

Chapter 1

What Is Law

CHAPTER OBJECTIVES

- Define *law*.
- Describe the structure and purpose of the U.S. Constitution.
- Outline the historical development of the constitutional form of government.
- Explain government structure.
- Briefly outline the history of the American legal system.
- Discuss the roles of each branch of government.
- Identify courts within the state system including the jurisdiction of each.

This lesson explores the history, development, and context of the U.S. Constitution, the centerpiece of the American legal system. All law and government flow in one form or another from the Constitution. Understanding the role of the paralegal within law and society is easier with an understanding of the formation, rationale, and structure of the Constitution. Our system of law and government protects rights of the individual both substantively and procedurally, which differs from all other government forms throughout history. After looking at the historical evolution and design of the system resulting from the Constitution, the paralegal should develop a better understanding of the procedures incorporated in the system and competing interests of various parties in any legal matter. You will learn the foundations for dispute resolution that honors the individual rights of the parties and resolves disputes in the context of these rights rather than the rules that must be observed regardless of any individual rights or needs.

WHAT IS LAW?

law

Identifiable governance form characterized by structure, power, and systemic operation.

There are almost as many definitions of **law** as there are attempts to define it. In general, there are many who define law in criminal terms, which includes systemic punishment for wrongful conduct against society. Then there are those who define law in terms of a moral authority. Likewise, there are those who think law is the way society controls the acts of citizens. Each person would claim emphatically that his or her definition is the only correct one, and each would be entirely correct in this assertion. The law is personal to each person. The definition any individual provides results from the social, moral, and philosophical environment of the person asked. In any definition, there is an element of order, power, theory, rules, and procedure. Despite the variety of approaches, there are certain consistent elements in every definition: structure, power, and systemic operation. There is also evidence that society wants the structure; thus, law is a voluntarily chosen design for community conduct. In any case, the existence of something called *law* unifies and stabilizes the society.

The commonalities in the definition and operation of law include that law involves action and concept or theory. Any dictionary definition includes a noun and verb form. Law is intangible. Law is elusive. Law is wonderful. Law is exciting. Law is stoic. Law is impersonal while at the same time incredibly personal and situation specific. If you gain nothing else through your journey and study, you will learn to love and respect whatever it may be that is called the law, regardless of which definition you give when asked: What is law?

*Black's Law Dictionary defines law as the regime that orders human activities and relations through systematic application of the force of politically organized society or through social pressure, backed by force, in such society; . . . The aggregate legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action [the law of the land].**

Law—a binding custom or practice of a community: a rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority.†

The definitions are similar, but there are subtle differences. Each definition embraces both a procedural and conceptual element. This consistent pattern reinforces that the operation of law is as important as the theory. You will see that the definitional relationship parallels perfectly the procedural and substantive law relationship that characterizes our legal system. While there are differences between substantive and procedural aspects of law, at the same time, they are inextricably interwoven in our system. A procedural error is as unacceptable as an obviously substantive one. Stated another way, the **substantive law** defines and establishes parameters for the rights, while the **procedural** establishes the way in which those rights are upheld.

substantive law

Legal rules that are the content or substance of the law, defining rights and duties of citizens.

procedural law

The set of rules that are used to enforce the substantive law.

Examples:

Procedural law error. The law requires that the defendant live within the county or district in which the issue arose, but the defendant really lives elsewhere. If this is the case, and the defendant nonetheless was found liable by what is essentially the wrong court, the judgment of the court would be invalid. To prevent this kind of violation of procedure, the law maintains that the judgment is unenforceable because the court had no power or authority to enter judgment against an individual who does not live within the district.

Substantive law error. Assume that the court is hearing a case involving breach of a contract to decorate a residence. The homeowner claims the decorator failed to complete the contract because one of the rooms was left unfinished after all existing furnishings were removed. After hearing the evidence, the jury finds the defendant liable, and the judge enters an order for repayment of the money paid for the one room, and also orders the decorator to go to a mental health professional for attitude adjustment and organizational skills training. This is a substantive error of law because the court has no authority and the law makes no provisions whatever for a judgment ordering mental health counseling and organizational skills training for a breach of contract. There is no legal basis for the court to enter such an order, thus it is unenforceable and violates substantive law principles.

The law in all cases essentially is that if you say what you say or do what you do improperly, it is no less wrong and contrary to law than saying or doing the wrong thing properly.

HISTORICAL PERSPECTIVE ON LAW

Since the beginning of man, and recorded time, something called *law* has been a part of each society. It may have been as relatively simple as the process through which the stronger animals survived and the weaker perished or it may have taken a less prominent role in society.

* Reprinted from Garner, B. A. (1999). *Black's Law Dictionary*, 7th ed. St. Paul, MN: West Group. © 1999. Used with permission of Thomson/West.

† By permission. From the Merriam-Webster Online Dictionary © 2006 by Merriam-Webster, Incorporated (www.Merriam-Webster.com).

It may have been the more formal social structure designed in the time of Socrates and Aristotle. Regardless of the culture served, it is never static in design, nor is it only a tightly engineered to-do list. To serve the society and endure, law cannot be rigid. Law designed around the concept of regulation through restriction does not endure in the long run. History contains a long list of failed societies supporting that fact. As society and law evolve, and different facts are presented, the existing law may be modified or changed to accommodate new needs and legal realities.

The original legal systems as we know them evolved from social pressures exerted by the population involved. This pressure developed from the strong survival instinct inherent in animals and man. Another strong contributor to the formulation of law was the evolution from the less to the increasingly more sophisticated social and technological society.

Structure is a fundamental principle of law and drives the formulation and application of some system in every culture and society regardless of how primitive. The details of the structure may differ. Even the earliest version of law, commonly called the law of the jungle, demonstrates that a design for conduct or living is intrinsic to both animals and man. It may be a more simplistic legal structure than our present system, but nonetheless it served the society.

The first formalized legal system, the **Code of Hammurabi** (1792–1750 B.C.), established a way of life that maintained social order through punishment commensurate with the nature and extent of the violation of the social order. The system relied on the fundamental principle of an eye for an eye. This means, quite simply, that the punishment used any method to guarantee the crime would not be repeated. Thus, the system was based on regulation, punishment, and deterrence. The Code was designed not only to punish the wrongdoer but also to remind society of the perils of activity opposed to the social order and of the unacceptability of such behavior.

An example of the operation of the code would be if a pickpocket ran throughout the marketplace picking pockets along the way but finally got caught in the act. The offender would have been taken to the city or village square and, in plain view of all interested citizens, the index finger of the right hand was chopped off. The theory was simple but effective. Without the right index finger, picking a pocket was nearly impossible; thus, the criminal behavior effectively was ended. Additionally, however, the absence of the finger made it clear to all citizens that the individual lived a criminal lifestyle and thus was unworthy of trust. In the case of a thief who stole large amounts of food or wares from the marketplace, however, not only was the index finger cut off, but several other fingers as well. The fingers were the tools of the crime; thus, if they were severed, the criminal activity ended. Without every finger, the offender could no longer steal, but also was prevented from finding alternative employment because of the missing digit(s). There were, therefore, myriad consequences suffered by the criminal, the most evident of which was the offender became a social pariah or outcast.

The **Socratic method** of discourse was the foundational tool in learning and social evolution that ultimately formed the legal and social structure in ancient Greece. Socrates (c. 425–399 B.C.) developed his method to provoke thought and analysis of acceptable rules and conduct, all of which translated into a harmonious, ordered, and respectable social form. The Socratic method in part resulted from the conviction that understanding and critical thinking were inherent to social success and efficient operation. Thus, citizens who thought critically were better citizens and participants in the social order. That method of teaching and learning instilled in the student a sense of individual moral responsibility. Socrates believed this sense of personal responsibility was the *sine qua non* of a well-ordered society. He believed the knowledgeable citizen was the effective citizen. The method also was based on the premise that for the mind to reach optimal effectiveness, the body too must be maintained in optimal condition. Thus, the Greek scholars were also superior athletes. They spent half the day in physical training and the remainder in mental training and learning. The original Olympians were the brightest as well as the strongest in the country.

Plato, one of Socrates' most renowned students, further refined the Socratic method into a moral imperative for all members of society that held that ethics were the base of a well-ordered and universally applicable system of law and social order. Aristotle, another Greek thinker, contributed structure to the formulation, expanding on the ethical reasoning of his predecessors Socrates and Plato.

structure

Fundamental principle of law and social order in any government system.

Code of Hammurabi

First formalized legal system (1792–1750 B.C.).

Socratic method

Analysis and teaching tool based on questioning and discussion.

The next noteworthy legal and government system was the Roman Empire. You have probably heard stories of the Roman games and the system of justice that allowed feeding Christians to the lions! No question this is a controversial practice by standards then as well as now. However, the nature of society and the legal system at that time permitted such punishment. Note also that even though society was more sophisticated at that time, the legal system still was based on the theory of rigid rules of regulation, punishment, and deterrence much as at the time of the Code of Hammurabi.

Christianity was not the recognized state religion; thus, demonstrating Christian practice or belief was forbidden and punishable by death at the whim of the Caesars together with the ruling Senate. The body of law at the time of the Roman emperors prohibited behavior, rather than preserving and protecting individual citizen rights. Law was built on the principle of prohibition. There were two social classes: the wealthy, or patrician, and the commoners, or plebeians. There was no middle class. The plebeians, or common people, were expected to observe the law without question or punishment would be meted out. National superiority was defined in terms of territory conquered. Thus, war and violence were inherent parts of the cultural fabric. Each conquered area was required to comply with the law of the caesars, thus spreading the legal system and beliefs throughout the civilized world.

The Crusades were the next great pervasive social effort to implement a legal system. The Crusades differed from the Roman conquests in that battles and human sacrifice were undertaken in the name of preserving and spreading Christianity. The Crusades targeted Islamic nations during the 12th and 13th centuries A.D. to eradicate Muslim nonbelievers and absorb the conquered peoples into one culture worshipping the same god following the same code of behavior and principles. Muslim strongholds were targeted throughout that time span.

Although Islam and Muslim beliefs differed from Christianity, they too had a well-defined legal and moral system. The religious differences created the conflict and led to the acrimony between the two cultures. As the Muslim territories were conquered, the Crusaders imposed a Christianity-based legal system that denied the legitimacy of all but the Christian religion, morality, and ethics. The government form supposedly reflected these same values.

By 1500, Great Britain was the most dominant legal and governmental power in the world. The **Magna Carta** was the document of governance embraced by the British and similarly the model for the governance in each country ruled by the British monarchy. The British colonized and ruled effectively through a powerful navy and strong regional governor system. All citizens of the conquered territories were British subjects, and governance in each was consistent with the British model. The drafters of the Constitution found certain parts of the Magna Carta consistent with the government form they sought to establish. They recognized that the Magna Carta in many respects was effective, moral, ethical, and equitable. This is an amazing commentary on both the founding fathers' insight and the incredible power of the British monarchy system.

The French government wielded enormous power and rivaled Great Britain, but it was in decline when the colonists arrived in America. The French Revolution of 1789 signified the end of French rule as it had been and introduced a new government form built on the motto of "Freedom, Equality, Brotherhood," which is remarkably similar to the concepts of society and law in our constitutional form of government.

The **Napoleonic Code**, enacted in 1804 during the reign of Napoleon Bonaparte in France, codified French government form and rule of law. The Code has been enormously influential on both world and U.S. government theory and policy and a significant influence in the formation of legal systems in Europe and Latin America. The state of Louisiana embraces Napoleonic Code principles in the state constitution, government, and legal system. Under our system of **federalism** and **state rights**, this is permissible providing there is no conflict between the federal and state provisions. (We will examine these concepts in much more detail in the next chapter.) The doctrine of **state supremacy** allows states to make decisions impacting only the citizens of the particular state without conflict or negative impact on the federal law and citizenry.

While some of the legal theories prominent throughout history continue to operate in some form today, the most enduring form is the democracy embraced in our Constitution. The foundation of democratic law is that government functions to protect and preserve individual rights rather than define and restrict behavior. In many other civilizations, power comes from

Magna Carta

British document (originally issued in 1215) describing the system and form of government and law upon which the U.S. Constitution was modeled.

Napoleonic Code

French code of law and government influencing certain aspects of our system. It serves as the model for the government and law in the state of Louisiana.

federalism

Balanced system of national and state government in the U.S. Constitution.

state rights

Constitutionally defined rights of individual state governments to preserve and protect individual rights of citizens of the state, providing there is no conflict with the federal Constitution.

state supremacy

Constitutional principle that the individual states have sole governmental authority over matters related to only state citizens without influencing or negatively impacting federal rights and privileges.



CYBER TRIP

Locate a copy or excerpts from the Napoleonic Code and Magna Carta. Review each, paying particular attention to form and theory. Locate sections in each related to punishment and crimes. Compare the provisions of each in general terms. Finally, prepare a brief description of the provisions in each. Use your written analysis as the basis for a classroom discussion.

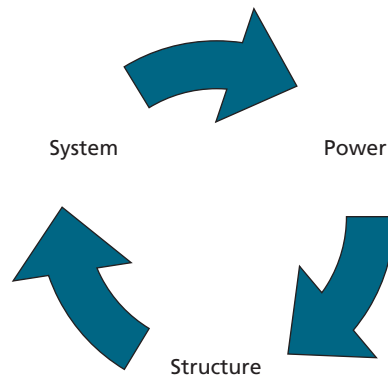


FIGURE 1.1 The Form of the Law

the military and the conquering of other nations. This theory ultimately falters, but, nonetheless, *power* is an important component of any government and law. However, power can be defined in a variety of ways. In our system, it comes from individual rights and freedoms, providing exercise of those rights does not trample on those of others. *Structure* is the next important component of effective law and government. Those governed must know where and how to find out about the rules or requirements, and must know the consequences of disturbing the social order. Structure functions best when it is consistent with the needs of both society and the government entity.

Once the structure and power are in place, the third element, *system*, emerges. The system operation derives from identifiable aspects of the structure with power clearly identified and distributed consistent with the needs and wishes of the society served. The nature and definition of the power, structure, and system are what defines any law and society. Figure 1.1 shows how the three purposes and functions operate in a circular, interrelated manner. Each leads to the other and all law flows from this interaction. If one of the three elements is eliminated, not only is there a break in the chain, as it were, but, more important, you no longer have a functional legal system.

U.S. CONSTITUTION

In some form or another, every American has at least a basic awareness of the Constitution and law. Understanding the historical setting at the time of formulation and the evolution of the government and law since that time is essential for anyone working in the field of law.

Our founding fathers came from England to avoid government intervention in private matters, including free exercise of religion. They believed that government intervention in certain uniquely personal issues was overreaching and an impermissible exercise of government power when the behavior targeted had no direct impact on society. They were unwilling to accept the state mandate that only the Church of England was the permitted religion. They were committed to the concept that establishing the new democracy required new applications of existing tools, theories, and procedures that served their goals and contained basic elements consistent with the concept of government they called **democracy**. The founding fathers defined *democracy* as the rule of, by, and for the people or, if more practical, by elected representatives of the people. They believed that government could only be effective if those governed participated in deciding how that government should operate to serve their needs.

The founding fathers understood not only the Magna Carta, but also the Napoleonic Code as well as other forms of government and society from as far back as ancient Greece. They assessed both strengths and weaknesses of each and used aspects borrowed from all of them to structure their form of democracy.

The British legal system embraced a series of rigid rules describing forbidden behavior as well as permissible social interaction or behavior. The monarchs believed their authority was limitless, their right to rule unrestricted, and the power of taxation to support the monarchy first unlimited. There was a two-class system: the wealthy gentility and the poor, or peons. This social structure endured from ancient Greece and Rome essentially unchanged. World expansion and

democracy

Government form characterized by rule of and by the people or, if more practical, by elected representatives of the people.

colonization of new territories in far-flung places contributed to the emergence of a British middle class comprised largely of merchants, shippers, and bankers. The founding fathers and many of the original colonists who came with them to the new country were part of this emerging middle class. Thus, the system built on a two-class model created the de facto middle class of articulate, educated thinkers representing the needs and wants of the general populace.

This middle class rejected the prevailing principle that preserving the monarchy at all costs was the purpose of law and government. The concept of monarchy ordering the conduct of the subjects and forcing unquestioned allegiance and homage to the crown was eroding. The founding fathers were the catalysts for large-scale emigration from the British monarchy system to the alternative democratic form of government emerging in the colonies.

The founding fathers realized that some form of structured guidance and governance was essential. However, unlike the British government approach, they were unwilling to embrace government through edicts of restriction and prescription. As so eloquently stated in the predecessor to the Constitution, the **Declaration of Independence**:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, . . .

This statement from the preamble of the Declaration of Independence embraces the fundamental principle of our law, government, and social form. It embraces the concept of individual rights rather than monarchy alone having rights. The preamble also opens with a statement reiterating that all men are created equal. This means that the power of government comes from the people governed and is not the imposed will of a select few individuals. It is important to note that individual life, liberty, and pursuit of happiness are given equal weight and importance in both shape and operation of our democratic government form.

Unlike monarchies that derive power from one person or source, the government contemplated by the signers of the Declaration of Independence was “of men, for men and by men.” In this form, those governed give consent and participate in government by casting individual votes. There is no distinction drawn in terms of value or weight of one vote as against another. From time to time, a law is enacted that an individual or even many individuals do not agree with and in fact may vigorously oppose. In those instances, the will of the majority prevails and the minority must conform to the voice of the majority. This concept is apparent in both the Declaration of Independence and the U.S. Constitution.

The Declaration of Independence, signed on July 4, 1776, was written primarily by Thomas Jefferson. The Declaration stated the intention of the framers of the Constitution to form a new government as well as general principles that would be the basis for the new government. The Declaration guided the design of the Constitution of the United States of America, after it was signed and ratified in May 1787. The **U.S. Constitution** is the primary source of law in the American system. In addition to establishing the operational schema and theoretical approach to law, the document establishes three separate but equal segments of government: the legislative, judicial, and executive branches.

Declaration of Independence

Statement, preceding the U.S. Constitution, giving the intention to form a new government in the colonies and including general principles guiding the form of that new government.

U.S. Constitution

The fundamental law of the United States of America, which became the law of the land in March of 1789.



CYBER TRIP

Go to the following site and read the Declaration of Independence as well as any other material you find about the document, its historical context, and facts related to the formation and operation of the Declaration: www.archives.gov/national_archives_experience/charters/declaration_transcript.html. While reading, consider what parts are surprising and also what you find that raises questions and perhaps even disagreement. Lastly, while reading, try to put yourself in the place of any of the signers and imagine what it was like at that time to conceptualize such shocking concepts of government, law, and social order.

Take notes on your comments and retain them for use later in the lesson. You may want to retain them in your PRM as well for future reference.

The framers of the Constitution looked to the Magna Carta, confirmed by Edward I in 1297 (originally drafted in 1215), for guidance in forming their government. There they found some sound and useful concepts, including

No freeman shall be taken, imprisoned, . . . or in any other way destroyed . . . except by the lawful judgment of his peers, or by the law of the land. To no one will we sell, to non will we deny or delay, right or justice.[‡]

In the discussions preceding the drafting and ratification of the Constitution, the framers agreed that they were particularly interested in some way to “spell out the immunities of individual citizens.” Prior to the ratification of the Constitution, no other government in history had a written constitution. Unlike all other legal systems, the American system approaches law from the perspective of rights preservation rather than deprivation or prohibition. This not only sets our system apart from others, but it also necessitates a different analytical framework. If the U.S. Constitution assumes individual rights as the underpinning, then the resulting social structure must be consistent.



CYBER TRIP

Visit the U.S. government official Web site. Click on each branch and explore the materials regarding the function, structure, and operation in each:

www.archives.gov/national_archives_experience/charters/bill_of_rights.html.

www.cec.org/pubs_info_resources/law_treat_agree/summary_enviro_law/publication/us01.cfm?varlan=English.

www.findlaw.com/casecode/constitution/.

Articles of the Constitution

Establish government form and function.

Bill of Rights

Set forth the fundamental individual rights government and law function to preserve and protect.

fundamental individual rights

Contained in the first Ten Amendments to the Constitution, which spell out the individual rights the government functions to preserve and protect.



CYBER TRIP

Either in a library using traditional books or electronically, locate the U.S. Constitution and read the Articles section. Explore the U.S. Constitution site on the Internet and read additional explanatory materials related to the articles: www.nara.gov/exhall/charters/constitution/constitution.html.

BILL OF RIGHTS

The Bill of Rights appears in the first 10 amendments. This particular section was ratified and adopted two years after the Constitution itself. Within the Bill of Rights are the fundamental individual rights recognized as the foundation of the legal and government system. The ratification process showed that negotiation and compromise are critical to our form of government and law, even at this early stage. The endurance of the constitutional form of government from that period until the present demonstrates how diligently and brilliantly the founding fathers’ debate worked.

[‡] www.archives.gov/exhibit_hall/featured_documents/magna_carta/index.html.

FIGURE 1.2
Bill of Rights

Bill of Rights Rights and Privileges	
First Amendment:	Freedom of religion, the press, speech as well as peaceable assembly and, finally, the right to petition the government in those instances where a right is breached, or in the event of other disagreement.
Second Amendment:	Right both to bear and to keep arms.
Third Amendment:	Prohibits the government from requiring a citizen to lodge soldiers or other military in peacetime.
Fourth Amendment:	Individual right to be free from unreasonable search and seizure, either personally or of property owned by the individual
Fifth Amendment:	The right to indictment by grand jury, due process of law, and just repayment for seized property that will be used for public rather than private purposes. Further, the Fifth Amendment ensures the individual will not be required to testify against him- or herself or be subject to double jeopardy.
Sixth Amendment:	Speedy and public trial in a criminal matter. Additionally, the trial is by jury with right to counsel assured. Implicit in this is the right to confront and cross-examine both accusers and witnesses.
Seventh Amendment:	In civil matters with the amount in controversy greater than \$20.00, the individuals likewise have a right to trial by jury. (The amount in controversy has been increased over time.)
Eighth Amendment:	Prohibits both cruel and unusual punishment as well as excessive bail.
Ninth Amendment:	Preserves the individual unnamed rights beyond those enumerated in the Constitution.
Tenth Amendment:	Powers not specifically conferred on the national or federal government are within the sole province of the state governments.

While the Declaration of Independence referred to citizen “immunities,” the Bill of Rights changed the term to *individual citizen rights*. Each right relates to other provisions, guarantees, and laws in both the document itself as well as any subsequent enactments. When reading the Bill of Rights, note that the language speaks to individual rights and extends guarantees, rather than forbidding or prohibiting behavior. The Amendments and rights addressed therein are summarized in Figure 1.2. You can use this chart as a reference source throughout your course work.

Fundamental individual rights are those rights essential to ensuring liberty and justice. They are, more particularly, rights such as freedom of religion, right to bear arms, and right to a speedy and public trial in criminal matters, to cite a few. Under our legal system and democratic form of government, if these rights are violated, the court applies a **strict scrutiny standard**. This fact and law analysis is the most exacting and precise because at issue are our fundamental constitutional rights, which indeed may have been unconstitutionally restricted or revoked. The

strict scrutiny standard

Most exacting and precise legal analysis because fundamental constitutional rights may have been unconstitutionally restricted or revoked.



CYBER TRIP

Visit one of the following Web sites and read the entire Bill of Rights: www.archives.gov/national_archives_experience/charters/bill_of_rights_transcript.html.

Read about the history of the Constitution and framers when you visit www.archives.gov/national_archives_experience/charters/constitution.html.

The Bill of Rights, in the first 10 amendments, can be viewed at www.archives.gov/national_archives_experience/charters/bill_of_rights_transcript.html.



CYBER TRIP

This would be an excellent time to read the Bill of Rights and formulate a list of the rights specified therein, and thus considered fundamental rights. The Bill of Rights can be located in your appendix or on the Internet at www.archives.gov/national_archives_experience/charters/bill_of_rights_transcript.html.

due process

Ensures the appropriateness and adequacy of government action in circumstances infringing on fundamental individual rights.

procedural due process

These requirements mandate scrupulous adherence to the method or mechanism applied. Notice and fair hearing are the cornerstones of due process, though certainly not the only consideration.

substantive due process

Requires that legislation be reasonable in scope and limitations, and further that the statute serve a legitimate purpose, including equal impact on all citizens.

courts require proof of compelling government interest to restrict these fundamental rights. The 20th century was the period in which personal individual rights overtook economic rights as the major focus of court challenge in this area. This focus resulted from emerging emphasis on how individual citizens can and do express themselves and behave within society. More recently, privacy and discrimination in all their forms are considered in a general sense as fundamental rights even though they are not enumerated or discussed in the Bill of Rights. As such, these are not constitutionally defined fundamental rights. Nonetheless, when infringements occur, a possible legal cause of action arises.

The Fifth Amendment of the Bill of Rights introduces the concept of **due process**. Over time, there has been a tremendous amount of litigation challenging the scope and adequacy of process. Due process as stated and interpreted implies both procedural and substantive process and the adequacy of the challenged process under the facts and law. The concept is one borrowed from the Magna Carta. The goal of due process as interpreted in our government and legal form is to ensure the appropriateness and adequacy of government action in circumstances infringing on any fundamental and individual rights. **Procedural due process** requirements mandate scrupulous adherence to the method or mechanism applied. Notice and fair hearing are the cornerstones of due process, though certainly not the only consideration. **Substantive due process**, on the other hand, requires that legislation be reasonable in scope and limitations, and further that the statute serve a legitimate purpose.

Example:

Substantive due process. A statute requiring every citizen driving along the interstate highway system to turn off their car air conditioners, drive with the windows opened, and further sing to pass the time would not pass a substantive due process challenge. There is no reasonable purpose for such a law. While one could argue turning off an auto air conditioner might save gasoline consumption, it is not at all certain that the government is reasonable to demand citizens take this action in furtherance of that goal. The individual has the right to consume gas as he or she sees fit. It is also unfair to impose such a limitation on automobiles when there are other vehicle types—trucks, busses, and recreational vehicles—not subject to the law.



CYBER TRIP

To get a better sense of what kind of unreasonable law has been passed from time to time, visit the following Web site: http://www.washingtonpost.com/wp-dyn/content/article/2005/05/22/AR2005052200963_pf.html. Upon completing the article, list the laws mentioned and decide whether they are substantive or procedural. If you believe there may be a due process violation with some or any, note which, and then briefly comment on why.

FEDERALISM

The form of government established in the Constitution includes both state and federal systems. The Constitution confers on the federal government responsibility to guarantee those rights and governmental functions that transcend state lines and equally protect citizens of all states. Our system is designed to limit federal power. The limitations are set forth in the various sections of

the Constitution describing the powers of the federal government. Any power not specifically designated to the federal government by operation becomes the right and purview of the individual states. The Tenth Amendment reiterates specifically this concept, which ensures its continued viability. The statement removes both conjecture and interpretation of whether the constitution applies to the states. Allocation of power is based on assessment of the needs of the whole and the impact overall if the individual states enacted different laws concerning something affecting all citizens.

The relationship and distribution of power between the state and federal government is called *federalism*. The seminal court decision regarding federalism is found in *Marbury v. Madison*, 5 U.S. 137 (1803), which remains good law even today. Under the *Marbury* decision, the court reinforced the right of the judiciary to review an act of another branch of government. Further, *Marbury* held that if the reviewing court interpreted an act as beyond the governmental branch's scope of authority, the court need not approve acts extending beyond that scope of authority. Thus, *Marbury* stands for the proposition that a strict construction of the constitutional provisions and language is appropriate. In its findings, the *Marbury* Court made clear that judicial review is limited to interpretation of existing law and cannot create new law.

Federal law takes precedence over the state in what are called **federal question** matters. Otherwise, the state has sole responsibility for ensuring the rights of the citizens therein for all matters arising within that state. **Preemption** is the right of the federal government to exclusive governance and control over certain areas of law. The doctrine sets our government apart from others. The federal Constitution preceded any state constitution. When the various states were formulating their own documents of governance, many chose to mirror the provisions of the federal Constitution. There is no requirement that states apply and embrace the federal form, Constitution, and codes, but the document and scope of government work equally well on the state level; thus, adopting it creates a particularly cohesive system. You may recall reading about the Napoleonic Code. The doctrine of state rights allows the state of Louisiana to model its state government on the Napoleonic Code rather than the federal Constitution. As you know, the state is free to design the state governance and legal system in those matters related to the state, but as to federal issues, federal law prevails. The federal government may not interfere in state issues under any circumstances absent clear evidence of the state impingement on constitutionally identified individual rights.

federal question

The jurisdiction given to federal courts in cases involving the interpretation and application of the U.S. Constitution or acts of Congress.

preemption

Right of the federal government to exclusive governance in matters concerning all citizens equally.

FEDERAL SUPREMACY

We have gained some insight into the structure of the Government, but how can we be certain the Constitution is indeed the ultimate statement of law and theory of government? The **Supremacy Clause** found in Article VI of the U.S. Constitution and shown in Figure 1.3 sets forth clearly the principle and unambiguously reinforces that the Constitution is the supreme law of the land.

The Supremacy Clause says that a state court may not interpret the Bill of Rights or any other Constitutional provision differently than the federal statement and interpretation. However, the state may interpret its own constitution more liberally than the federal Constitution and, in fact, may extend a broader scope of rights, providing the liberal interpretation does not conflict with the federal Constitution.

The Court held in *Edgar v. Mite Corp.*, 457 U.S. 624, 631 (1982), that “a state statute is void to the extent that it actually conflicts with a valid federal statute.” In practical terms, this means that if there is a direct conflict, or if there are both federal and state statutes on point, if compliance with the state statute creates conflict or failure to comply with the federal statute, then the federal statute prevails.

Supremacy Clause

Sets forth the principle and unambiguously reinforces that the Constitution is the supreme law of the land.

FIGURE 1.3
Supremacy Clause

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, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

—U.S. Const. art. VI, para. 2

FIGURE 1.4
Commerce Clause

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

—Art. I, § 8, cl. 3

COMMERCE CLAUSE

Commerce Clause

Statement in the Constitution that the federal government has absolute authority in matters affecting citizens of all states.

The federal government has limited powers but absolute authority in matters affecting citizens of all states. The specific operation of this federal versus state interaction is evident in the laws related to interstate commerce. Figure 1.4 contains the language from the Constitution known as the **Commerce Clause**.

Vehicles from various states use the interstate highway system. The federal government has legislative power in matters related to interstate highways, including funding, repairing, speed limits, truck weight limitations, and the like.

Example:

One state decided that no one could travel faster than 25 miles per hour within the road system of the state because the natural beauty is so spectacular that the state governor and legislature want to ensure that all who travel through enjoy it as much as the state residents do and/or should. While sharing the beauty of the state is the purpose of the law, in so doing, the law would create an extreme imposition on the truckers responsible for transporting goods across the country for consumers throughout the country. Schedules would suffer, consumers would be unable to get goods on a timely basis, and even serious emergency situations could arise from this restriction. While the law appears reasonable to the state citizens, it is unreasonable in the context of the federal interests and burdens that would accrue from such a law. Thus, federal law would govern and the state law would be constitutionally impermissible.

The court held in *Gibbons v. Ogden*, 22 U.S. 1, that the state of New York could regulate commerce on waterways within the state. At issue in *Ogden* was a dispute related to legislation by the federal government attempting to impose restrictions on New York state users of New York state waterways for business impacting only the citizens of that state. The opinion reaffirmed the scope of federal authority to regulate interstate commerce and distinguished inter- and intrastate commerce for purposes of enforcement and legislation.

Due to concerns of **comity** and federalism, the scope of federal injunctive relief against an agency of state government must be narrowly tailored to enforce federal constitutional and statutory law only. *Toussaint v. McCarthy*, 801 F.2d 1080, 1089 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987). This is critical because “a federal district court’s exercise of discretion to enjoin state political bodies raises serious questions regarding the legitimacy of its authority.” The doctrine of comity mandates that state and federal governments recognize the scope and limitations of the power of each. Thus, an act or omission by the federal government that goes beyond the scope of authority would not be imposed because, in so doing, the federal government would take power away from the state and would unconstitutionally expand federal authority.

comity

Federal government respect for state government power and authority results in federal refusal to intervene in matters clearly within the sole jurisdiction of the state government.

STRUCTURE OF GOVERNMENT

separation of powers

A form of checks and balances to ensure that one branch does not become dominant.

checks and balances

Mechanism designed into the Constitution that prevents one branch from overreaching and abusing its power.

The Constitution established the *legislative*, *judicial*, and *executive* branches of government. Each serves a specific role, but one is no more important than the others. The doctrine of **separation of powers** establishes the scope of authority for each branch of government, and further precludes intervention by other branches into that authority. The doctrine functions as a form of checks and balances to ensure that one branch does not become dominant. The framers recognized the possibility that an unmonitored branch could abuse its power base; thus, they put preventive monitoring mechanisms in place to prevent such abuse of power. (See Figure 1.5 for the structure of the U.S. government.)

The governmental system of **checks and balances** enables each government branch to exercise checks on others and, in so doing, maintain an appropriate balance of power and avoid exceeding the scope of authority vested in the branch under the constitutional design and intent.

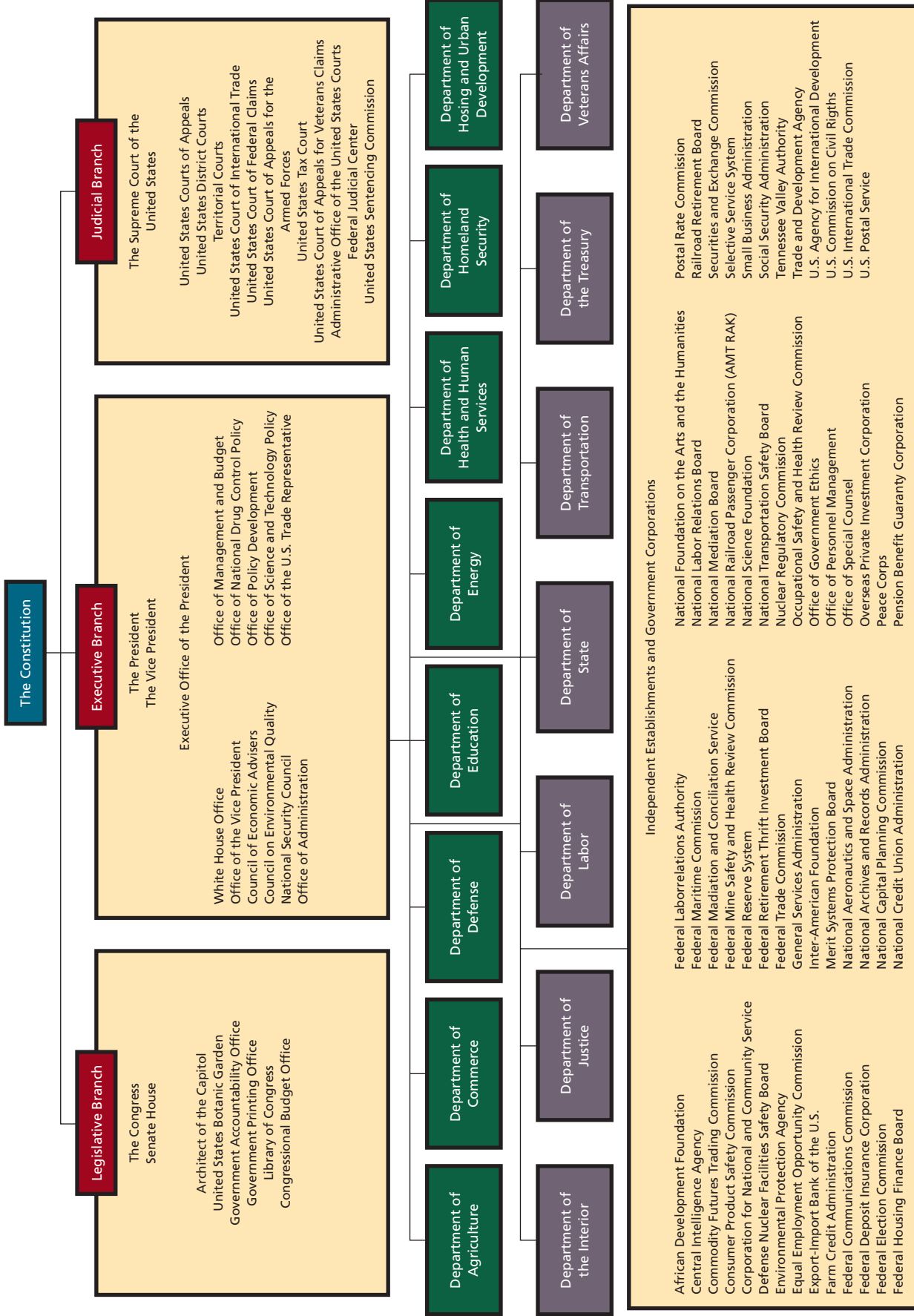


FIGURE 1.5 Structure of the U.S. Government



RESEARCH THIS!

Research the congressional Web site to locate examples of bills passed over presidential veto. Investigate what occurred after the veto and

determine what changes were made when the president accepted the bill.

enumerated powers

Powers listed in the Constitution or the jobs of the particular office, for example, the president, or the branch, for example, the judicial.

Understanding the checks and balances requires first understanding what powers rest with which branch or office. Article III, as an example, contains the **enumerated**, or listed, **powers** held specifically by the judiciary and Article I, the enumerated or specific powers of the president. An example of checks and balances in operation follows.

Example:

Checks and balances. Congress circulates a *bill*, which is a recommendation for enactment into law. The president has the power to ratify enactment. In some cases, the president may veto the bill, which is one of the enumerated powers of the president. This sends the message that the chief executive, for whatever reason, does not agree with the proposal. The Congress can enact a bill over a presidential veto. However, the collegiality of the system would reasonably dictate some negotiated resolution when the presidential intent to veto becomes known as a reasonable next step. Thus, when the president exercises his right to veto, under the system of checks and balances, the Congress reviews the bill and attempts to reformulate it such that the president can accept and ratify it. On the other hand, the Congress can pass a bill over a presidential veto if and only if the appropriate process has been scrupulously observed.

The inherent control mechanism embraced by the checks-and-balances system creates an environment of openness and fairness, since the work of one is related to that done by other branches. The extent of independent and interactive work must conform to the constitutional requirements in all cases.

Another example of the operation of the system of checks and balances occurs when the president nominates a Supreme Court justice, which is another enumerated power of the president. By constitutional provision, one of the presidential powers is nominating Supreme Court justices. The system also allows for congressional approval. Recently, when vacancies have occurred, we have had publicly televised hearings of the questioning of the nominee. In the past, the nominee was



PRACTICE TIP

Make note of the process and Web sites used to locate this information. This is the type of research a paralegal in practice may be asked to conduct for the supervising attorney. You also will have similar research assignments as you go through your course, so the research process features are important to understand along with those resources that were particularly helpful.



CYBER TRIP

Explore various Web sites that discuss and spotlight the confirmation hearings for the most recent Supreme Court appointees: Chief Justice John Roberts and Associate Justice Samuel Alito. Research which justices they replaced and, after reviewing material about the confirmation hearings and process, prepare a brief comment in writing in which you discuss your views on the pros and cons of the process. Include comment on the specific justices and their qualifications for the position.



RESEARCH THIS!

Research to locate examples of checks and balances written into the U.S. Constitution. Briefly comment on the value of such a process. Then, present an argument in favor of eliminating the system of checks and balances.

Present your comments to your instructor and retain a copy in your PRM for easy future reference use.

FIGURE 1.6
U.S. Constitution,
Article 1

U.S. Constitution Article I, § 8
Powers of U.S. Congress

The following powers, given to the federal government, are referred to as *delegated* or *enumerated* powers.

- The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
- To borrow Money on the credit of the United States;
- To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
- To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
- To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
- To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;
- To establish Post Offices and post Roads;
- To 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;
- To constitute Tribunals inferior to the supreme Court;
- To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
- To provide and maintain a Navy;
- To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

investigated and limited, relatively informal questioning occurred. The more probing questioning evolved as the demands on the Court expanded and emphasis on government in the public increased dramatically. While the public cannot vote on the nominee, nonetheless, understanding the process and qualifications of the nominee has taken on greater importance to the public at large.

Legislative Branch

The primary duty of the *legislative branch*, empowered under Article I of the Constitution, is to enact law. Figure 1.6 outlines the powers conferred on the Congress by the U.S. Constitution.

The Constitution provides additional guidance as to the scope and content of the laws that might be passed in the enumeration of powers of Congress contained in Article I, § 8. The list provides guidance as to the general type of law and authority resting with the federal government. Both the House of Representatives and the Senate are guided by the section 8 list, but additional specific roles have developed for each by custom, practice, and necessity.

The legislative branch, or Congress, is designed as a bicameral or two-part system consisting of the House of Representatives and the Senate. The Senate has two members per state. Membership of the House of Representatives is created by formula based on the population of the respective states. Senators serve a six-year term and representatives, two. Each member may be reelected for an unlimited number of terms. Individual states generally structure their legislative branch in the same way as the federal system. Likewise, the state house and legislative functions operate in similar fashion in terms of power, scope of authority, and relationship with other branches of state government.

The process of legislating commences with introduction of a *bill*, which is a recommendation for a law. When every step of the process is completed, the bill becomes law. Unless a special provision is incorporated into the legislation, the newly enacted law takes effect on the first of January of the year following passage. Figure 1.7 contains an outline of the process of enacting a statute.

FIGURE 1.7
How a Bill Becomes
a Law

How a Bill Becomes Law

A. Legislation Is Introduced

Any member can introduce a piece of legislation.

House: Legislation is handed to the clerk of the House or placed in the *hopper*.

Senate: Members must gain recognition of the presiding officer to announce the introduction of a bill during the morning hour. If any senator objects, the introduction of the bill is postponed until the next day.

- The bill is assigned a number (e.g., H.R. 1 or S. 1).
- The bill is labeled with the sponsor's name.
- The bill is sent to the Government Printing Office (GPO) and copies are made.
- Senate bills can be jointly sponsored.
- Members can cosponsor the piece of legislation.

B. Committee Action

The bill is referred to the appropriate committee by the Speaker of the House or the presiding officer in the Senate. Most often, the actual referral decision is made by the House or Senate parliamentarian. Bills may be referred to more than one committee and it may be split so that parts are sent to different committees. The Speaker of the House may set time limits on committees. Bills are placed on the calendar of the committee to which they have been assigned. Failure to act on a bill is equivalent to killing it. Bills in the House can only be released from committee *without* a proper committee vote by a discharge petition signed by a majority of the House membership (218 members).

Committee steps:

1. Comments about the bill's merit are requested by government agencies.
2. Bill can be assigned to a subcommittee by the chairman.
3. Hearings may be held.
4. Subcommittees report their findings to the full committee.
5. Finally, there is a vote by the full committee—the bill is “ordered to be reported.”
6. A committee will hold a “mark-up” session during which it will make revisions and additions. If substantial amendments are made, the committee can order the introduction of a “clean bill” that will include the proposed amendments. This new bill will have a new number and will be sent to the floor while the old bill is discarded. The chamber must approve, change, or reject all committee amendments before conducting a final passage vote.
7. After the bill is reported, the committee staff prepare a written report explaining why they favor the bill and why they wish to see their amendments, if any, adopted. Committee members who oppose a bill sometimes write a dissenting opinion in the report. The report is sent back to the whole chamber and is placed on the calendar.
8. In the House, most bills go to the rules committee before reaching the floor. The committee adopts rules that will govern the procedures under which the bill will be considered by the House. A “closed rule” sets strict time limits on debate and forbids the introduction of amendments. These rules can have a major impact on whether the bill passes. The rules committee can be bypassed in three ways: (a) members can move rules to be suspended (requires two-thirds vote), (b) a discharge petition can be filed, or (c) the House can use a Calendar Wednesday procedure.

C. Floor Action

1. Legislation is placed on the calendar.

House: Bills are placed on one of four House calendars. The Speaker of the House and the Majority Leader decide what will reach the floor and when. (Legislation also can be brought to the floor by a discharge petition.)

Senate: Legislation is placed on the Legislative calendar. There is also an Executive calendar to deal with treaties and nominations. Scheduling of legislation is the job of the Majority Leader. Bills can be brought to the floor whenever a majority of the Senate chooses.

(Continued)

FIGURE 1.7
(Concluded)

2. Debate.

House: Debate is limited by the rules formulated in the rules committee. The Committee of the Whole debates and amends the bill but cannot technically pass it. Debate is guided by the sponsoring committee and time is divided equally between proponents and opponents. The committee decides how much time to allot to each person. Amendments must be germane to the subject of a bill—no riders are allowed. The bill is reported back to the House (to itself) and is voted on. A quorum call is a vote to make sure that there are enough members present (218) to have a final vote. If there is not a quorum, the House will adjourn or will send the Sergeant at Arms out to round up missing members.

Senate: Debate is unlimited unless cloture is invoked. Members can speak as long as they want and amendments need not be germane—riders are often offered. Entire bills therefore can be offered as amendments to other bills. Unless cloture is invoked, Senators can use a filibuster to defeat a measure by “talking it to death.”

3. Vote. The bill is voted on. If passed, it is then sent to the other chamber unless that chamber already has a similar measure under consideration. If either chamber does not pass the bill, then it dies. If the House and Senate pass the same bill, then it is sent to the president. If the House and Senate pass different bills, they are sent to a conference committee. Most major legislation goes to a conference committee.

D. Conference Committee

1. Members from each house form a conference committee and meet to work out the differences. The committee is usually made up of senior members who are appointed by the presiding officers of the committee that originally dealt with the bill. The representatives from each house work to maintain their version of the bill.
2. If the conference committee reaches a compromise, it prepares a written conference report, which is submitted to each chamber.
3. The conference report must be approved by both the House and the Senate.

E. The President

The bill is sent to the president for review.

1. A bill becomes law if signed by the president or if not signed within 10 days and Congress is in session.
2. If Congress adjourns before the 10 days and the president has not signed the bill then it does not become law (“pocket veto”).
3. If the president vetoes the bill, it is sent back to Congress with a note listing his/her reasons. The chamber that originated the legislation can attempt to override the veto by a vote of two-thirds of those present. If the veto of the bill is overridden in both chambers, then it becomes law.

F. The Bill Becomes a Law

Once a bill is signed by the president or his veto is overridden by both houses, it becomes a law and is assigned an official number.



**CYBER
TRIP**

Locate the War Powers Act of 1973 on the Internet or manually in the law library. Read the act and compare its provisions with the war powers contained in the Constitution. What are the major changes or modifications of the power contained in the act of 1973? See <http://usinfo.state.gov/usa/infousa/laws/majorlaw/warpower.htm>.

Executive Branch

The *executive branch* was established under Article II, with the president at the head of this branch. The executive is responsible for the enforcement and administration of law and government. The powers of the office and the role the president plays within the branch and the federal power structure are contained in the Constitution, Article II, §§ 2–3. The powers are outlined in Figure 1.8 for easy reference.

The president has broad management power over national affairs and the operation of the federal government. On his or her own power, the president cannot legislate, but the Constitution conferred the authority to pass executive orders under certain specifically defined circumstances. These orders have the force of law. The House of Representatives does not need

FIGURE 1.8
Presidential Powers

Article II, Sections 2 and 3
Presidential Powers

Section 2

1. The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.
2. He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.
3. The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

to approve executive orders. The president has a number of roles including commander in chief of the military and National Guard. The war power is a broad one that operates in connection with the power of Congress to declare war pursuant to Article I, § 8. This is yet another example of the operation of checks and balances. The framers recognized the gravity of deciding about war with other nations; thus, exercise of the power requires two branches of the government working together.

The president nominates and the Senate confirms the heads of all executive departments and agencies, together with hundreds of other high-ranking federal officials. The scope of presidential power has been challenged in court from time to time. *Kendall v. United States*, 37 U.S. 524 (1837), heard by the Court in the 1800s, is still considered good law. The Court held, after review of the facts and law, “that Congress could impose upon an executive officer duties Congress thought proper which were not repugnant to any right secured and protected by the Constitution—especially where the duty enjoined was of a mere ministerial character.” This opinion reinforces that any branch acting within its authority cannot be restricted or overridden when the exercise of authority is consistent with the provisions of the Constitution.

Judicial Branch

The third of the three co-equal branches of government is the *judicial branch*, established in Article III, which includes all federal courts. The judicial branch is responsible for interpreting the law. In a trial setting, the judge therefore fills the role of **trier of law**. The highest court is the U.S. Supreme Court. There are nine justices appointed for life by the president at the time of a vacancy, one of whom fills the role of Chief Justice. While the president nominates appointees to the panel, the Congress must ratify the choice.

In any decision, the courts must ensure that individual fundamental rights are preserved and protected in the opinions rendered. The judicial branch includes criminal, civil, administrative, and specialty divisions. As trier of law, the judge functions to apply and interpret both procedural

trier of law
Judge.



CYBER TRIP

To get insight into the number of agencies within the federal government and the function of each, visit the site www.lib.lsu.edu/gov/fed-gov.html.

FIGURE 1.9
Branches of Government, Their Function in Law, and the Documents They Produce

Branches of Government			
Federal	State	Function in Law	Documents Produced
Legislative: Congress	Legislative: Congress	Enacts	Statutes
Judicial: courts	Judicial: courts	Interprets	Case opinions
Executive: president, agencies	Executives: governor, agencies	Enforces law	Regulations, rules, executive orders

and substantive law. Not all legal problems result in a trial proceeding. The system encourages amicable resolution through a variety of alternative means; thus, settlement prior to trial is a common outcome. Each specific court within the system has power, or *jurisdiction*, over those cases the relevant state or federal Constitution has authorized the court to hear and adjudicate, whether the matter resolves before or after a trial-by-jury verdict.

justiciable content

Genuine issue of law and fact within the power of the court to decide.

competent jurisdiction

The power of a court to determine the outcome of the dispute presented.

common law

Judge-made law, the ruling in a judicial opinion.

administrative law

The body of law governing administrative agencies, that is, those agencies created by Congress or state legislatures, such as the Social Security Administration.

A **justiciable content** is a genuine issue of law and fact within the power of the court to decide. The court cannot intervene or suggest a resolution unless there is a justiciable controversy raised in a complaint, filed along with a summons in a court of **competent jurisdiction**, or the power to determine the outcome of the dispute. The body of law resulting from judicial decisions is called **common law**; thus, it is law created through interpretation by the court of law applied to the case facts.

While the legislative branch is responsible for enacting, the judicial for interpreting, and the executive for enforcing the law, the system could not operate as well as it does without each part, and all activity guided by the umbrella of checks and balances. The Constitution itself represents the supreme law of the land, so it is the penultimate source of law. States have an analogous process to the federal judiciary. The law passed by state legislature must apply to the individual citizens within that state and cannot be in direct conflict with federal law, nor can state laws take away any of the rights and privileges guaranteed by the federal Constitution.

The **administrative law** system results from rules and regulations enacted and enforced by various agencies within the government structure. These agency law sources include the Occupational Safety and Health Administration (OSHA), the Internal Revenue Service (IRS), and the Environmental Protection Agency (EPA). The executive branch enforces the law, so it is reasonable to have the Department of Justice in the executive branch. The EPA monitors and controls observance and enforcement of penalties levied for violation of its rules and regulations.

The chart in Figure 1.9 provides a snapshot of the functions of each branch of government as well as the documents of primary law produced by the branches.

THE PARALEGAL WORKING WITH THE CONSTITUTION AND THE LEGAL SYSTEM

Now that we have looked briefly at the historical backdrop of the U.S. Constitution and the provisions of the document, you may be wondering why this information is relevant or important to your paralegal studies program. There are many reasons to be familiar with the background of the Constitution itself as the first step beginning your paralegal course of study. The first and



Team Activity

Divide the class members into groups with each representing one of the three branches of government. The teams should review the individual reports on checks and balances and then collectively formulate a list of appropriate checks and balances to apply to the branch. Be sure to include discussion of the potential overreaching of power your recommendations prevent.

jurisdiction

The power or authority of the court to hear a particular classification of case.

perhaps most important is to develop an understanding of what led the framers to their formulation of a democratic form of government as set forth in the Constitution.

In a more procedural vein, it is critical to understand the scope of state rights, but equally important to understand the limitations on both federal and state rights. **Jurisdiction** is the power of the court to hear the issues and impose a decision on the parties before the tribunal. If the matter is not properly within the jurisdiction of the court, any decision is nonbinding and unenforceable against the parties. In practical terms, this means that the whole process has been in vain, because the decision is meaningless.

Understanding that individual rights preservation and protection are the fundamental basis of the legal system helps in understanding how legal analysis is approached and decisions rendered. It also should remind you that each individual in any controversy has individual rights, regardless of the nature of the controversy. As you progress in your analysis of law, you may realistically ask which rights are first and whether there is actually a need to set priorities. You will answer as your analysis, knowledge, and understanding guide your thinking. The judge is responsible for ensuring that the legal interpretation of any concept is applied to the issue and parties to the dispute justly and equitably.

Many issues such as workplace discrimination or harassment are extremely challenging for any judge. A fundamental understanding of the theory and structure of government, agencies, and other legal entities within those agencies along with the law is particularly helpful to effective paralegal practice. You can get to the basic issues much more quickly when you have a good idea of the system, and law, and how to work within them both.

The court is clearly important to a paralegal in practice. Of course, you have an idea of the authority of the judge.

In real life, you undoubtedly will have more interaction with the clerk of the court, whose responsibility is to keep all records of any proceedings within the court. In some jurisdictions, the sheer volume has forced the office of the clerk to be divided according to type of cases, for example, family court, tax office, real property, and probate, which administers estates of the deceased, along with civil and criminal divisions. In smaller jurisdictions, there is no need for separate offices. The clerk's office is a great resource when you need to locate someone or something. The public has access to the records and case files. While the clerk cannot give legal advice, the office can and is willing to assist citizens and paralegals to ensure the procedural matters such as format, filing fee payment, court cover sheets, and the like are in order. Some judges have specific preferences such as receiving extra copies in the files, and the clerk of the court is your source for learning about those nuances. Many clerks' offices have become electronically accessible, so be certain you get the local rules regarding electronic filings, and do not forget that the rules in terms of format and timing apply equally for electronic and paper, or traditional, filings.



Eye on Ethics

Paralegals and attorneys are not the only professions with professional codes of ethics and guidelines. Many federal employees and private corporations have adopted similar codes for their employees. Likewise, the judiciary and attorneys are bound by codes. It is always valuable to see the scope and limitations or implied conditions in such codes.

Research to locate and review the federal employee code of ethics sites and state codes as well. After reviewing the materials, briefly summarize the similarities between them as well as any notable differences. Finally, if you have questions or suggestions that might improve the operation of the code in real life,

briefly discuss what those might be and what would be gained by adding the recommendations. On the other hand, if you find the codes adequate, then briefly discuss why there are breaches of those codes and strategies to minimize breach. Samples of available ethics code sites:

- <http://www.nara.gov/fedreg/eo.html>
- <http://www.faso-afrc.ca/docs/ethics-e.html>
- http://www.chra.eur.army.mil/staffing/inprocessing/ipguide/empl_guide/SecA-llEmpl/ethics.htm
- http://www.ethics.state.fl.us/publications/Guide_2004.pdf

Summary

We began with an overview of the historical events leading up to the drafting and ratification of the Constitution. We continued with an overview of law and the structure of the government that evolved from the Constitution. An overview was then presented of the three branches of government. The executive, legislative, and judicial branches each performs separate yet interdependent functions under the system of checks and balances. The concept of state rights and federalism was presented and illustrated. Finally, you have read both the Declaration of Independence and the U.S. Constitution, two of the most extraordinary examples of documents of governance ever created. You are well on your way to building your love of law and understanding of the government system in this country that is the lynchpin of our legal system and your career choice.

Key Terms

Administrative law	Law
Articles of the Constitution	Magna Carta
Bill of Rights	Napoleonic Code
Checks and balances	Preemption
Code of Hammurabi	Procedural due process
Comity	Procedural law
Commerce Clause	Separation of powers
Common law	Socratic method
Competent jurisdiction	State supremacy
Declaration of Independence	State rights
Democracy	Strict scrutiny standard
Due process	Structure
Enumerated powers	Substantive due process
Federal question	Substantive law
Federalism	Supremacy Clause
Fundamental individual rights	Trier of law
Jurisdiction	U.S. Constitution
Justiciable content	

Review Questions

TRUE AND FALSE

In each of the following, indicate whether the statement is true or false. For each false answer, rewrite the sentence to a true statement.

- Professional paralegal organizations are state controlled and guided.
- Paralegal practice does not require special training or knowledge.
- Primary sources of law include statutes, constitutions, and agency regulations.
- Paralegals can perform some legal tasks without a supervising attorney.
- If the client understands he or she is speaking to a paralegal, then nothing the paralegal says can be construed as legal advice.
- Separation of powers does not permit checks and balances.
- As long as the paralegal does not intend to violate any ethical guidelines, there cannot be an ethical problem.
- When the judicial branch is unable to complete the caseload for any given year, the president can appoint judges from the executive branch employees to help complete the task.
- A paralegal historically was also called a legal assistant.
- If the paralegal understands the codes of ethics related to paralegal practice, there is no need to be familiar with the attorney code of ethics and professional responsibility.

Discussion Questions

1. Louisiana uses the Napoleonic Code as the model for its constitution and government form. Discuss briefly your understanding of the constitutional provisions permitting states to do so. Include in your discussion any limitations on this state right. Finally, present your position on this constitutional provision and problems you foresee that may arise.
2. Test your understanding of the U.S. Constitution by visiting the Web site www.constitution-facts.com/. Once you have completed the test, reread those sections that may have posed a particular challenge. Describe in a brief essay what the test entailed, which parts you were particularly knowledgeable about, and which you decided to study more about to refresh your understanding.
3. Present a brief oral and written description of your understanding of the place of the U.S. Constitution in the American legal system. Include a description of the branches of government, the role of each in the legal system, the powers of each, and limitations if any.
4. Select a partner with whom you will prepare a chart or PowerPoint presentation outlining the primary provisions of the Articles of the U.S. Constitution as well as the Bill of Rights. This presentation should encompass the scope of the various sections in sufficient detail to ensure the reader will understand each discrete part as well as the entire document parts presented.
5. Prepare a brief essay on the judicial branch of the federal government. Present an overview of the legal system theory and structure as well as responses to the following questions: In a suit raising a federal and state issue, can the plaintiff decide which court has the best law for the desired outcome? Are there any rules regarding in which court to file a case and which court cannot hear certain cases? Does the system define the jurisdictional power of the courts? Based on your understanding, what suggestions would you make to ensure continued effective operation.
6. Prepare a PowerPoint or chart presentation of the court system in your home state. Include in your presentation the specific names of the various levels of the system, including all specialized courts and appellate courts in the system. Also, include the name and address of the clerk of courts office in your local U.S. district courthouse as well as for the state court. For all specialized courts in your state, briefly describe the scope and limitations of authority.
7. Prepare an outline of the judicial branch of your home state government. Present an overview of the structure as well as responses to the following questions: In a suit raising a state issue, can the plaintiff decide to go to a court other than the one for the district in which he or she resides to get a more liberal jury pool in terms of jury awards? Based on your understanding, what suggestions would you make to ensure continued effective operation? If your home state has municipal or other specialized courts, be sure to include them in your diagram, including clear indication of their rank or place in the general hierarchy of courts.



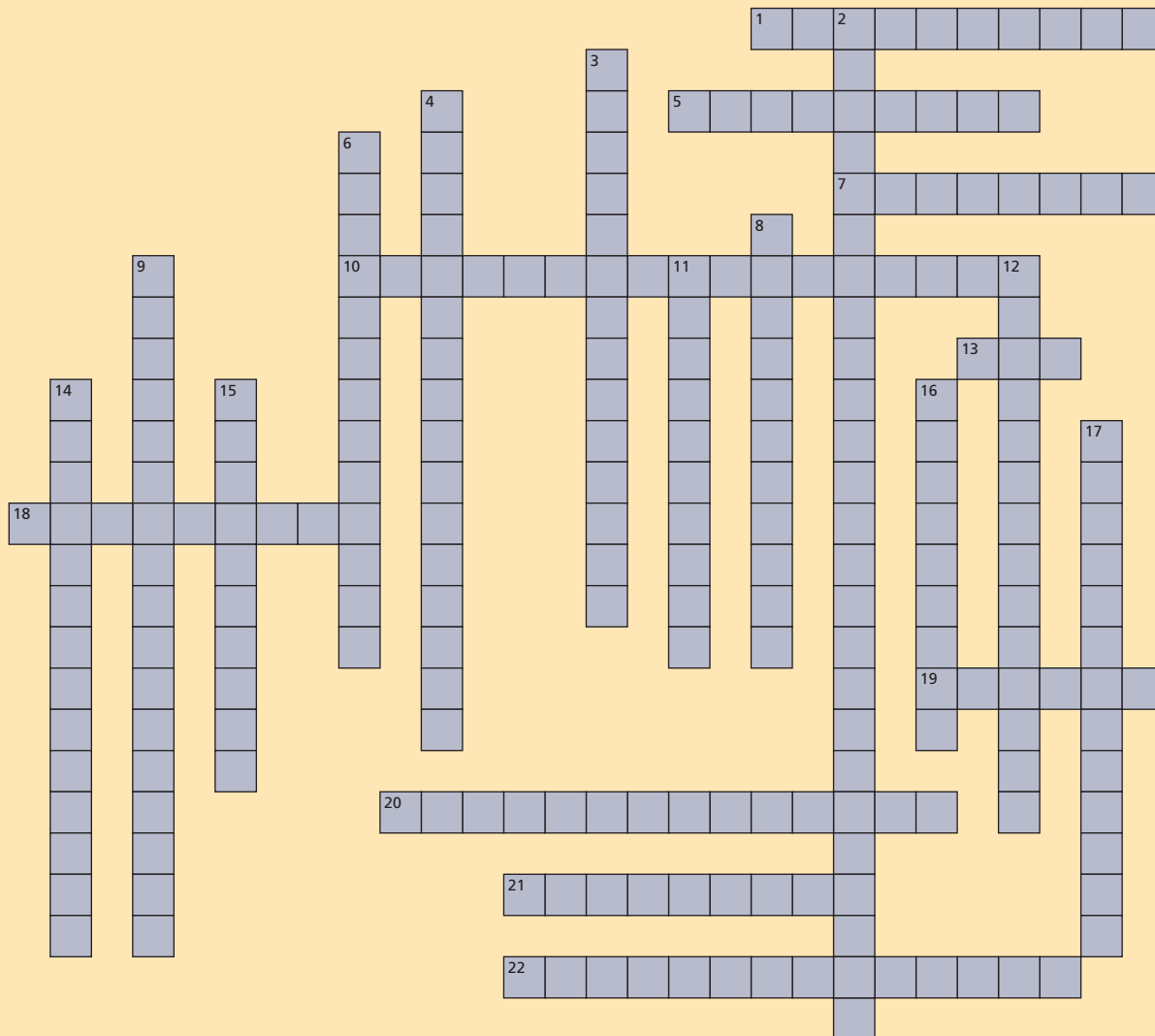
Portfolio Assignment

This chapter contains a great deal of information about law and our constitutional form of government. All of the information will be used continually in your education and career. Prepare a chart that shows the branches of government, the function of each, and the law each produces. Include in your chart the powers authorized to each branch. It is not necessary to include every power, but the major areas that were discussed in this chapter are the most important to include in your reference resource. Use any style that works well with your learning and working style. Identify the state government branch and specific changes in officers and/or law source, for example, the governor is the chief executive office in the state while the president is the chief executive office in the nation. The document from which federal law is derived is the U.S. Constitution, and, in the state, the document is the [Your home state] Constitution.

Retain both your written paper and a directory, if one is available from the court, or, in the alternative, that you prepare in your PRM for easy future reference.



Vocabulary Builders



Across

1. U.S. government form with authority and power balanced between individual states and federal government.
5. Fundamental principles and social order in government.
7. Sections of the Constitution establishing the form and function of government.
10. Mechanism in place preventing abuse of power by any branch of government.
13. Identifiable form of governance including structure, governance, and system.
18. Two-section structure of the legislative branch of government.
19. Doctrine of federal respect for state rights to govern in matters affecting only citizens of a particular state.
20. Part of government responsible for interpreting law.
21. Branch of government responsible for enforcing law.
22. Describes federal government right and authority regarding matters involving commerce and business flowing between and among several states.

Down

2. Came before the Constitution, stating a clear intention to form a government.
3. Defines rights.
4. Constitutional lists of powers of each governmental branch.
6. Defines how to preserve and protect rights.
8. British document describing form of government used as a model for the U.S. government form.
9. Part of government responsible for enacting laws.
11. Adequate, complete, and constitutionally acceptable procedure.
12. Allows states exclusive authority over matters affecting only citizens of the state.
14. Standard for assessing and interpreting legal issue based on a claim of constitutional violation.
15. Exclusive right of federal government in matters affecting all citizens in every state.
16. Government of, by, and for the people.
17. Sources of all law in the United States.