Chapter 1

What Is Law?

We are firmly convinced, and we act on that conviction, that with nations as with individuals, our interests soundly calculated will ever be found inseparable from our moral duties.

Thomas Jefferson

CHAPTER OBJECTIVES

After studying this chapter you should better understand:

- What is commonly meant by a rule of law
- The nature of formal law and its limits for governing behavior
- The interrelationship of norms, moral codes, and formal laws
- The fundamental characteristics of the U.S. constitutional system
- The basic sources of formal law in the U.S. legal system

The law is our constant companion. As with most companions our relationship is complex, sometimes supportive and other times maddening. Abortion, the death penalty, prayer in schools, government takings, and affirmative action are only a few examples of current issues that are the subject of much public attention and serious disagreement. Courthouses and law offices are crowded with individuals immersed in the legal process as parties or witnesses in criminal proceedings and civil lawsuits. The system is conspicuous in American culture: it is a recurrent setting for film and television, in popular novels, and in casual conversation. Jokes about lawyers are commonplace, as are expressions of frustration with lawyers' influence. Yet becoming a lawyer still attracts many of the nation's most gifted and ambitious individuals. There are more than 750 thousand lawyers in the country,[1] and hundreds of law schools produce a steady stream of new graduates. To what extent do the perceptions we have about the law and about the legal process reflect their true nature?

This book examines the nature of the law and of the legal process. It also describes the general nature of the laws, cases, and legal principles that public administrators are most likely to encounter. A grasp of these subjects can be valuable to anyone. But more than passing familiarity with basic law subjects is necessary for public administrators to be able to make

wise decisions about issues and problems involving the law. Decision makers should also appreciate the nature of sources of law and what makes laws matter or not matter.

The question considered in this chapter, "What is law?" is not just an academic exercise. Law is much more than the words of legislators or judges that can be found in published statutes and court decisions. Law does involve such rules, but decision makers should not assume that these rules explain what governs the behavior of others. Law involves more amorphous but equally important considerations. Everyone knows that there are formal laws that are routinely ignored and that there are sources of constraints on behavior other than formal law. Public administrators therefore should consider formal laws and what makes them legitimate as well as other factors that govern behavior.

This chapter considers the sources of rules that govern our behavior, including what we mean when we say a society is governed by a "rule of law," and the nature of natural and formal legal constraints. It also provides an introduction to the formal sources of law in the U.S. legal system, including legislation, court decisions, agency regulations, and international laws. Together these subjects build a framework for exploration in the remainder of this book of the substance of modern law and the operation of the legal process.

Rules and Their Legitimacy

Common notions about law involve rules that govern behavior and relationships. The terms "positive law" and "formal law" are used to refer to a set of rules that a government proclaims and enforces. Humans are not necessarily ruled by formal law; a society can be imagined in which there is none. "Anarchy" refers to a condition in which society is not effectively governed by any government or formal laws. As James Madison, the primary architect of the U.S. Constitution, said, "If men were angels, no government would be necessary."[2] But humans are not angels, and the experience of civilization shows that anarchic conditions are likely to result in violence and destruction. As William Golding put it in his classic novel *Lord of the Flies*, humans seem to face a choice: "Which is better—to have laws and agree, or to hunt and kill?"[3]

It is easy to see that it is better to be ruled by laws to which we agree than by primitive force, but throughout history civilizations have struggled with the essential question of how those laws are determined. The philosopher Plato, in *The Republic*, described the possibility of ideal rules emanating from benevolent "philosopher kings" who would use their power and superior intellect in society's best interest. But history has not given us much reason to expect such philosophic or benevolent tendencies from those with power. Autocratic rule has tended to entail flagrant abuses. In 1933, Hitler used the "The Law for Removing the Distress of People and Reich" to give himself the unfettered power he needed for fascist rule.[4] The Soviets, who also presided over a brutally repressive regime, were expert at adopting formal rules. Their constitution cynically proclaimed that "citizens of the USSR have the right to protection by the courts against encroachments on their honor and reputation, life and health, and personal freedom

and property."[5] But encroachment upon life, liberty, and property occurred at the pleasure of those who controlled the state and the party apparatus. These and many other experiences confirm economist Frederic Bastiat's observation that "the law has been applied to annihilating the justice that it was supposed to maintain; to limiting and destroying rights which its real purpose was to respect. The law has placed the collective force at the disposal of the unscrupulous who wish, without risk, to exploit the person, liberty, and property of others. It has converted plunder into a right, in order to protect plunder."[6]

Rule of Law

The founders of the U.S. legal system were well aware of the lessons of history about human tendencies toward seizing power and oppressing others. When they declared independence from England they listed the king's "abuses and usurpations" against them, and they declared a right to oppose such oppression by instituting a new government that would better protect rights they said were "unalienable." They sought to create a country governed by a "rule of law." As Chief Justice John Marshall famously said in one of the earliest cases decided by the U.S. Supreme Court, "The government of the United States has been emphatically termed a government of laws, and not of men."[7] Since then government leaders and scholars have continued to refer to an ideal as a rule of law, usually as a contrast to the extremes of anarchy and authoritarianism. What does it really mean to be governed by a rule of law?

Powerful concepts embedded within the notion of a government of laws include a conviction that the law should be adopted in an open and democratic process. In a republic, elected representatives enact the formal laws through a legislative process. The legitimacy of these formal laws stems from the notion of the consent of the governed. As explained by philosopher John Locke, whose ideas were expressed in the Declaration of Independence, although we are born into a state of natural law and no one has inherent power over others, "every man that hath any possession or enjoyment of any part of the dominions of any government doth thereby give his tacit consent, and is as far forth obliged to obedience to the laws of government during such enjoyment as anyone under it."[8] According to this view of government's legitimacy, the people empower their representatives to make and enforce rules for the common good, which are applied to everyone.[9]

The U.S. Agency for International Development invokes broader concepts when it says:

> *The term 'rule of law' embodies the basic principles of equal treatment of all people before the law, fairness, and both constitutional and actual guarantees of basic human rights. A predictable legal system with fair, transparent, and effective judicial institutions is essential to the protection of citizens against the arbitrary use of state authority and lawless acts of both organizations and individuals.*[10]

This well-reasoned definition of a rule of law refers to other conditions that must exist together with rules. Legitimacy comes not only from the process by which the rules are adopted

and enforced, but also the extent to which the rules reflect society's customs and notions of proper human conduct.

Natural Law

The existence of formal laws alone does not equate to a rule of law. We know from history that lofty constitutional principles and comprehensive legislative schemes cannot by themselves guarantee rights and freedom. Formal law does not constrain harmful tendencies or protect individual liberties unless it coexists with mutual respect for individual rights within society. Thomas Jefferson warned about confusing observance of formal law with liberty. He said that "rightful liberty is unobstructed action according to our will within the limits drawn around us by the equal rights of others. I do not add 'within the limits of the law' because law is often but the tyrant's will, and always so when it violates the rights of an individual."[11] Jefferson thereby reminded us that law can be something worse than an empty or cynical exercise, and time has proved him right.

We also know that even when formal laws are the product of a representative enactment process they do not always govern public behavior. Some laws are entirely unknown to the public or even though known they are routinely ignored. For example, there are state laws that still proscribe sexual conduct in which adults routinely privately engage. We also hear of inane laws, such as those prohibiting sleeping while wearing shoes or playing dominoes on a Sunday. Laws are not seen as legitimate unless they reflect community notions of right and wrong. Law philosopher Ronald Dworkin put it this way: the legal rule "represents the community's effort to capture moral rights."[12] When a formal law fails to capture those rights, or loses touch with them, the law is likely not to be followed or enforced.

Formal rules also fail to result in a rule of law when they become too distant or unwieldy. The power of formal law and legal process cannot possibly reach all aspects of interactions among members of a society. Economist Frederick Hayek noted this natural limitation when he said that a rule of law "means, not that everything is regulated by law, but, on the contrary, that the coercive power of the state can be used only in cases defined in advance by the law and in such a way that it can be foreseen how it will be used."[13] Even the American Bar Association's Model Rules of Professional Conduct acknowledge the limitations of rule formalization. The description of the rules' scope includes the following comment:

> *Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.*[14]

To understand what does constrain human activity we must consider the extra-legal bonds that exist as a matter of common understanding and custom.

Laws are an accurate measure of behavior when they reflect basic notions of right and wrong. The concept of natural law is a foundation of the American legal system. Natural law has been defined as "a system of rules and principles for the guidance of human conduct which, independently of enacted law or of the systems particular to any one people, might be discovered by the rational intelligence of man, and would be found to grow out of and conform to his *nature*, meaning by that word his whole mental, moral, and physical constitution."[15] Many eminent philosophers, including Aristotle, Thomas Aquinas, Thomas Hobbes, John Locke, and Thomas Jefferson have described the importance of natural law to human society. Jefferson wrote of this concept in the Declaration of Independence when he referred to the unalienable rights of life, liberty, and the pursuit of happiness.

Obviously notions of custom and morality guide those who enact and interpret the law. Legislatures sometimes expressly incorporate such concepts into their enacted laws. For example, unfair trade practice laws prohibit deception and authorize multiple damage awards and attorneys' fees compensation to those harmed by such behavior. Businesses have been struck with substantial verdicts based on violations of these standards of decency even in the harsh commercial realm. The law governing common sales also adopts boundaries of good faith. The Uniform Commercial Code declares that "[e]very contract or duty [governed by the Code] imposes an obligation of good faith in its performance or enforcement," which means "honesty in fact in the conduct or transaction concerned."[16] The Code also authorizes courts not to enforce a contract that is "unconscionable,"[17] which courts have used to invalidate contractual agreements based on perceived unreasonableness.[18]

Judges also sometime explicitly refer to natural law in their analysis. For example, North Carolina's constitution does not state that the government must pay compensation for property taken from citizens through exercise of the power of eminent domain, but the state's supreme court said that a right to compensation is "so grounded in natural law and justice that it is part of the fundamental law of this State."[19] Courts also regularly defer to a sense of community standards in defining other important constraints. For example, the U.S. Supreme Court invoked such standards for determining whether laws against obscenity violate constitutional guaranties of free expression. In the 1964 case *Jacobellis v. Ohio*,[20] involving an obscenity prosecution for a movie depicting an adulterous love scene, Justice Potter Stewart famously said, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that."[21] He believed that communities share unarticulated notions of unacceptable depictions of sexual material and that such notions could be the basis for deciding cases.

Even in the criminal context, our legal system acknowledges that the formal laws must sometimes defer to behavioral norms. This can be seen with "jury nullification," by which a jury decides a case based on the jury's sense of what is right without regard to the court's instructions. As one court put it, "The pages of history shine on instances of the jury's exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge."[22] Judge Learned Hand described the jury as "introduc[ing] a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions."[23]

Community norms also underlie everyday exchanges. The innumerable social and business interactions in which individuals engage depend on trusting relationships and predominant norms of behavior by which individuals keep their word and act in good faith. Participants in a market economy rely on each other's willingness to do business, which can be diminished by a reputation for bad behavior. Reasonable business people prefer to expend their energies in a mutually cooperative way rather than focus on disagreements.[24] The limited reach of formal law means we must rely to a great extent on other constraints to govern our actions in our relationships. As Nobel Prize-winning economist Amartya Sen has explained, "Successful operation of an exchange economy depends on mutual trust and the use of norms—explicit and implicit. When these behavioral modes are plentiful, it is easy to overlook their role."[25] We depend on behavioral norms to facilitate our commercial and private interactions and constrain harmful tendencies, and these norms deserve attention as much when they are present as when they are absent.

Despite the inseparability of law and moral standards in core legal building blocks, much modern legal theory has strived to isolate morality from formal law analysis. Oliver Wendell Holmes, Jr., was the pathfinder in this movement. In his 1897 article "The Path of the Law," he launched a quest for "legal realism" based on what has been called "moral skepticism."[26] Although acknowledging that a community would resist laws that violated basic moral senses, Holmes said that confusing legal and moral ideas will render the law useless in its essential role of providing predictable rules. He argued that the law should be seen scientifically as "the prediction of the incidence of the public force through the instrumentality of the courts."[27] Whatever the merits of social realism in the development and application of coherent formal rules, it necessarily falls short of providing a complete picture of how a society is governed. The result, as legal scholar Lon L. Fuller said, is that "the legal mind generally exhausts itself in thinking about law and is content to leave unexamined the thing to which law is being related and from which it is being distinguished."[28] Analytically separating morality from formal law causes us to fail to appreciate the extent to which morality legitimates law and governs our extralegal behavior.

Sources of Norms

What is the nature of the norms and moral codes that legitimize laws and guide behavior? They have spiritual, philosophical, and social origins, and many bright minds and devout souls have searched for clarity about what is right. Aristotle's philosophy is a solid enough foundation for understanding the basic nature of behavioral norms, for several reasons. It is consistent with our predominant moral concepts. It profoundly influences the development of democratic government. It also puts virtue in the context of relationships, which is the sense in which morality results in constraints on behavior.

Aristotle saw moral virtues as habits that moderate between extremes. He said virtues are not instinctive—they must be learned and practiced within a culture.[29] Philosopher Leszek Kołakowski explained this notion of virtue as the "moral skills essential for life in a human community, [that] in one important respect resemble other, non-moral skills. . . . We learn

virtues by being brought up in a community where they are practised, in the same way as we learn to swim, or to use a knife and fork."[30] Those who achieve these virtues aim their actions, in Aristotle's terms, "to the right person, to the right extent, at the right time, with the right motive, and in the right way."[31] Of the virtues identified by Aristotle, two in particular are at the heart of shared concepts of social norms of interactive behavior: truthfulness and justice. The person who loves truth, Aristotle said, will be "truthful where nothing is at stake, will still more be truthful where something is at stake; he will avoid falsehood as something base, seeing that he avoided it even for its own sake."[32] Justice is a closely related concept, which requires, among other things, keeping faith in one's agreements.[33]

Fundamentally, these virtues put our behavioral choices in the context of our relationships with others. Even those who have never considered philosophical definitions tend to share this conviction, as expressed in the "Golden Rule," by which we know it is right to treat others as we would want to be treated ourselves, a profound imperative on which the world's cultures generally have agreed. As philosopher Immanuel Kant said, "There is . . . only a single categorical imperative and it is this: Act only on that maxim through which you can at the same time will that it should become a universal law."[34] Religious tenets worldwide express the same notion. For example:

> *Buddhist Udana-Varga*: "Hurt not others in ways that you yourself would find hurtful."
> *Christian New Testament*: "Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets."
> *Confucian Avalects*: "What you do not want done to yourself, do not do to others."
> *Hindu Mahabharata*: "This is the sum of duty: do naught to others which if done to thee would cause thee pain."
> *Islamic Sunnah*: "None of you truly believes until he wishes for his brother what he wishes for himself."
> *Jewish Talmud*: "What is hateful to you, do not do to your fellowman. This is the entire Law; all the rest is commentary."

Of course behavior does not always reflect philosophical or religious principles, and many aspects of community standards of expected and acceptable behavior vary among societies and over time. What one society abhors may be condoned by another; what was once forbidden may become commonplace. Nevertheless, the commonality of the Golden Rule in philosophical and sacred commandments reflects that at least as a matter of principle humans tend to ascribe to the same fundamental notions of right and wrong. These fundamental notions are at risk if we lose touch with their importance. To avoid disintegration of the essential governing norms we must abide by Shakespeare's advice, "This above all—to thine ownself be true; And it must follow, as the night the day, thou canst not then be false to any man."[35] Or as Kołakowski put it, "[W]e should always be on guard against self-deception and self-satisfaction, and scrupulous in examining the true motives of our actions."[36] Those who formulate the law and administer the legal process need to heed this advice and must strive to align their motives and actions with society's moral principles.

Public administrators may not be the kind of philosophers that Plato imagined could benevolently govern for the public good. Public administrators are humans with practical responsibilities, and they cannot reasonably be expected to act in all ways as if they are enlightened philosophers. But one need not be a philosopher to guide behavior according to thoughtful principles. As the Stoic philosopher Epictetus said, "Never call yourself a philosopher and do not talk a great deal among non-philosophers about philosophical propositions, but do what follows from them."[37]

Evolution of Formal Law

As notions of fairness and justice have continued to evolve throughout history, civilizations have developed formal legal systems to reflect those notions and to organize a functioning society with increasingly complicated interrelationships. Although the founders of the United States declared independence from English rule, many fundamental aspects of the government, civil and criminal laws, and judicial procedures that governed the colonies were continued in the federal and state systems. Formal law is a product of thousands of years of evolution in legal traditions. These shared concepts about law and legal process continue to bind Western political and legal systems.

Scholars trace the Western legal tradition at least as far back as the Babylonians. In 1901 a stone monument was found in the Persian mountains on which were engraved hundreds of laws. These laws have become known as "Hammurabi's Code" named after the Babylonian ruler believed to have proclaimed a code during his reign in 1795–1750 B.C. Jewish law incorporated many aspects of Babylonian law, as expressed in the Ten Commandments, the Torah, and the Talmud.[38] These laws were believed to have emanated from God, and they were interrelated with religious practices. Many of the proscriptions, such as the commandments against murdering and stealing, are embedded in modern law.

The Greeks are known for laws not necessarily issued by a deity and for the emergence of laws, especially criminal laws, that focused on individual rather than family or collective responsibility.[39] The writings of Ancient Greek philosophers such as Aristotle, about individual liberties, property ownership, and criminal procedure, were influential in the development of modern Western legal systems and remain sources of enlightenment for legal scholars.

Similarly, the period of Roman dominance made important contributions to development of modern legal systems in the Mediterranean region and beyond. The Romans were governed by published imperial edicts and judicial opinions. In the sixth century Roman Emperor Justinian published the first comprehensive set of formal legal rules in the *Corpus Juris Civilis*, or Justinian Code, from which Western legal systems draw inspiration.[40] Justinian collected all of the imperial edicts into one source and collected judicial opinions into a digest. The word "Code," which is now used to describe the collection of statutes currently in force, is derived from the word "codex" that the Romans used to describe their compilation.[41] The Romans are also known for the emergence of a professional class of lawyers who valued legal reasoning and argument,[42] although religious leaders continued to play a major role in the development of formal law.

While Mesopotamian, Greek, and Roman innovations built a framework for a comprehensive system of formal laws, many core aspects of the U.S. legal system are derived from innovations in English law. One of the most important developments is the idea of a constitution as the ultimate source of formal law. Western constitutional law customarily is traced to the Magna Carta of 1215, a charter to which English church leaders and nobles compelled King John to agree. The Magna Carta challenged the notion that monarchs are divinely chosen rulers subject to no earthly authority. King John agreed that certain rights were inviolable, such as the right that no "freeman" may be deprived of property or liberty except by process of the law. The king acknowledged that even he was bound by law,[43] principles later expressed in the U.S. Declaration of Independence and in the Bill of Rights.

England is also important for development of a system of common law. The English Parliament, and other legislatures, enact statutes as rules to address many matters involving government and individual relationships. The common law emerged to address matters not covered by such enactments. It is the body of judicial decisions resolving disputes according to judges' sense of custom and justice. Once a common law principle is established, by tradition the courts later abide by it as a matter of *stare decisis*, by which prior decisions on the same issue within the same jurisdiction are considered to be binding precedent in the same or substantially same circumstances in later cases. Over time the common law is adapted to new circumstances, and new common law principles evolve to deal with previously unaddressed situations. This English common law tradition survived the American Revolution in the United States. The newly established federal and state courts relied on English judicial opinions and law scholars as authorities in deciding cases. Most areas of the law remain heavily influenced by these English common law principles. For example, courts rely on common law to resolve property ownership disputes or claims for damages as a result of personal injuries and to define some crimes such as fraud.

This brief introduction to the evolution of formal law in Western Civilization is intended to give some perspective about the philosophical and cultural traditions that underlie modern law. Legislatures and courts do not often speak of such traditions when they pass laws or decide cases. But history unquestionably influences their initiatives and decisions. An understanding of this framework can lead to greater understanding of the nature of law and legal process.

Sources of Formal Law

Formal law is a complex puzzle with pieces that do not fit neatly together and with no discernable perimeter. Answers to legal questions can be found in any of a myriad of constitutions, statutes, ordinances, regulations, judicial opinions, and other sources. Moreover, the nature of formal law cannot be understood without also understanding the manner in which law makers are allocated power within the legal system. The following sections discuss each of the major sources of law, beginning with a discussion of the constitutional system and the main features

of the manner in which legal authority is allocated, then continuing with a discussion of the principal sources of formal law.

Constitutional System

Formal laws begin with a constitution—a compact authorizing a government to exercise entrusted powers and forbidding government from infringing on certain rights. With the U.S. Constitution the states established a federalist government, granting certain powers to a central government but continuing their own self-government over other matters. The states' constitutions in turn address their forms of government and limitations on their powers, which are in large degree modeled on the federal structure.

Recognizing the truth of Baron Acton's famous statement, "Power tends to corrupt, and absolute power corrupts absolutely," the framers of the U.S. legal system intentionally installed counterweights to the concentration of power. The states ratifying the U.S. Constitution agreed to surrender some of their power to the federal government to facilitate interstate commerce and self-defense and to promote prosperity and growth. But the states retained power over other matters. The founders also created separate branches of government—legislative, executive, and judicial—at both the federal and state levels, which were intended to have the tendency to check each other's natural inclination to assume ever greater authority. James Madison, who said no government would have been necessary if humans were angels, also observed that "If angels were to govern men, neither external nor internal controls on government would be necessary."[44] The framers understood that humans were not angels and built controls into the legal system.

Federalist System

When the states joined the federal union their citizens became subject to federal laws enacted pursuant to the powers that the U.S. Constitution gave to the federal government. Article VI of Constitution provides, "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitutions or laws of any State to the contrary notwithstanding." With this Supremacy Clause the states conceded state law to matters assigned to the federal government in the Constitution. The states' authority to enact laws in conflict with federal law is said to be "preempted." A federal law preempts any state law or regulation if the federal law expressly does so or if preemption is implicit in the structure and purpose of the federal law. A state may be preempted from legislating in an entire field of law if the federal law is so expansive as to indicate that it was intended to occupy the field.[45]

Separation of Powers

The federal and each state constitution established three branches of government: the legislative branch to make law, the executive branch to enforce the law, and the judicial branch to resolve disputes. As discussed in other chapters in this book, the U.S. Constitution was not

always entirely clear about which branch had a particular power or about how to resolve conflicts when more than one branch assumed the same power. A very important question not expressly addressed in the Constitution was how to resolve questions about whether a branch exceeded its constitutional authority. As discussed in Chapter 2, in the 1803 case of *Marbury v. Madison* the U.S. Supreme Court said that it was its role to declare what the law was and to determine whether a legislative or executive act was unconstitutional. Although at the time not all leading political figures thought the Court had such an implied role—some thought each branch determined the extent of its power and that the states ultimately could nullify actions not constitutionally authorized—the view expressed in *Marbury v. Madison* was accepted as establishing the Court's ultimate arbitral authority.

The framers intended for there to be tension among the branches of government in the exercise of power. A separation of powers intentionally put the branches at odds to prevent any one branch from becoming tyrannical. In addition to dividing power among each of the branches the Constitution gave each branch some involvement in the others' activities. One example of this interrelatedness is the process for enacting law. The Constitution gave the power to make law only to Congress, but the president was enabled to block legislation with a veto. The framers left the final say with Congress, however, which may override a veto with a two-thirds vote of both chambers. As another example of the checks built into the system, the Constitution gave the president the power to appoint federal judges, but those appointments are subject to the Senate's approval. Also, Congress was given control over the judiciary's budget, may impeach federal judges, may initiate amendments to the Constitution if it disagrees with the judiciary's interpretation, and may change laws or enact new laws in response to court decisions. Conflicts among the branches are inevitable, but the framers saw tension as essential for preventing the power consolidation that history showed would otherwise occur.

Many important legal issues involve the tensions among branches of government. Some U.S. Supreme Court justices have seen their roles as protectors, ready to declare legislative acts invalid if they infringe on the justices' understanding of what rights should be. Other justices have tended to defer to elected legislators as those who are constitutionally empowered to express the will of the people. Some justices seem to express both views over time, depending on the nature of the issue. Differing views about the proper role of the branches of government is a recurring theme in the discussion of substantive law in later chapters in this book.

Legislation

The federal and state legislatures enact statutes governing matters over which they have constitutional authority. Article I of the U.S. Constitution establishes Congress to enact federal laws. Provisions in state constitutions similarly establish state legislatures.

Legislative Enactment Process

Statutes become law through a legislative process. In the U.S. Congress members initiate legislation by introducing a bill. The president may propose legislation with an executive

communication, which is referred to a congressional committee with responsibility for the subject matter of the proposal, and a member of the committee may then introduce the bill. A similar process is followed in the state legislatures.

Bills can be public or private. In essence a public bill is supposed to affect everyone within a jurisdiction generally, and a private bill is supposed to affect only a specific individual, entity, or area within the jurisdiction. Bills usually are numbered in chronological order according to when they are introduced and are preceded with an abbreviation for the chamber in which they are introduced—for example "H." for the House of Representatives and "S." for the Senate in the federal system. In the U.S. Congress, and in some state legislatures, a proposal can also take the form of a resolution. In Congress a joint resolution is effectively the same as a bill but usually begins with a statement of intent. A simple resolution is a statement by a legislative body about a procedural or similar matter and is not submitted to the president. A concurrent resolution is an expression by both chambers that does not become a statute.

Legislative chambers have procedures for referring bills to committees for study and debate. Usually the chamber's presiding officer—a speaker of the house or senate majority leader—assigns the bill to a committee. Committees consider bills within their areas of responsibility and may use subcommittees to further delegate and allocate responsibility. Committees may hold public hearings to receive testimony and comments about the advisability of the proposed legislation. The committee may endorse the legislation as proposed and report it to the legislative chamber for a vote, table it so it is not to be considered, or amend the bill to propose a variation. If the bill is passed in one chamber it is sent to the other for its consideration, which may refer the bill to its own committee for consideration and hearings. If there is disagreement, a conference committee of both chambers may attempt to reconcile differences.

Bills passed by both chambers are presented to the executive—president or governor—who may choose to sign it into law or to veto it, in which case the legislature will need a supermajority to override the veto. The bill may also become law if there is neither approval nor a veto within a designated time. The rules for such disposition vary within jurisdictions. In the federal system, if Congress is not in session, the bill fails by a "pocket veto" if it is not signed within 10 days excluding Sundays; if Congress is in session, the bill becomes law after 10 days.

Voter Legislation

About half of the states have a process that enables citizens to introduce a proposed law through a process called an initiative. The process might entail placing matters directly on a ballot for voter approval, or legislative endorsement may be required before the matter is submitted to the voters. A famous initiative is California's Proposition 13, approved by the voters in 1978, which amended Article 13A of the California Constitution to cap the state's property tax. About half of the states have referendum provisions for citizens to reject, approve, or repeal legislation that the legislature enacted or is proposing. This is begun with a citizen petition, or a proposal by the legislature or a state commission or department, which is presented to the voters. The initiative and referendum procedures are seen by some as empowering citizens to

change the law directly, and by others as enabling special interest groups to secure legislation that would not survive the legislative deliberative process.

Federal Legislation

Congress has the constitutional authority to enact legislation concerning the powers entrusted to it in Article I of the U.S. Constitution. Section 8 of Article 1 gives Congress power over 17 specific subjects, such as "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" through patents, trademarks, and copyrights; "[t]o constitute tribunals inferior to the supreme court" such as the federal district courts and courts of appeals; and to raise and maintain armed forces. Congress also is empowered to "lay and collect taxes." In addition, Article I contains two clauses that over time have been interpreted as giving Congress very broad powers to extend its authority to pass laws affecting many details of private economic and social activity. One such broad clause gives Congress the power "[t]o regulate commerce . . . among the several states," which is known as the Commerce Clause. The second clause grants the power "[t]o make all laws which shall be necessary and proper for carrying into execution" the powers expressly enumerated, which is known as the Necessary and Proper Clause. The meaning of these two clauses was the subject of serious disagreement among the leaders who were first responsible for creating an operational federal government, and the issue remains a fundamental constitutional question that affects the balance of power in the country.

The extent of implied federal power to legislate arose in the Washington administration in connection with establishing a national bank. Secretary of State Thomas Jefferson maintained that an overly strong federal government was a threat to individual liberty. He said that Congress did not have power to create a national bank on the theory that a bank was "necessary and proper" because though perhaps convenient it was not necessary.[46] Attorney General Edmund Randolph and constitutional framer James Madison agreed with Jefferson.[47] Secretary of the Treasury Alexander Hamilton, who envisioned a strong federal government and powerful national economy, argued that a bank was essential to a functioning federal government and therefore necessary; he also argued that it was sufficiently related to the enumerated power to collect taxes.[48] The disagreement was eventually decided in favor of Hamilton's expansive view. In 1819 in *McCulloch v. Maryland*,[49] the U.S. Supreme Court held that Congress had the constitutional power to establish the bank. Chief Justice John Marshall said, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[50] Chief Justice Marshall similarly interpreted the Commerce Clause expansively in *Gibbons v. Ogden*,[51] holding that the powers of Congress applied not only to commercial traffic between states but also more broadly to commerce connected to interstate trade.

The early U.S. Supreme Court cases set the groundwork for later expansion of the federal government's powers. Over the decades federal law has steadily grown in its breadth and detail. Federal statutes now address virtually every sphere of economic and social activity. The following are some of the major subjects addressed in the 50 titles of the current federal statutes:

- Air transportation
- Bankruptcy
- Banking
- Contracts with the federal government
- Copyrights, patents, and trademarks
- Customs
- Emergency management
- Environmental protection
- Federal courts and federal court procedure
- Federal lands
- Firearms
- Food and drug preparation and sale
- Foreign relations
- Health care
- Homeland security
- Income and estate taxes
- Indian affairs
- Interstate highways
- Labor conditions and labor unions
- Military and veteran affairs
- Postal service
- Power generation
- Railroads
- Retirement plans
- Stock markets and securities
- Telephone, radio, and television lines and broadcasts

State Legislation

The U.S. Constitution expressly reserved powers to the states in several ways. The ultimate power of self-governance was reserved in Article V, which enables two thirds of the states to propose an amendment to the Constitution. A proposed amendment becomes effective by approval of three quarters of the state legislatures or constitutional conventions. In addition, the Tenth Amendment, added to the Constitution in the Bill of Rights, provides as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The federal government has tended to assume for itself increasing authority to govern, which the courts have only occasion-

ally resisted. Nonetheless, state law continues to govern many aspects of individual and commercial affairs.

A state's basic governance is prescribed in its constitution. Each state has a constitution establishing state and local governments and declaring rights of its citizens. Many states' current state constitutions are different versions than the state first adopted, and state constitutions tend to have been amended much more often than the U.S. Constitution. As law scholar G. Alan Tarr observed, "Most state constitutions have been amended more than once for every year that they have been in operation, a proliferation of amendments that shows that there is no reluctance to tinker with the handiwork of the founders of state constitutions."[52]

The typical state constitution is three times longer than the U.S. Constitution.[53] State constitutions have declarations of individual rights similar to the federal Bill of Rights. They tend to be more specific and to identify rights not expressly enumerated in the U.S. Constitution. For example, Florida's constitution declares a right of privacy: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein."[54] The U.S. Constitution does not contain a similar declaration. As discussed in the next chapter, however, the U.S. Supreme Court has held that such a right was implied in the Constitution within the "penumbra" of other explicit rights. State constitutions may differently address many other important individual rights.

State constitutions establish the same basic kind of three-branch governmental structure as the federal system. The details of the legislative, executive, and judicial branches, and their reciprocal checks and balances, vary among the states. For example, a number of states have more than one elected executive officer, providing for such other elected officials as a deputy governor, attorney general, secretary of state, and treasurer. These officers need not be of the same party as the governor, which can create something of a balance of power even within the executive branch.

A state's constitution is the source of its legislature's authority to pass laws on particular subjects. The U.S. Constitution is seen as granting specific powers to a federal government but not requiring them to be exercised. State constitutions, however, often impose affirmative obligations on the state government. For instance, the North Carolina Constitution declares that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."[55] Declarations of such rights can have an impact on many aspects of state government. For example, in some states, including North Carolina, the legislature and judiciary battle over the nature of the legislature's obligation to fund public education. Other state constitutional provisions may similarly reflect issues deemed important to the particular state in which they exist. For example, Idaho requires its legislature "to pass all necessary laws to provide for the protection of livestock" against certain infectious diseases.[56]

The process for enacting legislation in the states is fundamentally the same as the federal process. State legislators tend to meet less often than Congress, sometimes only a few months every other year. Much of their legislative effort will be concentrated on the budget and sources of revenue. Many states adopt uniform state legislation recommended by such bodies as the National Conference of Commissioners on Uniform State Laws, a group of legal scholars and

experts who propose laws for state adoption. For example, the Uniform Commercial Code, now in effect in nearly all jurisdictions, unified laws governing many aspects of lending and commercial transactions. Even with such uniform laws states often have variations. State approaches vary considerably as result of tradition, political inclinations, or happenstance.

The length and organization of state statutes vary widely. Some state statutory compilations occupy a few feet of shelf space, others take up a wall of shelves. The following are some of the major areas of law typically addressed by state statutes:

- Agriculture
- Alcoholic beverage sales
- Archives, museums, and public libraries
- Commercial sales
- Criminal offenses and procedure
- Corporations, limited liability companies, partnerships, and other businesses
- Electricity, cable, and other utilities
- Estates, inheritances, wills, and trusts
- Jails and prisons
- Hospitals
- Leases and evictions
- Local government powers and organization
- Motor vehicle licensing and registration
- Personal property security interests
- Professional licenses
- Public records
- Real estate conveyances, mortgages, and taxes
- Schools and universities
- State courts and state court procedure
- State income and sales taxes
- State personnel law
- State roads and highways
- State social services
- Worker compensation
- Zoning, land use planning, and environmental protection

The U.S. Constitution does not address local governments within the states. There are differing views about the source of local government power. The prevailing view is called "Dillon's Rule," named after judge and law scholar John F. Dillon, who in the late 1800s said that local governments could have only those powers that are expressly granted in state constitutions or statutes, or those that are necessarily or fairly implied in those express grants.[57] The

other approach is called "home rule," by which local governments are deemed to have broad power to govern within their jurisdictions, and they need not have specific authority in the state constitution or statute over a particular matter.

The allocation of local government authority also varies among the states. There are more than 89,000 local governments in the country, including more than 3,000 counties and almost 40,000 general purpose cities, municipalities, towns, townships, or boroughs. Georgia alone has 154 counties; Hawaii and Delaware only 3. Only Connecticut, the District of Columbia, and Rhode Island do not have counties; Louisiana has similar governmental regions called parishes. Illinois has 1,299 municipalities; Nevada has 19. In addition, there are more than 13,000 school districts and more than 14,000 special purpose districts with authority to govern specific local public functions.[58] School districts can be independently established together with the power to tax, or they can be aligned with other local government units and dependent on those units' power to tax.

The nature of local government management also varies. The most common form is a council-manager approach in which an elected city council appoints a manager to act as chief administrative officer responsible for most day-to-day functions, and an elected mayor presides over council meetings. Another common organizational form, typically found in smaller communities, is the mayor-council approach, in which the mayor is the functional administrator. The specific allocation of powers and duties is prescribed by statute, or in charters that typically are approved by the state legislature.

Local governments provide many essential services. They or enterprises to which they grant franchises provide police, fire, emergency rescue, schools, libraries, and public utilities such as electric, water, and sewer. They build and maintain many roads, bridges, and other elements of infrastructure. Local governments also are the primary source of land-use regulations, and they regulate traffic and prohibit nuisances. Local government enactments usually are called ordinances, but those that apply to land use are often called regulations.

The coverage of local ordinances varies widely from state to state and within states. The following are some of the main areas typically addressed in a local code of ordinances:

- Animal control
- Building and housing code
- Business operation and vending licenses
- Cemeteries
- Garbage disposal
- Land use and subdivision
- Libraries
- Municipal contracts
- Municipal personnel
- Noise and nuisances

- Police and fire administration
- Public transportation
- Signs and advertising
- Streets, sidewalks, and parking
- Traffic laws
- Water, sewer, and septic

Judicial Decisions

The federal and state constitutions establish courts with judicial power to resolve controversies between individuals and between individuals and their government. Constitutions authorize a judiciary and its basic jurisdiction and authorize the legislature to determine the other details of court organization and procedure. When a matter can be heard only in one court, that court is said to have exclusive jurisdiction. When matters can be heard in more than court, those courts are said to have concurrent jurisdiction. The federal system and each state system have trial courts of general jurisdiction to resolve two kinds of matters: criminal and civil. Criminal matters involve prosecutions by the government for violations of a criminal statute. Because someone's liberty or life is at stake, courts typically give priority on their calendars to criminal matters. Civil cases involve claims among individuals or legal entities. Some are decided by judges and others by juries. A right to have a dispute decided by a jury is sometimes constitutionally guaranteed, as in a criminal prosecution; for some kinds of disputes a right to a jury trial is afforded by legislation. Questions of law are decided by judges, and fact questions are decided either by juries if a right to a jury trial for the particular issue exists, or otherwise by judges.

A party who is dissatisfied with the way the law has been applied in a trial may have the matter reviewed by an appellate court. Appeals courts do not hear new testimony or receive new evidence. They examine legal issues and reverse decisions in which the law was incorrectly applied. Appeals can be "discretionary" or "as of right." If the appeal is discretionary, the appellate court may simply decline to consider it. Even when an appeal is "as of right," the court does not necessarily hear the argument or issue an opinion. The court may simply affirm the decision without an opinion or explanation.

Judges and the Law

Judges decide whether statutes enacted by legislators are constitutional, and they interpret how statutes apply. Judges also develop common law rules. Judges' influence on law therefore is considerable and their views about justice and fairness have a lot to do with the fabric of formal law.

Appointed judges are nominated by the executive and are therefore likely to reflect the views of the elected administration at the time of appointment. But they remain in office despite changes in administration. Life tenure reflects a notion that judges are more likely to make

decisions without being swayed by changing political influences. In states that have elected judges some effort is made through laws or ethical canons to prevent judicial candidates from being elected based on predisposed political views.[59]

Judges usually are not typical citizens. They tend to be very well educated and prominent figures and usually had extensive legal experience before becoming judges. They are in a sense expected to be undemocratic and to decide cases in an enlightened way that does not necessarily reflect popular opinion. Of course judges are humans with their own political and philosophical perspectives. Still, judges are products of the communities in which they serve. They should not be assumed to be oblivious to the norms of the society or to the impact of their decisions. As former President and U.S. Supreme Court Chief Justice William Howard Taft said, "Nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subjected to the intelligent scrutiny of their fellow-men, and to their candid criticism. . . . In the case of judges having a life tenure, indeed, their very independence makes the right freely to comment on their decisions of greater importance, because it is the only practical and available instrument in the hands of a free people to keep such judges alive to the reasonable demands of those they serve."[60]

The evolution of formal law in the United States therefore necessarily has had much to do with the capabilities and inclinations of influential judges. No judge had more of an impact than U.S. Supreme Court Chief Justice John Marshall. As described in the next chapter, his 1803 opinion in *Marbury v. Madison* established the principle of judicial review of legislation for constitutionality. Later in *Gibbons v. Ogden*,[61] he broadly interpreted federal power over interstate commerce to pave the way for expansion of the federal government. The law might have evolved very differently without Marshall's influence.

Other prominent judges also have been agents of fundamental changes in the law. For example, Justice Roger Traynor's opinions while on the California Supreme Court became a framework for holding manufacturers liable for defectively manufactured products.[62] During the period when Earl Warren was Chief Justice of the U.S. Supreme Court, the Court issued opinions involving issues that previous courts had left to the legislatures. In the 1954 case *Brown v. Board of Education*,[63] Warren led the Court to declare that segregated public schools violated the Equal Protection Clause of the Fourteenth Amendment, reversing prior cases that held "separate but equal" schools were permissible. The nature of criminal procedure underwent a similar significant change in 1966 with *Miranda v. Arizona*,[64] in which Warren, writing for a bare minority of justices on the Court, held that a criminal suspect must "be clearly informed" of certain constitutional rights before being interrogated. The Court said such warnings had to be mandated to address coercive police practices, and the warnings continue to be a routine feature of arrests. Many other significant constitutional interpretations were transformed during the Warren years.

The law evolves according to prevailing judges' views about justice and the courts' proper role. The propriety of change through judicial decision making is the subject of considerable debate involving widely divergent views. Some see judges as safeguards against the tendencies of majorities to use legislative power to their own advantage. Others see judges as undemocratic elitists who should not presume to know better than those who pursue change through the

legislative process. The path of the law is a product of tension between often-competing impulses, which may not be very smooth or efficient, but it has resulted in fundamental changes peacefully achieved.

Federal Courts

Article III, Section 1 of the U.S. Constitution states, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish." Article III, Section 2 states the following with respect to federal jurisdiction:

> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.*

This constitutional provision gives federal courts jurisdiction over several kinds of cases that were considered to be appropriate for the unified federal system rather than individual state systems, including cases arising under the U.S. Constitution and federal laws, sometimes referred to as "federal questions." The Constitution also empowers federal courts to consider disputes between citizens of different states, which is called diversity jurisdiction. Congress sets minimum requirements for diversity cases, such as a minimum dollar amount in dispute. The wisdom of allowing state diversity jurisdiction cases in the federal courts has been the subject of considerable debate. Supporters argue that it affords aggrieved citizens an opportunity to avoid local prejudices that might be encountered in state courts. They also argue that federal courts have more resources than state courts and may be better equipped to hear difficult or controversial cases. Opponents argue that diversity jurisdiction unduly shifts a burden to federal courts. They note that juries and judges in federal courts come from the same local populations as in state courts, and that modern state courts are not as provincial or lacking in resources as was once feared.

The federal court system consists of trial and appellate courts. District courts are the federal trial courts with general jurisdiction over civil and criminal matters. There are 94 districts including at least one in each state, the District of Columbia, and Puerto Rico. As described above, they have jurisdiction over federal questions and diversity cases. Under current law, diversity cases must involve at least $75,000 not including interest and costs.

Although most cases in the federal system are filed in district courts, there are other specialized courts that also conduct trials. Federal courts have exclusive jurisdiction over bankruptcies filed under federal law. Each federal judicial district handles bankruptcy mat-

ters, and in almost all districts these cases are heard in a bankruptcy court. The Court of International Trade has nationwide jurisdiction over international trade and customs issues. The Court of Federal Claims has jurisdiction over most claims for damages involving federal contracts, federal eminent domain, and many other kinds of claims against the federal government. Congress has also created legislative courts that do not have full judicial power. These include the Court of Military Appeals, the Tax Court, and the Court of Veterans' Appeals.

U.S. courts of appeals hear cases from the federal district courts located within their regions. There are eleven regional circuits and a District of Columbia circuit. For example, the first Circuit hears appeals from district courts in Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico, and the Ninth Circuit hears appeals from district courts in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, the Northern Mariana Islands, and Oregon. The Federal Circuit has nationwide jurisdiction over appeals involving specific kinds of matters, including certain claims against the U.S. government, government contracts, international trade, patents, trademarks, federal personnel, and veterans' benefits.

The U.S. Supreme Court hears appeals involving federal constitutional rights or federal law from the courts of appeals, state supreme courts, and in rare circumstances from other courts. (Note the legal convention, followed in this book, that the capitalized phrase "Supreme Court" or word "Court" means the U.S. Supreme Court.) Congress sets the number of justices—there is a chief justice and eight associate justices, whom the president appoints for life subject to Senate confirmation. Although the Court receives thousands of requests for review it agrees to hear and issues opinions for fewer than 100 annually. Therefore, although the phrase "I'll take this all the way to the United States Supreme Court!" may often be uttered in response to an unwelcome trial outcome, the odds of being heard at the Court are very long. Most cases involve disagreements among the courts of appeals or an important and unsettled question of law.

State Courts

Although each state establishes its own courts, the systems tend to be similar in basic features. States have a system of trial courts with regional courts of general jurisdiction, and local or specialized courts for certain kinds of matters. They also will have at least one appellate court. Increasingly the state courts follow rules of procedure and evidence modeled on the federal rules, but all states have their own procedural variations and may retain peculiar procedures that have been fundamentally unchanged for many decades.

A typical state trial court system has local courts that hear minor criminal offenses, landlord tenant cases, and civil disputes up to a certain amount, and county courts that hear more serious criminal matters and civil disputes that exceed the relatively small jurisdictional limits of the local courts. The local courts often are called district courts, and the county courts often are called superior courts. Specialized courts hear other matters. For example, county probate courts may have jurisdiction over matters involving a deceased's estate, and states may have family courts to handle divorces and child custody matters.

All states have at least one appellate court, and the highest state court usually is called the supreme court. Sometimes it goes by another name, which can be confusing. For example,

in New York the highest appeals court is called the court of appeals. New York's supreme court is primarily a trial court, with civil and criminal branches, but it also has an appellate branch that is an intermediate court of appeals. Many courts, especially in the larger states, have intermediate appellate courts. The rules vary about which cases may be brought in which appellate courts within a state that has more than one, and about a party's right to be heard in the highest court. States that have intermediate appeals courts often require appeals to be brought in those courts in the first instance, and the highest court has discretion to review the decisions.

Agency Regulations

As discussed in much more detail in Chapter 11 of this book, administrative agencies issue and enforce regulations pursuant to authority delegated to them by legislatures. Federal and state agencies have been authorized to issue regulations affecting a vast array of government activities, commerce, social services, and other details of modern life. In recent decades administrative agencies and their regulations have grown explosively. There are now more than 500 federal agencies, and each state has dozens of its own agencies. The reach of administrative regulations is very broad. For example, there are extensive federal regulations on aeronautics, armed forces, environmental protection, federal highways, federal lands, food and drug preparation and distribution, immigration, labor standards, occupational health and safety, railroads, social security, and worker's compensation. State administrative regulations also govern many areas of public and private activities. For example, detailed state regulations are likely in the areas of farm production and distribution, fisheries and harbors, public utilities, state contracts, state highways and roads, and state taxes, among other things. Sometimes state and federal regulations are interrelated with many details addressed by a federal agency and others addressed at the state level. This is so, for example, for many environmental, employment, health, and safety regulations.

International Law

International law is a complex and highly specialized field of the law. Individuals and organizations involved in international law matters engage experts in the field. This book can provide only a very brief overview sufficient to give some sense of the laws likely to be encountered.

"International law" refers to treaties, agreements, and rules affecting nations or individuals of different nations. "Public international law" is a term used to refer to multilateral agreements affecting many nations, such as the Geneva Conventions and the Universal Declaration of Human Rights. It is also used to refer to agreements between two nations or among nations within a region, such as the North American Free Trade Agreement. International dispute resolution also involves international law custom based on recognized principles not addressed with express agreements. "Private international law" is a term used to describe rules for determining which jurisdiction's laws apply to a dispute between individuals or entities from more than one nation, and rules for determining the forum in which a dispute between such parties

must be heard. The term "foreign law" usually is employed when referring to the law of another nation that applies to matters within that other nation's jurisdiction.

A number of international organizations are involved in implementing international conventions, such as the United Nations Commission on International Trade Law and the Hague Conference on Private International Law. Under Article II, Section 2 of the U.S. Constitution, the president has the power to bind the United States to treaties with two-thirds consent of the U.S. Senate.

The very notion of an international law can be challenged because throughout history nations and individuals have tended to abide by international agreements when to do so suits their present interests, and to discount or disregard prior commitments when circumstances change. Nevertheless, both national and international tribunals often apply rules of international agreements to restrict commerce, resolve disputes, and prosecute violators of international principles. International rules may affect any activity involving a government, entity, or individual in another nation. For example, international agreements may affect the extent to which goods or services may be sold to someone in another nation, or whether cultural items may be exported. They govern the payment of tariffs for exported or imported goods. International rules also may be important for determining whether an agreement or judgment can be enforced in another country. For example, although a party seeking recovery for breach of contract from a foreign company may be able to obtain a judgment in the United States, both international law and the law of the breaching party's nation may affect the party's ability to recover the judgment.

Modern international agreements add layers of complexity to the usual considerations about sources of applicable law. For example, the members of the European Union have agreed to abide by European Union laws governing a wide range of commercial and private affairs, to be bound by the enactments of the Union's political institutions, and to resolve certain kinds of disputes through a unified court system. The system facilitates the movement of individuals and capital among the nations involved, and in many ways simplifies an understanding of the law. Similar issues arise with arrangements into which other countries have entered, such as the North American Free Trade Agreement to which the United States, Canada, and Mexico have agreed.

Review Questions

1. What is commonly meant by a rule of law?
2. What is commonly meant by formal law?
3. What is the nature of the norms and moral codes that legitimize laws and guide behavior?
4. What is the basic nature of the federalist system in the United States?
5. In what fundamental way does the U.S. Constitution separate powers and why does it do so?

6. Give some examples of important subjects likely to be governed by federal, state, and local legislation.
7. What is the general nature of federal court jurisdiction?
8. How is a typical state court system structured?
9. Who issues statutes, cases, and regulations, and how does each fit within the modern system of U.S. formal law?
10. How do judges' views about justice and the courts' proper role affect the evolution of the law?

Notes

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