



A Primer For Non-Americans On Understanding The Legal System In The United States: Sources, Schools Of Thought, And International Implications

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"The law is not a series of calculating machines where definitions and answers come tumbling out when the right levers are pushed." Associate Justice William O. Douglas, The Dissent, A Safeguard of Democracy (1948)

ABSTRACT

This paper is a primer or introduction to the American legal system prepared especially for those outside the United States who may be called upon to navigate the American legal system. It discusses the origins and functions of American law and its derivation from both the common law system of England and from aspects of the civil law system of continental Europe. The paper delineates the sources of American law, with a special emphasis on the hierarchy of American courts and the principles of supremacy and preemption. The paper then contrasts the American legal system with discreet aspects of international law, based on Article 38 of the Statute of the International Court of Justice, and the Convention on the International Sale of Goods or CISG to which nearly 90 states are signatories. The paper concludes with a discussion of jurisprudence with a focus on the legal philosophies judges bring to the adjudication of actual cases. In addition, the paper provides thumbnail summaries of the major constitutional cases identified in the narrative, as well as references relating to the categorization of the legal systems of nations around the world, an extensive bibliography, and an Appendix containing a list of those nations who have adopted the CISG.

KEY WORDS: common law; civil law; international law; supremacy; preemption; jurisprudence

INTRODUCTION

To many around the world, the American legal system seems to be unintelligible, contradictory, or incomprehensible. Issues relating to the jurisdiction or powers of courts, judicial decision-making, and enforcement of judgments, often appear to be insurmountable roadblocks to seeking justice within the United States. This paper is a primer on the American legal system—an explanatory note—as to the sources of law in the United States, the nature of

the judicial processes, international implications, and a background to *how judges may come to their decisions*.

By gaining a knowledge of American law and the American system, litigants—most especially those from outside the borders of the United States—will come to a clearer understanding of their rights and responsibilities when attempting to enforce these rights or when they are the subject of litigation in the United States.

WHAT IS THE LAW?

Professor Cheeseman (2002, p. 2) asserted that "The law consists of rules that regulate the conduct of individuals, business, and other organizations within society." In *The Spirit of Liberty*, Judge Learned Hand (1960) stated: "Without the law we cannot live; only with it can we insure the future which by right is ours. The best of men's hopes are enmeshed in its success."

The system of law in the United States is based primarily on the English system (Posner, 1997). Vermont provides an interesting insight into this circumstance. As Gillies (2017, p. 14) writes: "It [Vermont] adopted the common law of England and the statutes of that country up to the time of the [Revolutionary] war, and through all of these sources inherited the customs, traditions, and principles of law that were created by Roman law." However, other nations, such as Spain and France, have also influenced the law as well. It may be interesting to note that certain aspects of land-law (specifically condominium, co-op, and time-share law) have their origins in the Dutch civil law system (Hunter, 2018).

In the United States, all states, with the exception of Louisiana, have based their legal systems on the English common law. In contrast, because of its unique French heritage, Louisiana modeled its legal system on French civil law, with its origins in the Romano-Germanic civil law system, which traces its beginnings to 450 B.C. when Rome adopted the *Twelve Tables*, a code applicable to all Romans (Gillies, 2017). A compilation of Roman laws, called the *Corpus Juris Civilis* (Kunkel, 1966; Dingley, 2016) or the "Body of Civil Law," was completed in 529 A.D. In 1804, France adopted the Civil Code (often referred to as the Napoleonic Code) (Lehrman, 2008; Wilde, 2018), and in 1896, the German Civil Code was adopted. Wilde (2018) noted that the Napoleonic Code "heavily influenced world laws in the nineteenth century."

In the civil law system, individual national codes and statutes adopted by the parliaments of various nations are the sole sources of national law (Syam, 2014). The main function of courts operating within the civil law system is to adjudicate a case by applying the relevant section of the code or statute to the particular facts presented. In that sense, the role of a judge is quite limited. Syam (2014) notes that "there are roughly 150 countries that have what can be described as primarily civil law systems, whereas there are about 80 common law countries" (CIA, 2018). Civil law countries include most of the nations of Western Europe, nations which comprised the former Indochina (Laos, Cambodia, and Viet Nam), Indonesia, Japan, nations of Latin America, South Korea, Poland and Eastern and Central Europe (most especially after 1989), Russia, China, nations in Sub-Saharan Africa (other than those which were former British colonies), and Turkey (CIA, 2016). In some civil law countries, judicial decisions do not create law, which is the exclusive province of the legislature.

DEVELOPMENT OF LAW IN THE UNITED STATES

From their founding, the American colonies adopted the English system of law which became the foundation from which judges created a "common law" in the United States (Gillies, 2017). The basis of the common law is found in *cases* decided by judges. The English common law

provided a framework and a structure of courts within which the legal system in the United States would develop. The English system of courts included:

- *Law Courts*: After the Norman Conquest in 1066 after the Battle of Hastings, a uniform system of courts was gradually established in England to supplant the patchwork of local courts administered by local lords or chieftains. The crown would now appoint its local supporters as judges in localities who would administer the law in a uniform manner. These courts were called *law courts*. The law courts often stressed legal procedures over the substance, content, or equities of a case. Law courts were confined to awarding money damages as a remedy in any case filed "at law."
- *Chancery or Equity Courts*: As the law courts were often subjected to criticism for favoring form over substance, a second set of courts—the Court of Chancery or a Court of Equity—was established (The Law Dictionary 2018). These specialized courts fell under the authority of the Lord Chancellor, the most trusted personal advisor to the crown. Individuals who challenged the fairness or equity of decisions of the law court or who were seeking a remedy other than monetary damages could now seek relief in the Court of Equity.

Remedies available in the Court of Equity were termed *equitable* remedies (often in the form of a *writ* or order of a court) and were shaped to fit each individual situation. An example of such an order is the writ of specific performance in which a court orders a party to undertake a specific act or enjoins a party from violating the terms of a contract. The remedy of specific performance is especially relevant in a contract action where a court of equity can order a party to carry out the terms of a contract where the "bargained for" consideration was unique (i.e., "family heirlooms or priceless works of art," etc.) and where monetary damages were inadequate under the circumstances of the case (see UCC Section 2-716, Comment 1). Calamari and Perillo (1979, p. 581) note: "The remedy of specific performance is an extraordinary remedy developed in Courts of Equity to provide relief when the legal remedies of damages and restitution are inadequate." Professor Cheeseman (2002, p. 9) noted that "Equitable orders and remedies of the Court of Chancery took precedent over the legal decisions and remedies of the law courts."

In the United States, the title of the *court of chancery* is applied "to a court possessing general equity powers, distinct from the courts of common law" (*Parmeter v. Bourne*, 1894, quoted in The Law Dictionary, 2018). As noted in the *Law Dictionary* (2018), "The terms "equity" and "chancery," "court of equity" and "court of chancery" are constantly used as synonymous in the United States. It is presumed that this custom arises from the circumstances that the equity jurisdiction which is exercised by the courts of the various states is assimilated to that possessed by the English courts of chancery. Indeed, in some of the states it is made identical there with by statute, so far as comfortable to our institutions."

- *Merchant Courts*: As commerce developed during the Middle Ages, the merchants themselves developed rules to resolve commercial disputes (Trakman, 1983). These rules became known as the "law of merchants" (*Lex Mercatoria*) or "*Law Merchant*," and were based on the common trade practices adopted by English merchants who traveled throughout England, Europe, and other places (Mitchell, 1904). From these informal arrangements, a separate set of courts was established in England to administer the rules that had been established from practice and common usage. This court came to be known as the *Merchant Court*. The Merchant Court was absorbed into the regular law court system in England, but the philosophy which underpinned the creation of the Merchant Court may be seen as the origin of a separate set of rules applicable to "merchants" and certain commercial transactions embodied in the Uniform Commercial

Code (1952/2018) in the United States or the international Convention on the United Nations Convention on the International Sale of Goods or CISG (1980) (Trackman, 2011). [See Appendix I for a listing of CISG signatory nations.]

As Huber and Mullis (2007, p. 25) noted:

"The CISG applies to contracts of sale of moveable goods between parties which have their place of business in different states when these States are Contracting States (Art. 1(1) lit. (a) CISG) or when the rules of private international law lead to the application of the law of a contracting state (Art. 1(1) lit. (b) CISG). Certain types of contracts are excluded from its scope of application by virtue of Art. 2 CISG. By way of example, most consumer sales will not fall under the CISG (cf. Art. 2 lit. (a) CISG)."

Sources of Law and the Hierarchy of Courts in the United States

The main sources of law in the United States are the U.S. Constitution, treaties, state constitutions, federal and state statutory law, local ordinances, rules and regulations of state and federal administrative agencies, executive orders, and judicial decisions of both federal and state courts.

The U.S. Constitution is the *supreme law of the land* in the United States. As such, any law that conflicts with the Constitution is deemed unconstitutional and unenforceable. Treaties which are entered into with the "advice and consent" of the United States Senate are a part of the supreme law of the land (*Fairfax's Devisee v. Hunter's Lessee*, 1813/*Martin v. Hunter's Lessee*, 1816). An example of a modern application of treaty law is a *Bilateral Investment Treaty* or BIT that regulates trade relations between nations (Juillard, 2001). Swenson (2008) states that "... BITs foster international integration through channels that are mediated by multinational firms" and are thus an important part of the fabric of commercial law in the United States (see also Hunter, Shapiro, & Ryan, 2003).

Statutory law consists of written laws enacted by a legislative body—either federal or state. Often times, statutes enacted by the legislative branch will be further organized by topic into codes. Perhaps the best known are the United States Bankruptcy Code, the Internal Revenue Code, or the Uniform Commercial Code. State statutes deal with issues such as corporation and partnership law, business associations, criminal law, products liability, and workmen' compensation laws. State legislatures often delegate a portion of their lawmaking authority to a variety of local governmental bodies who are then empowered to enact what are termed ordinances. Some examples include local building codes, zoning laws, and traffic laws. These ordinances are likewise often codified or organized by topic.

Article III of the United States Constitution and similar provisions of state constitutions deal with executive actions undertaken by the President of the United States and of the governors of the various states. Recently, executive orders have come under intense scrutiny and have been criticized as a way to avoid legislative action relating to sometimes difficult or controversial issues. For example, in 1993, President Clinton issued an executive order that "lifted the so-called 'gag' rule forbidding abortion counseling in federally funded family planning clinics" (Cheeseman, 2002, p. 12), or the January 27, 2017 executive order issued by President Trump (Number 13769), "Protecting the Nation from Foreign Terrorist Entry into the United States." An executive order may be challenged in the courts on the basis that is a violation of the United States Constitution or of a federal or state statute.

The legislative and executive branches of both federal and state governments are empowered

to create a variety of administrative agencies, bureaus, boards, and commissions to enforce, administer, and interpret statutory law enacted by Congress or state legislatures. Agencies then create administrative rules and regulations in order to interpret the statute which the agency is authorized to enforce which have the force of law. Administrative agencies have the authority to hear and decide disputes [through an Administrative Law Judge or ALJ] which occur under their statutory jurisdiction. The decisions of administrative bodies are termed as *orders*. In some cases, litigants may challenge the authority of administrative agencies on grounds that the agency has exceeded its delegated powers; that is, that an agency has acted "*ultra vires*" ["beyond their powers] or rule making authority (generally, Hunter, 2011; Hunter & Shannon, 2017).

Stare Decisis

Judicial decisions are found in the written opinions of judges in which a judge explains the legal reasoning or rule used in deciding a "case or controversy." These opinions often involve an interpretation of a statute, an administrative regulation, or a local ordinance. The common law system is based on the premise that certain court decisions will become a *precedent* for court decisions in future cases. In the United States, lower federal courts (both the United States District Courts and the Courts of Appeals) must adhere to the precedents established by higher federal courts. In addition, under the principle of precedent, *all* federal and state courts in the United States are bound to follow the precedents established in cases decided by the United States Supreme Court (see *Marbury v. Madison*, 1803). In the American legal system, the courts of one jurisdiction (state) are not bound by the precedents established by courts in another jurisdiction (state) but may "take judicial notice" of a precedent in deciding a similar case in their own state court proceedings (*Brown v. Piper*, 1875; Dorfman & Zogby, 2017).

Adherence to precedent is termed as *stare decisis* ("to stand by the decision") (Cooper, 1988; Kozel, 2010). *Stare decisis* provides the legal system with both predictability and stability (see *contra*, Roland, 2000), although courts may on occasion change, distinguish, or even overrule a precedent (see *Flagiello v. Pennsylvania*, 1965). Questions relating to a judicial nominee's views on *stare decisis* play an important part of the confirmation process of an individual nominated for the United States Supreme Court today (generally, Hunter & Lozada, 2010).

Stare decisis, while providing an important element of stability, nevertheless may prove to be an obstacle to social change. In such cases, for example in *Brown v. Board of Education* (1954), the Supreme Court may be called up to discard or overrule a precedent that no longer merits protection, one that reflects or calls for a change in societal norms, or one in which the Court now admits it simply had "made a mistake." Generally, a court will only overrule an earlier precedent on "compelling grounds" (see, e.g., *Morrison v. Thoelke*, 1963).

THE SUPREMACY CLAUSE

Article VI, Section 6 of the U.S. Constitution, known as the *Supremacy Clause*, establishes that the Constitution, treaties, federal statutes and federal regulations are the "supreme law of the land" (see Williams, 2014). Thus, any state or local laws that conflict with federal law are held to be unconstitutional. This concept of the supremacy of federal law is commonly found in the *preemption* doctrine (generally, Conway, 2013). However, as Spence and Murray (1999, p. 1) noted, "Federal preemption case law under the Commerce Clause and Supremacy Clause has been marked by a high degree of conflict and controversy."

John Marshall, who served as Chief Justice of the United States Supreme Court from 1801 to 1835, provides the proper context: "The government of the United States, then, though limited

in its powers, is supreme, and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding'" (*McCulloch v. Maryland*, 1819; Ray, 2018). The Supremacy Clause is the keystone in establishing order in the relationship between the federal and state governments. The Supremacy Clause provides that when a *direct conflict* exists between a federal law and a state law, the state law is invalid and the federal law is supreme. As Professor Tribe (2000, p. 1178) noted: "Such actual conflict is most clearly manifest when the federal statute and state enactments are directly and facially contradictory. Federal regulation obviously supersedes state regulation where compliance with both is a literal impossibility...."

Some powers, however, are shared by the states and the federal government. These are called *concurrent powers* (see *Gibbons v. Ogden*, 1824). In cases of shared or concurrent powers, it may be necessary to determine which law or regulation—federal or state—should prevail. As noted, as a general rule, when concurrent federal and state powers are involved, a state law that conflicts with a federal law is invalid. However, when Congress has chosen to act in an exclusive manner, it may be said that Congress has exercised its power of *complete preemption* in this area (Merriam, 2017). Newell (2017, p. 1353) notes that "The preemption doctrine arises out of the Constitution's Supremacy Clause, which provides that federal law is the 'Supreme Law of the Land,' such that federal law supersedes conflicting state laws." In the case of preemption, a federal regulatory scheme would preempt state regulation not only if there is a direct conflict between the two, but also where the state regulation *interferes* with a federal objective, as where "it encourages conduct the absence of which would aid in the effectuation of the federal scheme as interpreted and applied" (Tribe, 2000, p. 1884).

For example, in *City of Burbank v. Lockheed Air Terminal Inc.* (1973), the Supreme Court concluded that a city ordinance, making it unlawful for jet aircraft to take off from the privately owned city airport between 11 p.m. and 7 a.m., was in conflict with the purposes of the *Federal Aviation Act* (1958) because local "control of takeoffs and landings would severely limit the flexibility of the FAA to control air traffic control" (*City of Burbank*, 1973, p. 639). Similarly, in *Jones v. Rath Packing Co.* (1977), the United States Supreme Court invalidated a California regulation relating to the labeling of packaged flour sold in the state because to do would frustrate the purpose of the federal *Fair Packaging and Labeling Act* (1967).

In fact, however, Congress rarely expresses its clear an unambiguous intent to preempt an entire subject area against state regulation. As a result, it is the responsibility of the courts to determine whether Congress intended to exercise exclusive jurisdiction over the area in question. Such an intention may be found where the federal regulation is so "pervasive, comprehensive, or detailed" that the states have no room to augment or add to it. Under these circumstances, it may be said that the federal law "*occupies the field*" (Chemerinsky, Forman, Hopper, & Kamin, 2015). As noted by Professor Tribe (2000, p. 1205): "For if Congress has validly decided to 'occupy the field' for the federal government, state and local regulations within the field must be invalidated no matter how well they comport with substantive federal policies."

In two cases, the United States Supreme Court invalidated a state regulation limiting the length of trailer trucks traveling on interstate highways on the basis of federal preemption. In *Raymond Motor Transportation, Inc. v. Rice* (1978), the Supreme Court determined that the regulations adopted by the State of Wisconsin "place[d] a substantial burden on interstate commerce and they cannot be said to make more than the most speculative contribution to highway safety." In *Kassel v. Consolidated Freightways Corp. of Delaware* (1981), the Supreme Court concluded that an Iowa law prohibiting 65-foot double trailers from entering the state

discriminated against interstate commerce and was therefore invalid. In both cases, the Supreme Court determined that these state laws had been preempted through an application of the Supremacy Clause.

In a third case, *Cipollone v. Liggett Group, Inc.* (1992), a case which is important as well from an historical point of view—“outlining the history of the required warnings on cigarette packages and the evolving form of the warning itself so as not to minimize the danger of smoking” (Hunter, Shannon, & Amoroso, 2012)—the United States Supreme Court held that federal law preempts only those actions that *related to the required warnings, advertising, or promotion of cigarettes*. Other actions or theories of recover offered by the plaintiffs, with the exception of those based on the required warnings, were *not preempted* and could proceed (Foley, 1992).

Finally, “occupation of the field” may be seen in the direct federal regulation of safety designs for nuclear power plants which precluded state regulation (*Silkwood v. Kerr-McGee Corp.*, 1984; Voight, 1984).

CONTRAST WITH INTERNATIONAL LAW

In contrast and sometimes complementary to American law, there is also a body of law termed “international law” (von Glahn & Taulbee, 2017). International law encompasses both “public international law” (Brownlie, 1990; Vos, 2013) and “private international law” (Hill, 2014). As Fawcett and Torremans (1998) noted in the synopsis of *Intellectual Property and Private International Law*: “The protection and commercial exploitation of intellectual property rights such as patent designs and copyright are seldom confined to one country and the introduction of a foreign element inevitably raises potential problems of private international law, ranging from establishing which court has jurisdiction and which is the applicable law to securing the recognition and enforcement of foreign judgments.”

Professor Christopher Greenwood (2008) outlines the essential problem with international law when he notes: “There is no ‘Code of International Law.’ International law has no Parliament and nothing that can be described as legislation. While there is an International Court of Justice and a range of specialized international courts and tribunals, their jurisdiction is critically dependent upon the consent of States and they lack what can properly be described as compulsory jurisdiction of the kind possessed by national courts.”

Public international law deals with actions of states and other parties in their international relations or obligations (generally, Feliu, 2018). As Feliu (2018) notes: “Public International Law is composed of the laws, rules, and principles of general application that deal with the conduct of nation states and international organizations among themselves as well as the relationships between nation states and international organizations with persons, whether natural or juridical. Public International Law is sometimes called the ‘law of nations’ or simply just International law.”

Disputes relating to public international law are frequently adjudicated by the International Court of Justice or ICJ (Gilmore, 1945/1946), which was established in 1945 under the Charter of the United Nations. According to Article 36 of the Statute of the International Court of Justice, public international law concerns: a) the interpretation of a treaty; b) any question of international law; c) the existence of any fact which, if established, would constitute a breach of an international obligation; and d) the nature or extent of the reparation to be made for the breach of an international obligation. By way of contrast, “private international law” deals with

such issues as private contract enforcement and interpretation, private business interests, intellectual property (Fawcett & Torremans, 1998), and transnational taxation.

Sources of Public International Law

Although as Omar (2011) notes, "They are neither the only source nor the most authoritative one, for creating rights and obligations under international law," Article 38(1) of the Statute of the International Court of Justice lists the four sources of public international law (see Kennedy, 1987) in hierarchal form as follows:

- Treaties and conventions are the functional equivalent of domestic legislation or statutory law at the international level. As Greenwood (2008) states: "Treaties [are] sometimes called agreements, conventions, exchanges of notes or protocols between States—or sometimes between States and international organizations...." A bilateral treaty is entered into between two nations; a multilateral treaty involves an agreement among more than two nations. Conventions are treaties that are sponsored by an international organization and normally involve multiple signatories. Examples of prominent international conventions include the Convention on the Law of the Seas (1982), the Vienna Convention of the Law of Treaties (1969/1980) (Dorr & Schmalenbach, 2012), and the Third Geneva Convention Relative to the Treatment of Prisoners of War (1949).
- Customary international law describes practices that are followed by two or more nations when dealing with each other in the international sphere (see Born, 2017). Customary law may be found in official government statements or practices, diplomatic correspondence recognizing certain rights or privileges, policy statements made by governmental officials, press releases, speeches, etc. (It will be interesting to see the legal status of certain "presidential tweets" in the creation of law in the United States.) Professor Cheeseman (2002, p. 90) notes that two elements must be demonstrated in order to show that a discreet practice should be recognized as creating a legally recognizable custom which rises to the level of customary law: "Consistent and recurring action by two or more nations over a considerable period of time; and recognition that the custom is binding—that is, followed because of legal obligation rather than courtesy" (see also Greenwood, 2008).

As the International Court of Justice stated in *North Sea Continental Shelf* cases (1969, p. 44): "Not only must the acts concerned be a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. ... The States concerned must feel that they are conforming to what amounts to a legal obligation."

Customs are often later codified in bilateral or multilateral treaties.

- Specialized international courts or specially constituted tribunals, for example, the International Criminal Tribunal for the former Yugoslavia (ICTY) (del Rosso, 2016) or the International Criminal Tribunal for Rwanda (Schabas, 2006), often rely on "general principles of law that are recognized by civilized nations" (see Schlesinger, 1957; Friedmann, 1963; Leyh, 2018).
As noted by Piero Bernardini (2016, p. 1), President of the Italian Arbitration Association, "Association of States national law with international law may be found in the formation of the general principles of law recognized by civilized nations and in applicable law clauses of State contracts. The general principles of law, one of the sources of international law under Article 38(1) of the ICJ Statute, are drawn by the creative task of the international judge from the legal system of the great majority of States, provided they are uniformly applied and felt as obligatory and necessary also on the point of view of international law."
- Judicial decisions and "teachings of the most qualified legal scholars of various nations"

are a fourth, yet subsidiary, source of international law. Unlike in the United States, international courts are not bound by the principle of *stare decisis* and are free to decide each case on its own individual merits. "Indeed, the Statute of the ICJ expressly provides that a decision of the Court is not binding on anyone except the parties to the case in which that decision is given and even then only in respect of that particular case" (Greenwood, 2008, citing Article 59 of the Statute of the International Court of Justice). However, other international courts, most notably the European Court of Justice, often refer to its own past precedents as informative guidance. Decisions of national courts do not create precedent for international courts.

FUNCTIONS OF LAW IN THE UNITED STATES

The law has taken on a number of important societal functions. In the realm of promoting societal norms, the law provides an important vehicle for maintaining "peace," by enforcing societal standards regarding certain types of conduct which are declared criminal or anti-social in nature. Often reflecting the moral standards of society, the law both encourages and discourages various types of conduct (for example, discouraging drug use; encouraging home ownership or charitable contributions through the tax code). The law may be seen as a method to ensure social justice through enacting "social" legislation to assure fair treatment by groups in society seeking equal treatment or fair adjudication of claims ("Equal Pay" legislation; anti-discrimination laws; the Violence Against Women Act; etc.). The law provides a forum to resolve societal conflicts, either formally, through the adjudication process found in filing a lawsuit, or through the processes termed "alternate dispute resolution" [arbitration, mediation, etc.] (Schackman, 1996; Pryor, 2018; Greenspan, Brooks, Painter, & Walton, 2018).

In the United States, the law also fulfills an important role in facilitating contractual relationships, protecting business relationships and associations, and assuring fairness in the allocation of productive resources (for example, enacting antitrust legislation). Finally, law assures the protection of individual freedoms and liberties, such as the freedom to worship, the freedom of the press, the freedom to carry a firearm, the freedom of association, and certain procedural and substantive protections within the context of criminal law found in the Bill of Rights of the U.S. Constitution.

Many of these functionalities carry within them potential or real conflicts which then must be adjudicated or resolved as well. For example, a Boy Scout assistant leader files a law suit against the Boy Scouts of America (BSA) when he was terminated for being a homosexual (*Boy Scouts of America v. Dale*, 2000). The Boy Scouts countered by claiming that requiring them to continue his position with the organization violates *their* freedom of association to select leaders for their private organization who embody their "core beliefs" (see Leonard, 2000; Knauer, 2001; Bhagwat, 2011). A second example involves a recurring controversy relating to a women's "right to choose" an abortion versus the putative rights of the unborn (see *Roe v. Wade*, 1973). The same may be said of the Supreme Court's decision recognizing "gay" marriage under the guise of enforcing the equal protection clause of the Fourteenth Amendment (*Obergefell v. Hodges*, 2015; Siegel, 2017. Nan Hunter (2017, p. 1662) noted, however, that "The lawyers who led the marriage equality campaign succeeded by decentering litigation until after opinion polls registered majority support for allowing same-sex marriage." These types of conflicts are often resolved through the legal system, which may be called upon to balance rights between competing claimants. Some resolutions will be accepted by society-at large, and others may be the subject of continued opposition, criticism, or challenge. Perhaps with the exception of the eradication of slavery and the American Civil War, Americans have looked to the courts for resolution rather than "the streets" or violence.

METHODS OF DECIDING CASES: *JURISPRUDENCE*

Because the law fulfills so many important societal and functional roles, it is important to understand the philosophy behind a legal system. Social scientists and jurists often refer to the philosophy or science of the law as *jurisprudence*. Jurisprudence will provide a unique glimpse into the reasoning behind the creation of laws, the adjudication of cases, the development of an overall judicial philosophy of a nation, or of the judicial philosophies of individual judges. The same is certainly true of the development of the legal system in the United States. These legal philosophies (generally, Dasgupta, 2011) will be summarized in the following explanatory paragraphs:

- *Natural Law School*: The most common school of law thought in much of Western civilization is the natural law school (Rice, 1999). The natural law school is based upon morality, ethics, and "right conduct" (see, e.g., Finnis, 2012). As the *World Encyclopedia of Law* (2018) notes, "Natural law [is] a jurisprudence that emphasizes a law that transcends positive laws (human laws) and points to a set of principles that are universal in application." The United States Constitution, the English Magna Carta, and the United Nations Charter are said to be natural law documents, reflecting a moral basis of law. The natural law school provides an important philosophical critique of modern *secular* legal institutions and of law thought (Marske, Kofron, & Vago, 2017; Legarre, 2017).
- *Legal Positivism*: The positivist school of law is often contrasted with the natural law school. Positivism is a particular view of man-made law "as it is... rather than as it ought to be" (Business Dictionary, 2018). The positive school holds that legal rules are valid not because they have their origins in moral or natural law, but because they have been enacted by the legitimate legal authority. If morality is a consideration in the legal system, it only has relevance at the point a law is debated and enacted (see, e.g., Leiter, 2009). As Boyte (2017, p. 493) writes, "For legal positivists, laws do not have to embody and incorporate moral ideal because laws are, by nature, socially contingent and independent of moral ideals."
- *The Sociological School*: The sociological school asserts that the law is a means of achieving and advancing certain sociological or societal goals (Cotterrell, 2018). The sociological school posits that the purpose of law is to shape and influence social behavior (see Gardner, 1961). Adherents to the sociological school of law are sometimes referred to as *legal realists* (see Green, 2005; Dubey, 2018). Legal realists are most prone to disregard a precedent which might conflict with a differentiated view of society from that reflected in an early precedent. It may be said that the social context of law is more important to the school of legal realism than the formal application of precedent to decide current or future legal disputes.
As noted in the *World Encyclopedia of Law* (2018), "The legal realist school flourished in the 1920s and 1930s as a reaction to the historical school. Legal realists pointed out that because life and society are constantly changing, certain laws and doctrines have to be altered or modernized in order to remain current."
- *The Analytical School*: Adherents to the analytical school maintain that the law should be shaped by the application of logic to specific facts of each case. Adherents emphasize the logic of the result to be obtained rather than on how the result is achieved. The analytical school is sometimes referred to as "legal formalism" (see Boyte, 2017).
- *The Historical School*: The historical school maintains that the law is an aggregate of social traditions and customs that have developed over many centuries (Berman, 1994; Rodes, 2004). Berman (1994) notes that "The basic tenet of the historical school is that the primary source of the validity of law, including both its moral validity and its political validity, is its historicity, reflected especially in the developing customs and ongoing traditions of the community whose law it is." The historical school holds that

changes in societal norms will *gradually* be reflected in the law. To those who adhere to this philosophy, the law is an evolutionary process and legal scholars will look to past legal decisions or precedents or to the words of certain “foundation documents” to solve contemporary problems or for insights into current issues or controversies (e.g., Calabresi, 2011). Those who model the historical school are often said to follow “judicial restraint” in deciding cases and argue against precipitous judicial involvement in social conflicts that may better be resolved *over time* through the political or legislative processes.

- *The Command School*: Adherents to the command school hold that the law is a set of rules developed and enforced by those in power rather than a set of principles based upon morality, history, logic, or sociology. The command school rejects any legal philosophy that is not based on the promulgation of political power. Changes in the law will occur when the ruling class changes. Aspects of socialist law, based on the writings of Karl Marx, may be seen as a representation of the command school because of its close symmetry with the existence of the “command and control” economies of Central and Eastern Europe after World War II (see, e.g., Hunter, Nowak, & Ryan, 1995) and the development of law in China which are based on the expression of the political will of those in power.
- *The Critical Legal Studies School (CLS)* (Kelman, 1987): Adherents (sometimes referred to as “*Crits*”) posit that hard and fast legal rules are unnecessary, and in fact often stand as an obstacle to legal reform by the powerful in society who desire to maintain their power and the *status quo* (e.g., LaGreca, 2015). At the core of this theory lies the view that that disputes should be resolved by the application of rules that are based on broad notions of “fairness” in each particular circumstance. This theory permits judges to engage in subjective decision-making based on an individual judge's concept of fairness. “Judicial activism” is often associated with the critical legal studies school (Hunter and Alexander, 2001).

As noted in the *World Encyclopedia of Law* (2018), “Some ‘*Crits*’ are clearly influenced by the economist Karl Marx and also by distributive justice theory. The CLS school believes the wealthy have historically oppressed and exploited those with less wealth and have maintained social control through law. In so doing, the wealthy have perpetuated an unjust distribution of both rights and goods in society. Law is politics and thus not neutral or value free. The CLS movement would use the law to overturn the hierarchial structures of domination in the modern society.”

The critical legal studies school is not without its severe critics. As noted by Unger (1983), “The critical legal studies movement has undermined the central ideas of modern legal thought and put another conception of law in their place. This conception implies a view of society and informs a practice of politics.”

- *The Law and Economics School*: The law and economics school seeks to apply “free market” principles to determine the outcome of lawsuits and the necessity for legislation or regulation in the economic sphere (e.g., Mercurio, 2009). As noted by Kaplow and Shavell (1999), the law and economics school has special relevance in “liability for accidents (tort law), property law, and contracts.” With its origins at the University of Chicago (Medema, 2003) and the philosophical moorings of Judge Richard Posner of the Seventh Circuit Court of Appeals, the promotion of market efficiency is the central focus of legal analysis. The law and economics school has held particular sway in the application of antitrust litigation in the United States, particularly in analyzing corporate mergers, acquisitions, and takeovers. Instead of deciding cases on the basis of potential market domination, adherents to this school of thought would find such activities illegal only if they render the market less efficient. In cases involving the

regulation of business, members of the law and economics school would be prone to adopt a cost-benefit analysis to the exclusion of moral or policy arguments and would generally favor deregulation of the American economy.

FINAL COMMENTARY

It surprises many non-Americans that the legal system in the United States is really not *a* legal system; but rather, the system is an amalgam of *both* common and civil law, coupled with a strong element of administrative law and executive action. In addition, with the possible exception of Germany and a few other nations (see Darlington, 2018), our dual side-by-side federal and state court systems prove to be a challenge in attempting to understand the concept of jurisdiction or the power of the various courts to hear and adjudicate cases.

As well, it may come as a surprise that many contentious social, religious, or political issues are resolved not through legislation or the administrative process, but rather by the intervention of the courts—most notably by the United States Supreme Court—whose members apply various forms of reasoning described above to their decision-making. Finally, while there is a well developed body of international law, American courts by-and-large are resistant to its application in the American legal system, especially in non-commercial areas.

This paper has explicated many of the issues and concepts central to an understanding of the American legal system in the belief that one seeking or called upon to participate in the system will come away with a better understanding of the important—perhaps central—role that law plays in shaping American social, economic, and political policy.

APPENDIX I

CISG: List of Contracting States

- [Albania](#)
- [Argentina](#)
- [Armenia](#)
- [Australia](#)
- [Austria](#)
- [Bahrain](#)
- [Belarus](#)
- [Belgium](#)
- [Benin](#)
- [Bosnia-Herzegovina](#)
- [Brazil](#)
- [Bulgaria](#)
- [Burundi](#)
- [Canada](#)
- [Chile](#)
- [China \(PRC\)](#)
- [Colombia](#)
- [Croatia](#)
- [Cuba](#)
- [Cyprus](#)
- [Czech Republic](#)
- [Denmark](#)
- [Dominican Republic](#)
- [Ecuador](#)
- [Egypt](#)
- [El Salvador](#)
- [Estonia](#)
- [Finland](#)
- [France](#)
- [Gabon](#)
- [Georgia](#)
- [Germany](#)
- [Greece](#)
- [Guinea](#)
- [Guyana](#)
- [Honduras](#)
- [Hungary](#)
- [Iceland](#)
- [Iraq](#)
- [Israel](#)
- [Italy](#)
- [Japan](#)
- [Kyrgyzstan](#)
- [Latvia](#)
- [Lebanon](#)
- [Lesotho](#)
- [Liberia](#)
- [Lithuania](#)
- [Luxembourg](#)
- [Macedonia](#)
- [Mauritania](#)
- [Madagascar](#)
- [Mexico](#)
- [Moldova](#)
- [Mongolia](#)
- [Montenegro](#)
- [Netherlands](#)
- [New Zealand](#)
- [Norway](#)
- [Paraguay](#)
- [Peru](#)
- [Poland](#)
- [Republic of Congo](#)
- [Republic of Korea](#)
- [Romania](#)
- [Russian Federation](#)
- [Saint Vincent & Grenadines](#)
- [San Marino](#)
- [Serbia](#)
- [Singapore](#)
- [Slovakia](#)
- [Slovenia](#)
- [Spain](#)
- [Sweden](#)
- [Switzerland](#)
- [Syria](#)
- [Turkey](#)
- [Uganda](#)
- [Ukraine](#)
- [United States](#)
- [Uruguay](#)
- [Uzbekistan](#)
- [Yugoslavia](#)
- [Zambia](#)
- [USSR\(superseded\)](#)

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* Contained in Constitutional Case Summaries

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CONSTITUTIONAL CASE SUMMARIES

Boy Scouts of America v. Dale (2000)

"Applying New Jersey's public accommodations law to require the Boy Scouts to admit Dale violates the Boy Scouts' First Amendment right of expressive association. Government actions that unconstitutionally burden that right may take many forms, one of which is intrusion into a group's internal affairs by forcing it to accept a member it does not desire. Such forced membership is unconstitutional if the person's presence affects in a significant way the group's ability to advocate public or private viewpoints."

The United States Supreme Court held that the constitutional right to freedom of association allowed the Boy Scouts of America (BSA) to exclude a homosexual person from membership in the Scouts despite a New Jersey state law requiring equal treatment of homosexuals in "public accommodations." The court ruled that a private organization such as the BSA may exclude a person from membership when "the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." In a five to four decision, the Supreme Court ruled that opposition to homosexuality is part of BSA's "expressive message" and that allowing homosexuals to become adult leaders would interfere with that message, reversing a decision of the New Jersey Supreme Court.

Brown v. Board of Education (1954)

"We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the 14th Amendment."

In *Plessy v. Ferguson* (1896), the Supreme Court had sanctioned segregation by upholding the doctrine of "separate but equal." The National Association for the Advancement of Colored People, represented by future Supreme Court Justice Thurgood Marshall, challenged the constitutionality of segregation in the Topeka, Kansas, school system. In 1954, the United States Court unanimously overruled its decision in *Plessy*, holding that "separate schools are inherently unequal."

Cipollone v. Liggett Group, Inc. (1992)

"We conclude that § 5 of the 1965 Act only pre-empted state and federal rulemaking bodies from mandating particular cautionary statements and did not pre-empt state-law damages actions."

The Supreme Court addressed the issue of *preemption* of federal law in regard to state law regulating the tobacco industry relating to advertisements and promotion. In question was *The Cigarette Labeling and Advertising Act of 1966*, which regulates manufacturers who label their packages with warnings prescribed by the Act. The majority of the court ruled that the "failure-to-warn" claim against the tobacco industry by the plaintiff was invalid and prohibited because such an action had been preempted. In addition, cases involving the "neutralization" of federal warnings in cigarette advertisements (either weakening or strengthening such warnings) were also invalid and prohibited on the grounds that the Act preempted, or overrode, state laws.

The majority ruling by the Supreme Court also limited the potential litigants in lawsuits against tobacco industries to only smokers who developed diseases *prior* to 1969. The opinion did not

exclude common law fraud and conspiracy or express warranty actions—but only related to issues relating to advertising.

Fairfax Devisee v. Hunter's Lessee (1813)/Martin v. Hunter's Lessee (1816)

"The appellate jurisdiction of the supreme court of the United States extends to a final judgment or decree in any suit in the highest court of law or equity of a state; where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favour of such their validity; or the construction of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed, by either party, under such clause of the constitution, treaty, statute or commission."

The original case from 1803, *Fairfax's Devisee*, was the prelude to the eventual constitutional confrontation between the state of Virginia and the government of the United States that culminated in the Supreme Court's decision in *Martin v. Hunter's Lessee* (1816). The cases involved questions relating to Virginia's wartime confiscation of Loyalist (pro-British) property, state obligations under the Jay Treaty of 1794, and the authority of the Supreme Court over decisions of state supreme courts under section 25 of the Judiciary Act of 1789. *Fairfax Devisee* provided the basis for *Martin v. Hunter's Lessee*, a case decided on March 20, 1816, which was the first case to assert ultimate Supreme Court authority over state courts under the Constitution of the United States.

Gibbons v. Ogden (1824):

"When a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do."

In 1808, the government of New York granted a steamboat company a monopoly to operate its boats on the state's waters, which included bodies of water that stretched *between* states. Ogden held a license under this monopoly to operate steamboats between New Jersey and New York. Gibbons, another steamboat operator, was a competitor Ogden on this same route but held a federal coasting license issued by an act of Congress. Ogden filed a complaint in a New York court to stop Gibbons from operating his boats, claiming that the monopoly granted by New York was legal even though he operated on shared, *interstate* waters. Gibbons argued that the U.S. Constitution gave Congress the *sole power over interstate commerce*. After losing twice in New York courts, Gibbons appealed the case to the Supreme Court. The Supreme Court determined that the commerce clause of the Constitution grants the federal government the exclusive power to determine how interstate commerce is conducted.

Marbury v. Madison (1803)

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law,

disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."

In the Judiciary Act of 1789, Congress gave the Supreme Court the authority to issue certain judicial writs or orders, expanding its original jurisdiction beyond what was stated in the Constitution. Included was the authority of the Supreme Court to issue a *writ of mandamus*. Because the Constitution is the Supreme Law of the Land, the Court held that any contradictory congressional Act is without force. *Marbury v. Madison* established the power of federal courts (in this case, the United States Supreme Court) to declare legislative unconstitutional. This power has come to be known as the power of *judicial review*.

McCulloch v. Maryland (1819)

"The government of the United States, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, any thing in the constitution or laws of any State to the contrary notwithstanding."

The state of Maryland imposed a tax on the Bank of the United States and questioned the federal government's ability to grant charters without explicit constitutional sanction. The United States Supreme Court held that the tax imposed by Maryland unconstitutionally interfered with federal supremacy and ruled that the Constitution gives the federal government certain implied powers. The Court noted, "The power to tax is the power to destroy."

Obergefell v. Hodges (2015)

"Under the 14th Amendment, no State shall deprive any person of life, liberty, or property, without due process of law. The fundamental liberties protected by this Clause include most of the rights enumerated in the Constitution. In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."

The United States Supreme Court held that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The 5-4 ruling required all fifty states to perform and recognize the marriages of same-sex couples "on the same terms and conditions as the marriages of opposite-sex couples, with all the accompanying rights and responsibilities."

Roe v. Wade (1973)

"This right of privacy, whether it be founded in the concept of personal liberty and restrictions upon state action, as the court feels it is, or, in the reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

Jane Roe, a pseudonym for the actual plaintiff, Norma McCorvey, was an unmarried and pregnant Texas resident in 1970. Texas law made it a felony to abort a fetus unless "on medical advice for the purpose of saving the life of the mother." Roe filed suit against Wade, the district attorney of Dallas County, who was charged with enforcing the statute, arguing that the statute violated the guarantee of personal liberty and the right to privacy implicitly guaranteed in the

First, Fourth, Fifth, Ninth, and Fourteenth Amendments. *Roe* was based on the Supreme Court's decision in *Griswold v. Connecticut* (1965), which had recognized a fundamental right of privacy protected in the "penumbras and emanations" of the Bill of Rights. In deciding for *Roe*, the Supreme Court invalidated any state laws that prohibited first trimester abortions. *Roe* is still subject to severe criticism as a prime example of "judicial activism," and has been modified over the years in several decisions of the United States Supreme Court

Silkwood vs. Kerr-McGee (1984)

"The federal government occupies the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states."

Karen Silkwood's father and her children filed a lawsuit against Kerr-McGee for negligence on behalf of her estate. The estate presented evidence from an autopsy that proved Silkwood was contaminated with plutonium at her death. To prove that the contamination was sustained at the plant, evidence was given by a series of witnesses who were former employees of the facility.

The defense relied on the testimony of an expert witness, Dr. George Voelz, a top-level scientist at the Los Alamos Lab. Voelz testified that he believed the contamination in Silkwood's body was within legal standards. The defense later proposed that Silkwood was a "troublemaker," who might have poisoned herself. Following the summation arguments of the attorneys, Judge Frank Theis instructed the jury as follows: "[I]f you find that the damage to the person or property of Karen Silkwood resulted from the operation of this plant ... defendant Kerr-McGee Nuclear Corporation is liable...."

The jury rendered its verdict \$505,000 in actual damages and \$10,000,000 in punitive damages. On appeal, the judgment was reduced to \$5,000, the estimated value of Silkwood's losses in property at her rental house. The appellate court also disallowed the award of punitive damages. In 1984, the U.S. Supreme Court restored the original verdict, ruling that "the NRC's exclusive authority to set safety standards did *not* foreclose the use of state tort remedies." In so doing, the appellate court rejected the preemption claim raised by the defendants. Although suggesting it would appeal on other grounds, Kerr-McGee nonetheless settled out of court for \$1.38 million, still admitting no liability.