laws may not conflict with federal laws, including the U.S. Constitution. This is because the U.S. Constitution is the supreme law of the land.

Statutory law is law created by a legislative body. Congress is the legislative body at the federal level. The states also have legislative bodies, most of which are bicameral, like our federal system. The state legislatures' names vary by state. For instance, in Indiana, the legislature is known as the General Assembly. In North Dakota, it is the Legislative Assembly. In New York, it is called the Legislature. Nevertheless, their purposes are the same. They are the legislative branches of their respective state governments.

Congress is composed of a Senate, with 100 members, and a House of Representatives, with 435 members. The forefathers who wrote the Constitution deliberated and argued over how to compose the legislature, and the result is a deliberative body that doesn't always respond quickly to the will of the majority. Since population numbers from the census taken every ten years determine how many House seats a state receives, smaller states are sometimes disproportionately represented in the Senate. Alaska and Delaware, for example, have only one representative in the House, but each has two senators. Senators serve six-year terms, and members of the House of Representatives serve two-year terms. There are no term limits for either senators or members of the House. One benefit of having no term limits is that institutional knowledge and wisdom can be carried forward in perpetuity. One drawback is that elected officials may hedge their votes on important issues in a calculated way, to ensure reelection. If term limits were imposed, then vote pandering would not be a problem, but the Congress would be forever laboring with many inexperienced lawmakers.

As you can see from "Hyperlink: How a Bill Becomes a Law", a bill may be introduced in Congress through the Senate or through the House of Representatives. Both the House of Representatives and the Senate have many committees, and these are related to all areas under the purview of Congress to legislate. After a bill is introduced, it is sent to an appropriate committee in the chamber of the Congress where the bill originated. If the committee moves forward with the bill, it modifies the bill as it sees fit to do, and then it sends the bill to the house of origination (either the Senate or the House of Representatives) for a vote. If the bill passes, then it is sent to the other house (again, either the Senate or the House of Representatives), where it undergoes the same process. If the other house votes to approve the bill, then the bill goes to the joint committee, which is composed of members of both the House of Representatives and the Senate, where final work is completed. After that, the bill is sent to Congress for a full vote. If the bill passes, it is sent to the president. If the president signs the bill, then it becomes a statute.

The president may veto a bill. A presidential veto is an executive "check" on the legislative body. However, if the president vetoes a bill, the legislature can override the veto by a supermajority vote. A congressional override is a legislative "check" on the executive branch. These checks are built into our U.S. Constitution.

Hyperlink: How a Bill Becomes a Law

http://www.lexisnexis.com/help/CU/The_Legislative_Process/How_a_Bill_Becomes_Law.htm

Check out the interactive flowchart for how a bill becomes law. Be sure to click on the different boxes for additional information about each step.

Importantly, Congress may not act outside of its enumerated powers. Many people wrongfully believe that Congress can do anything. That is simply not true. Look at Article I, Section 8, accessible through "Hyperlink: The U.S. Constitution", for the

enumerated powers of Congress. Remember that any power not granted to the federal government by the U.S. Constitution is reserved to the states. This means that if Congress passed a law in an area that was actually reserved to the states to regulate, Congress would have acted outside the scope of its powers. If challenged, the law would be struck down as unconstitutional.

As a practical matter, this means that many U.S. states have state laws that are very different from each other. For instance, in Oregon, certain terminally ill patients may legally commit suicide under the state's Death with Dignity Act. However, in many other states, such an act would be illegal.

Common law is judge-made law. Common law is a feature of most countries previously colonized by Great Britain, where it originated. In continental Europe, an alternative system called civil law developed, where judges do not have the power to create law through interpretation. In civil-law jurisdictions, only the legislature may create law. A jurisdiction is an area where power may be exercised.

In a common-law system, when an appellate court hears cases and writes opinions, rules of law are created, formed, and shaped. After a particular legal issue has been decided in a jurisdiction, there is a high probability that subsequent cases that present the same legal issue will use the same rule of law generated from already-decided cases regarding the same legal issue. This policy is known as *stare decisis*, or "let the decision stand." This is how a precedent is formed, though precedents may shift or change over time. Precedents also may be entirely overturned, though that is rare. Precedents and *stare decisis* allow us to anticipate the behavior of others and to gauge the legality of our own actions.

Legal reasoning is used by attorneys to argue for a particular outcome in a case and by judges when rendering decisions. At its most basic form, legal reasoning involves first identifying the legal question, which is the issue in dispute. Then, the rule of law that applies to that issue is identified. The rule of law may be drawn from precedent, for example. The facts of the case are analyzed against the rule of law to reach a supportable conclusion. This method of legal reasoning is referred to as the IRAC method, which is an acronym for issue, rule, analysis, and conclusion.

Common law is an important source of law in those many areas that are reserved to the states to regulate. A state may exercise its police powers to regulate the safety, health, and welfare of its citizens, for example. The laws implemented in these areas may give rise to laws in divergent areas, such as property law (e.g., zoning regulations), so-called vice laws (e.g., restrictions on vice business activities in certain areas or during certain days), and domestic relations (e.g., laws relating to marriage and adoption). It's also important to note that precedents vary among different jurisdictions because precedents created by one jurisdiction are not binding in other jurisdictions.

Most administrative agencies are created by the legislature. At the federal level, they are created by Congress, and at the state level, they are created through the state legislative bodies. Administrative agencies may be thought of as a delegation of congressional authority to area experts in particular fields, so that those experts can engage in limited lawmaking, adjudicative procedures, and investigations within their particular purviews. Laws made by administrative agencies are called rules or regulations. Administrative agencies are created by enabling legislation, which sets forth the agencies' jurisdictional boundaries, rule-making procedures, and other information relating to agencies' scopes of power.

Key Takeaways

The legal system in the United States is composed of multiple jurisdictions at the local and state levels and one federal jurisdiction. Local and state laws may not conflict with federal laws. Primary sources of law in the United States include constitutional law, statutory law, common law, and administrative law.

? Exercise 1.2.1

1. Identify an action that would violate social norms but would not violate any laws. Can you identify any violations of law that would not violate any social norms?
2. What are three specific powers of Congress? What are three specific powers of the executive branch? Do you think that the powers of the judicial branch are well defined? Why or why not?
3. What areas of law have been reserved to the states to regulate? How do you know?
4. Identify a bill in either the House of Representatives or the U.S. Senate. What stage(s) of the bill process has it passed through? To be passed into law, what stages must it still pass through?
5. Which three federal administrative agencies affect you or your family the most? Why?

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