**COMPARATIVE COMPANY LAW**

**(SUSTAINABLE CORPORATIONS)**

**Introduction to US Law**

This week introduces you to US corporate law, the first step in our path to understanding how the design of the US public corporation may be inconsistent with the dual goals of “sustainability” to provide for current social needs and to assure that future generations can meet their needs.

Today’s readings introduce you to US law. You’ll begin by reading excerpts from a book written for US college (non-law) students. The book gives an overview of US law – its purposes, history, principal institutions, structure, and methodology.

In reading this introduction -- a precursor to our look at US corporate law -- you’ll also want to consider how law seeks to achieve social justice and legitimacy, two important concerns of corporate law. You’ll also want to focus on how the US common law system (in this modern age of statutes) compares to the civil law system of Italy and other European countries. Then the book describes the US Constitution, which we later compare to the US publicly-traded corporation. Next you’ll see how statutes (and codes) have become an important part of US law, something we’ll see with the corporate statutes of Delaware and other states.

The book then describes US federalism, an important topic when we consider the division of labor between state and federal corporate/securities law. You’ll find interesting how federal laws are “made” and the structure of the US federal court system. There’s also a summary of federal regulatory agencies, including the Securities and Exchange Commission. Finally, you’ll find a useful overview of the US legal profession and law schools in the United States.

The second reading is extra – only if you really want to delve more deeply into “corporate federalism.” It is an excerpt from a US law school casebook and includes an excerpted decision by the US Supreme Court. (The full version of decision is available on the Internet – see the link below.) The case involves the constitutionality of a state corporate statute that regulates takeover bids of corporations incorporated in that state. The issues is whether the statute interferes with trading on national stock markets, where bidders often seek to buy control of US corporations.

**INTRODUCTION TO THE AMERICAN LEGAL SYSTEM (2d ed. 2009)**

**Introduction**

US society is very much preoccupied with law. We have an elaborate system to make and enforce the law. A large professional class is engaged in the practice of law. Numerous academic institutions are devoted to teaching the law. Our mass media and popular culture reflect the social preoccupation with law, in that we are exposed to a steady barrage of books, films, newspaper articles, television shows; and web sites dealing with the law.

Despite this cultural preoccupation with the law, an essential question remains: What is "law”? We begin with the following simple formulation: law is a set of rules promulgated and enforced by government. This formulation is often referred to as positive law, which the nineteenth century English legal theorist John Austin defined as “the command of the sovereign." To be law, the command of the sovereign must take the form of a rule, a principle, or a directive that applies with equal force to everyone. Moreover, to be accepted as legitimate, the law must be perceived as rational, fair, and just and, some would say, must conform to a higher law.

**Higher Law**

Natural law is law that is presumed to flow from man's 'natural" condition, that is, the social condition existing prior to the emergence of government. Natural law is sometimes used to refer to universal principles of morality and justice; however, precisely what those principles are is subject to conflicting interpretations. In De Republica, the Roman orator Cicero (10643 B.C.) defined natural law as “right reason in agreement with nature." In Summa Theologica, the medieval philosopher Thomas Aquinas (1224-1274) viewed natural law as the “participation in the Eternal Law by rational creatures." In his influential Commentaries on the Laws of England (1769), William Blackstone asserted the primacy of natural law.

Our Declaration of Independence (1776) asserts 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." Those who created our basic governmental framework believed that rights ultimately are not of secular origin, but rather flow from natural law as ordained by God.

**Chapter 1: Development of US Law**

But natural law as such is not an enforceable body of rules, It is more of a philosophical concept—the idea that there is a set of principles of morality and justice that transcends the positive law. Natural law provides a basis for the criticism, and sometimes the disobedience, of the positive law.

**Legitimacy of Law in a Democratic Society**

The legitimacy of law in a democratic society depends on how the law is made. In a representative democracy, law is made by elected representatives serving in a legislature. All members of the legislature have the right to introduce legislation; a majority is required to enact a law. In a democracy, legislators are elected through free and fair elections in which all adult citizens have the right to participate.

The United States relies on representative democracy, but our system of government is much more complex than that. We are not a simple representative democracy but rather a constitutional republic in which majority rule is tempered by minority rights protected by law. Moreover, lawmaking power is vested not only in legislators but also in executive officials, in regulatory agencies, and in courts of law. How these bodies make law is key to whether their legal pronouncements are regarded as legitimate. Thus, in thinking about the legitimacy of law, we need to think about both substantive legitimacy and procedural legitimacy. The law is substantively legitimate if people believe that the law’s content is fair, just, and reasonable. It is procedurally legitimate if it is enacted, applied, and enforced according to procedures that people regard as fair, just, and reasonable.

**Forms and Sources of Positive Law**

In the US legal system, the major forms of law are the following:

* Constitution. The fundamental law. It sets forth the structure and powers of government as well as the rights of citizens vis-a-vis that government.
* Statute. A law enacted by a legislature that is generally applicable within the jurisdiction of that legislature.
* Ordinance. A law enacted by a local governing body such as a city council or a county commission (usually of local concern).
* Executive order. An order issued by a President, governor, county executive, or mayor relating to matters over which the executive official has authority.
* Treaty. A legally binding agreement between countries.
* Regulation. A rule promulgated by a regulatory agency.
* Judicial decision. A decision by a court of law enunciating a principle of law.

When we speak of the "law," we are really talking about the sum total of all of these elements. Law is complex, somewhat uncertain, always dynamic, and sometimes contradictory.

**THE FUNCTIONS OF LAW IN SOCIETY**

Law performs many different functions in society. Law promotes social order and stability, but it can also be a force for change. Law seeks to establish justice, but law is no guarantee thereof. Law determines to a great extent how government operates, although law cannot ensure good government.

Fundamentally, law protects people and their property. To the social contract thinkers of the seventeenth and eighteenth centuries, this was the primary purpose of law. Without law backed by the coercive power of the state, people must protect themselves, their families, their land, and their possessions by force. Law, at least ideally, protects the rights of the weak as well as the strong.

**Law, Liberty, and Morality**

Classical liberals like Thomas Jefferson viewed law as a means of protecting not only life and property but also liberty. To the classical liberals, freedom of speech and freedom of religion were as important as the right to own property and to engage in private enterprise. In the classical liberal view, the purpose of law was to safeguard these basic human rights.

Conservatives, on the other hand, see law and morality as inextricably intertwined. They believe that the maintenance of societal morality is one of the essential functions of law. According to this perspective, law must preserve traditional morality to prevent disintegration of the society.

**Law and Economic Life**

A society's economic system affects its law, and vice versa. As the great social theorist Max Weber recognized, a capitalist economy requires a highly developed legal system capable of enforcing contracts and property claims and providing a predictable climate in which business can take place. Uncertainty in the law regarding property, contracts, and commercial transactions impedes voluntary economic activity. But when too many conflicting demands are placed on the law, it becomes excessively complex, bureaucratic, redundant, and inscrutable, which frustrates economic activity. Some commentators assert this is the situation in contemporary United States!

Of course, not everyone takes a benign view of the relationship between law and capitalism. Marxists of various persuasions generally see law, at least in capitalist society, as a tool of oppression and a protector of inequality. Under this view, law in capitalist society is little more than a cloak for the power of the ruling class.

**Social Control**

Law is a means of social control, but it is certainly not the only one. Informal, unwritten rules are transmitted and enforced by social groups, including families, peers, and colleagues. Moral principles are developed and enforced by the individual conscience. Religious precepts are developed, transmitted, and reinforced by religious institutions. Social norms, moral principles, and religious precepts constrain the behavior of most people, at least most of the time.

**Resolution of Conflict**

Law is a means of conflict resolution. Individuals, groups, families, corporations, and governments usually can work out their differences informally through discussion, negotiation, and compromise. The law serves as a framework for such interactions. Law provides a mechanism for the peaceful resolution of conflict.

Most theorists believe that modem society, which is increasingly conflictual, requires a formal system of law. As society becomes more diverse, impersonal, complex, and specialized, this requirement grows ever stronger. In a democratic society such as that of the United States, law also depends on a reasonable degree of social consensus. With increasing social, economic, and political diversity, such a consensus is difficult to maintain.

**THE DEVELOPMENT OF LAW**

Primitive, tribal societies had no formal systems of law. These societies were governed by rulers who relied on sheer power and charisma buttressed by claims of supernatural authority. Individual behavior and social and economic relationships were governed by custom, often reinforced by religion, magic, and superstition. Offenses against the tribe, such as sacrilege or consorting with an enemy, were dealt with by sanctions such as shunning, banishment, or even death. Wrongs against individuals, like murder, rape, and theft, were avenged by the victim's family, often in actions against the family of the wrongdoer that were grossly disproportionate to the offense that gave rise to the vengeance.

With the emergence of agriculture, isolated tribal societies evolved into territorial confederations. Systems of government emerged, and with them came the beginnings of law, as leaders (usually monarchs) began formalizing and enforcing customs that had evolved among their peoples. Eventually, informal norms and customs came to be formalized as written codes of law.

[The authors then describe Roman Law, the Napoleonic Code, and the Civil Law Tradition]

**THE COMMON-LAW TRADITION**

US law is derived largely from the English common law, which dates from the eleventh century. At the time of the Norman Conquest of 1066, English law was a patchwork of local laws and customs, often applied by feudal courts, and church law enforced by ecclesiastical courts. William the Conqueror, the first Norman king of England, strengthened the royal courts established by his Anglo-Saxon predecessors. His son, King Henry I, dispatched royal judges to preside in county Courts. His successor, Henry II, greatly expanded the role of the royal judges by instructing them to travel throughout the kingdom, taking jurisdiction in cases formerly under the province of feudal and local courts.

The King's judges settled disputes based on the customs of the Anglo-Saxon people and the well-established principles of feudal society. These royal courts grew increasingly popular due to their reliance on trial by jury, which of course would become a bedrock principle of Anglo-US justice. Out of the decisions of these courts grew a law common to the entire kingdom, hence the term "common law."

**The Common-Law Courts**

By the time Magna Carta [a series of promises by King John to his subjects in 1215], there were three common-law courts:

* King's Bench, which dealt primarily with "pleas of the Crown,” which later came to be known as criminal cases.
* Court of Common Pleas, which had jurisdiction over "common pleas," disputes between individuals that would later come to be termed “civil" cases.
* Court of Exchequer originally dealt with matters involving the King's property and revenue.

**The Doctrine of Stare Decisis**

In 1292 court clerks began recording the rulings of the common-law courts and by the fourteenth century these decisions were serving as precedents to guide judges in similar cases. As the centuries passed, coherent principles of law emerged from the decisions of the judges. Thus, in contrast to Roman law systems, which are based writings of legal scholars, the common law developed primarily through judicial decisions.

The common-law doctrine of following precedent, known as stare decisis (meaning "to stand by that which is decided"), took hold with the development of the printing press in the fifteenth century. Today, it remains an important component of both the English and US legal systems. The doctrine holds that a court should follow the principle of law enunciated in previous decisions by the highest court within its jurisdiction, assuming that the principle is relevant to the current decision and makes sense in contemporary circumstances.

**Civil and Criminal Law**

Early on the common law developed a distinction between civil law and criminal law. The criminal law sought to punish people for offenses against the Crown; the civil law provided remedies for essentially private wrongs. As defined by the common law, a crime was an intentional evil act that produced harm to the society. Thus criminal prosecutions were brought by the Crown in cases styled, for example, *Rex v. Jones* or *Regina v. Smith* (in Latin, 'Rex' means king; "Regina" means queen).

Civil wrongs were not seen as offenses against the entire society but only against private parties. In a civil suit the plaintiff was the aggrieved party; the defendant was the party accused of the wrongful act. Much of the early common-law litigation involved disputes over land, giving rise to a complex body of property law, Other civil offenses came to be classified as breaches of contract or torts.

**Juries**

One of the keys to the success of the common law was the emergence of the institution of the jury trial. Prior to the advent of the common law, trials in England often took the form of trial by ordeal, the defendant was tortured by fire or water. If a defendant survived the ordeal, God had intervened to prove the defendant's innocence before the law.

In the place of this, the common-law courts substituted a more rational process of fact-finding. Early on, common-law judges heard testimony from witnesses. Eventually, neighbors of the accused or of the litigants served as fact-finders, basing their conclusions only on evidence introduced in court. The jury system developed at common law became an integral part of the US legal system. In many civil cases the defendant has the right to a jury trial.

**Equity**

In its formative period, the common law was characterized by considerable flexibility. By the fourteenth century, the common law had become highly technical and rigid. Moreover, litigation was expensive. Aggrieved parties who were unable to secure a remedy at common law would appeal to the King directly for justice. The King often delegated such matters to his Chancellor, a cleric and a member of the King's court who was often referred to as the "keeper of the King's conscience." Eventually this practice of referring disputes to the Chancellor evolved into a secular tribunal called the Court of Chancery, which developed its own jurisprudence called equity.

The term "equity" comes from the Latin *aequitas*, which means justice or equality. The idea of equity as a supplement to law can be traced to the Roman Law and ultimately to the ancient Creek philosopher Aristotle (384-322 B.C.). The idea is that when existing legal rules and procedures are insufficient to remedy injustice, a court should rely on general principles of fairness in granting relief. The Court of Chancery did not follow the writ system [specialized form documents necessary for bringing a case in the King’s courts] nor did it utilize juries—chancellors made factual determinations in addition to fashioning equitable remedies.

**Reception of the Common Law in America**

As England became a colonial power, the common-law tradition was exported throughout the Empire. Thus the common law was extended not only throughout the United Kingdom but also to Australia, New Zealand, Canada (with the exception of Quebec), and to same extent India.

After independence was declared, some of the new US states adopted statutes or constitutional provisions that followed the English common law to the extent that it did not conflict with the new state and federal constitutions. Other states adopted the common law, in whole or in part, through judicial decision making. Of the fifty states in the Union, Louisiana is the only one whose legal system is not based essentially on the common law. Rather, it is based primarily on the Napoleonic Code.

**THE US CONSTITUTION**

By the spring of 1776 it was apparent to most Americans that independence from England was both necessary and desirable. On July 4, the Continental Congress adopted the Declaration of Independence. Authored by Thomas Jefferson, the Declaration outlined the colonies' grievances against the King and asserted the right of revolution. Many of the ideas expressed in the Declaration had been articulated a century earlier in John Locke's Two Treatises of Government. When the Declaration of Independence refers to life, liberty and the pursuit of happiness" as being the "unalienable rights” of individuals, it echoes John Locke's formulation of the natural rights of “life, liberty and property."

**The Articles of Confederation**

After the US Revolution, the United States was a confederation of sovereign states barely held together by an agreement called the Articles of Confederation. Congress had no power to tax and no power to regulate interstate commerce. There was no presidency to provide leadership and speak for the new nation with a unified voice. Nor was there a national court system to settle disputes between states or parties residing in different states. Finally, the Articles of Confederation could not be amended except by unanimous consent of the states. In early 1787 Congress issued the call for a federal convention to meet in Philadelphia "for the sole and express purpose of revising the Articles of Confederation."

**Adoption of the Constitution**

The delegates to the Philadelphia Convention decided to scrap the Articles of Confederation and draft a new constitution. The Framers accepted the existence of the states as sovereign political entities. Yet most of the delegates knew that without a strong national government, economic growth and political stability would be seriously undermined by interstate rivalries.

To create a viable federal system, the delegates had to confront a number of contentious issues. The two greatest sources of contention were (1) a disagreement between the small and large states over representation in Congress and (2) the conflict between northern and southern states over slavery. For a time it, appeared that the Convention might fail altogether. Ultimately, through persuasion and compromise, the Convention reached agreement. On September 17, 1787, thirty-nine delegates representing twelve states placed their signatures on what would become the Nation's new fundamental law. Although ratification of the Constitution was in some states a close question, by the end of 1790 all thirteen of the original states had ratified the document.

The Constitution succeeded in correcting the major deficiencies of the Articles of Confederation. It strengthened the national government, gave Congress ample legislative powers, established an executive branch, and provided for a national court system\_ Above all, it provided a blueprint for a workable Government, one that could adapt to dramatic social, economic, and technological change.

**Separation of Powers**

The Framers of the Constitution had no interest in creating a parliamentary system, because they believed that parliaments could be manipulated by monarchs or captured by impassioned but short-lived majorities. Accordingly, parliaments provided insufficient security for liberty and property. The delegates believed that only by distributing the three basic functions of government (legislative, executive, and judicial) among three separate branches of government power would be dispersed. Thus, the first three articles of the Constitution specify the structure and powers of Congress (Article I), the executive (Article 11), and the judiciary (Article III).

The Framers of the Constitution believed that a system of checks and balances would be necessary if separate, coordinate branches of government were to be maintained. Thus, the Constitution contains a number of "auxiliary precautions.” The President is authorized to veto bills passed by Congress, but Congress can override the President's veto by a two-thirds majority in both houses. The President is given the power to appoint judges, ambassadors, and other high government officials, but the Senate must consent to these appointments. The President is commander-in-chief, but Congress has the authority to declare war, raise and support an army and a navy, and make rules governing the armed forces. These provisions were designed to create an ongoing tension between Congress and the Executive for control of the government, with the expectation that neither institution would permanently dominate the other. That is in fact how things have worked out.

The Framers said much less about the judiciary, which Alexander Hamilton described as “the least dangerous branch" of the new national government. The President and the Senate are given the shared power to appoint federal judges, but these appointments are for life. Congress is authorized to establish lower federal courts and determine their jurisdiction; it may even regulate the appellate jurisdiction of the Supreme Court. The only means of removing members of the judiciary is through a cumbersome impeachment process, but this requires proof that the judge has committed "high crimes or misdemeanors." Clearly, the Framers wanted to create an independent federal judiciary.

**Judicial Review**

The text of the Constitution is silent on the means by which the judiciary can check and balance the other branches. In *Marbury v. Madison* (1803), the single most important case in US constitutional history, the Supreme Court asserted the power to review acts of Congress and declare them null and void if found to be contrary to the Constitution. Later the Court extended this power to encompass the validity of state laws under the Federal Constitution.

Commonly referred to as judicial review, the power of the federal courts to rule on the constitutionality of legislation is nowhere explicitly provided for in the Constitution. However, many of the Framers of the Constitution supported the concept of judicial review, and most probably expected the courts to exercise this power. In any event, the power of judicial review is now well established.

**The Bill of Rights**

There is no question that the protection of the liberty and property of the individual was one of the Framers' highest goals. Yet the original Constitution had little to say about individual rights. This is because the Framers assumed that the limited national government they were creating would not be a threat to individual liberty and property. Moreover, citizens were already protected against their respective state governments by provisions in their own state constitutions.

Not everyone thought that the Constitution went far enough in protecting individual rights. So a "gentlemen's agreement" was worked out whereby ratification was obtained in key states on the condition that Congress would immediately take up the matter of creating a bill of rights. The first ten amendments to the Constitution, known collectively as the Bill of Rights, were adopted by the First Congress in 1789 and ratified by the requisite nine states in 1791. All of the provisions of the Bill of Rights were responses to abuses of official power and the perceived inadequacies of the common law in curtailing such abuses.

**The First Amendment Freedoms**

The First Amendment to the United States Constitution, which is the first article of the Bill of Rights, recognizes the fundamental freedoms of religion, speech, press, and assembly as well as the right to petition government for a redress of grievances.

**Rights of Persons Accused of Crimes**

The Framers of the Bill of Rights were acutely aware of the abuses of the criminal law that had characterized England and all of Europe for many centuries. Thus the Fifth, Sixth, and Eighth Amendments contain provisions protecting the right to a speedy and public trial by an impartial jury, the right to counsel, the right to confront prosecution witnesses, and the right to compel the testimony of witnesses for the defense. They also contain protections against compulsory self-incrimination, double jeopardy, excessive bail, excessive fines, and cruel and unusual punishments.

**Other Notable Constitutional Amendments**

The Constitution has been amended only seventeen times since the ratification of the Bill of Rights. The most important are the post-Civil War amendments, which abolished slavery (Thirteenth Amendment, 1865), prohibited states from denying equal protection and due process of law to all citizens, including newly freed slaves (Fourteenth Amendment, 1868), and forbade the denial of voting rights on the basis of race (Fifteenth Amendment, 1870).

**Incorporation of the Bill of Rights**

The Bill of Rights was created as limitations on the power of the national government, leaving citizens of states had to look to their state constitutions for legal protection against the actions of their state or local governments. But the Fourteenth Amendment has understood by the Supreme Court to make the provisions of the Bill of Rights enforceable against state and local governments as well as the national government. Under the doctrine of incorporation, the Court has held that most of the provisions of the Bill of Rights are embraced within the terms “liberty" or "due process" and are thus applicable to the states.

**MODERN STATUTES AND CODIFICATION**

Although the US legal system is based on English common law, Congress and the fifty state legislatures have become extremely active in adopting statutes to meet modem conditions. Once adopted, a statute supersedes the common law within that jurisdiction. Many modem statutes deal with subjects unknown to the common law, such as civil rights, public health, antitrust law, environmental protection, and social welfare. Although Congress was not vested with a general statutory power under the Constitution, it has relied upon its broad authority under the Commerce Clause (Article 1, Section 8) to legislate in many areas that are only indirectly related to commerce.

**Statutory Construction**

Although the adversarial system of justice and the basic common-law concepts remain today defined essentially as they were by the common-law judges centuries ago, the law has now been codified by legislatures to a great extent. Thus, when attempting to answer questions of law, lawyers and judges now look first to the relevant statutes. Of course, statutory provisions do not always have plain or obvious meanings. One of the principal functions of contemporary courts, therefore, is statutory construction, which is the task of assigning concrete meaning to statutory provisions that may allow for different interpretations.

**Codification**

One of the most important developments in the US legal system has been the codification of the common law. Through codification, a legislature transforms the common law in a given area into a clear, systematic code of laws.

**The Diffusion of Uniform Codes**

One way that the law in the United States has been standardized is through the diffusion of uniform codes. Consider the case of commercial law, which covers sales, leases, negotiable instruments, insurance, brokerage, shipping, and other matters pertaining to business. The common law, which had developed in a rural, agrarian, pre-industrialized setting, was not very relevant to modem commercial practices. States had enacted-statutes in this area, but prior to the 1950s there was little uniformity among states' commercial laws. In 1952, the Uniform Commercial Code (UCC) was developed by legal scholars and business practitioners. It spread rapidly among the states, as state legislators saw the wisdom of adopting uniform business laws. All 50 states have now adopted the UCC, in whole or in part, thus greatly facilitating interstate commerce:

**ADMINISTRATIVE REGULATION**

The role of government has changed dramatically in the two centuries since the US nation was founded. In the early days of the republic, government essentially followed the dictum that "that government is best which governs least." For the most part, the national government left such functions as social welfare and education to state and local governments and concerned itself with the regulation of foreign trade, internal improvements such as canals and post roads, and the protection of the national security. State and local governments, in turn, tended to leave matters of social welfare and education to neighborhoods, churches, and families.

In the wake of post-Civil War industrialization and the emergence of an economy dominated by giant corporations, the limited role of government began to change. A new ethos emerged, one in which government assumed primary responsibility for solving social problems. With the passage of the Interstate Commerce Act in 1887 and the concomitant establishment of the Interstate Commerce Commission, the relatively unobtrusive government envisaged by the Founders began to evolve in the direction of ever more complex and intrusive regulation. The era of Progressive reform in the early twentieth century and the subsequent New Deal fostered by President Franklin D. Roosevelt in the 1930s contributed mightily to the growth of such regulation, as did the New Frontier and Great Society of the 1960s.

The expansive role now played by the national government renders the legislative task of Congress considerably more difficult. Consequently, Congress has come to rely more and more on "experts” for the development as well as the implementation of regulations. These experts are found in a host of government departments, commissions, agencies, boards, and bureaus that make up the modern administrative state. Through a series of broad delegations of legislative power, Congress has transferred to the federal bureaucracy much of the responsibility for making and enforcing the rules and regulations deemed necessary for a technological society. The Food and Drug Administration (FDA), the Federal Aviation Administration (FAA), the Environmental Protection Agency (EPA), and the Securities and Exchange Commission (SEC) are just a few of the government agencies to which Congress has delegated broad authority to make public policy.

**THE DECISIONAL LAW**

Although substantive law and procedural law are often modified by the adoption of federal and state statutes, courts play an equally important role in the development of law. Trial courts exist primarily to make factual determinations, apply settled law to established facts, and impose sanctions. In reviewing the decisions of trial courts, appellate courts must interpret the federal and state constitutions and statutes. The federal and state constitutions are replete with majestic phrases such as “equal protection of the laws" that require interpretation.

Likewise, federal and state statutes often use vague language like "affecting commerce" or "reasonable likelihood." Courts must assign meaning to these and a multitude of other terms. In rendering interpretations of statutes and administrative rules, appellate courts generally follow precedent, in keeping with the common-law doctrine of stare decisis. When there is no applicable precedent, appellate courts can make new law. Thus appellate courts perform an important lawmaking function as well as an error correction function.

**CONCLUSION**

As we have seen, the foundations of US law have a rich cultural and political history. The English common law, with its emphasis on precedent and requiring the sovereign to be subject to the law, and with its inflexibility eventually tempered by the concept of equity, became the basis for law and political institutions in America. The laws established by sovereign authority, referred to as the positive law, became the essence of US law—yet the natural law and its concept of right and wrong have tempered the application of those laws.

The law has many dimensions. Today, US law is based on the supremacy of written federal and state constitutions and laws enacted pursuant to those constitutions by elected representatives. Yet in allocating power among the branches of the government the Framers of the United States Constitution and the Bill of Rights painted with a broad brush, allowing an independent judiciary the prerogative of interpreting and applying the Constitution and laws enacted pursuant to it. Wisely, the states have followed the same pattern. Thus in America we have created a government ruled by the majority but protective of the rights of the minority.

The framework of our national and state constitutions is sufficiently flexible to allow implementation by laws and delegation to administrative agencies to enact regulations made necessary as the Nation has advanced from an agrarian economy to an industrial and, more recently, to a technological society. But laws and regulations are words spread upon documents, and, no matter how positive the law, it is the application of the law that affects society. Congress and the state legislatures have the primary role in enacting laws. No one, however, has succeeded in drafting a law that provides for every contingency. Consequently, it becomes the function of independent federal and state courts to interpret those laws with wisdom and often with compassion. There will always be “gaps” in the law, and today, every serious student of law and government must realize that the courts must at times “make law” to fill in those gaps.

**Chapter 2: Structures of US Law**

**FEDERALISM**

Any explanation of the US legal system necessarily involves the principle of federalism, a hallmark of the US constitutional system: the fundamental division of authority between the national government in Washington, D.C. and the 50 state governments. Each of the states has its own machinery of government as well as its own constitution that empowers and limits that government, Of course, the provisions of the state constitutions, as well as the statutes adopted by the state legislatures, are subordinate to the provisions of the U.S. Constitution and the laws adopted by Congress.

There are significant legal differences between the national government and that of the states. The authority of the federal government extends throughout the United States and its territories, whereas state authority is confined within state borders. The national government has sole authority to make treaties with other nations, enact laws governing the high seas, coin money, regulate standards of weights and measures, regulate international trade, regulate immigration and naturalization, and provide for the national defense. The national government also has primary, although not exclusive, authority to regulate interstate commerce, which is a major source of federal legislative power.

The states, on the other hand, have exclusive authority over their own machinery of government. They have exclusive power to establish and control local governments (cities, counties, and townships). States have sole responsibility for conducting elections and apportioning electoral districts, although in exercising these functions they must comply with federal constitutional standards. States are the primary locus of the police power—the power to make laws in furtherance of the public health, safety, welfare, and morality. States also have primary (though no longer exclusive) authority over commerce within their borders.

The federal government and the states also possess a number of concurrent powers, that is, powers vested in both levels of government. These powers include the power to tax, to spend and borrow money, to enact legislation, to charter and regulate banks, and to establish courts of law and administrative and regulatory agencies. The national government and the states also both possess the power of eminent domain; which is the power to take private property for public use, as long as property owners are compensated for the taking.

**Fifty-One Legal Systems**

The national government and each of the states have their own legal systems. Although there is significant variance among these systems, there are certain common features. Each system is based on a constitution, which represents the fundamental and supreme law within the system. Like the United States Constitution, each of the fifty state constitutions is based on the principle of separation of powers, which means that governmental power is distributed among coordinate legislative, executive, and judicial branches. Each system has a legislature empowered to enact statutes—laws that apply generally within the system. Each has a chief executive responsible for administering the government, and each has its own bureaucracy located within its executive branch. Each jurisdiction has its own set of law enforcement agencies, which are also located within the executive branch.

Each of the fifty-one legal systems in the United States has its own “governmental law office" in the form of a department of justice or attorney general's office. These government lawyers represent the interests of the people within their jurisdictions in both civil and criminal matters. That is to say that they prosecute crimes, defend against lawsuits, file suits on the public's behalf, and present legal arguments in court.

Finally, each of the fifty-one legal systems has its own system of courts. Courts of law play the pivotal role in the legal system. They preside over the resolution of civil and criminal cases by conducting trials and hearing appeals. In so doing, courts interpret the constitutional provisions, statutes, ordinances, regulations, executive orders, treaties, and principles of common law that bear on the outcome of 'these cases. They also exercise the power of judicial review—the power to determine the constitutionality of all governmental enactments and actions.

**LEGISLATURES**

All governments make laws, or legislation. In a democracy, the governmental institution with primary responsibility for enacting legislation is the legislature. Legislatures in the United States and other democratic countries are composed of the people's elected representatives chosen through free and fair elections. The members of these assemblies are known as legislators. In the lawmaking process, legislators follow either the preferences of their constituents or their own best judgment, depending on whether they consider themselves to be delegates or trustees. And, of course, because nearly all legislators are elected as Democrats or Republicans, and because legislatures are organized along party lines, the positions taken by their respective parties are usually quite important in determining how legislators will vote.

The U.S. Congress

In the United States, the national legislature is called the Congress. The Framers of the Constitution wanted a strong legislature to be the central feature of the new national government. Congress's legislative authority may be divided into two broad categories: enumerated powers and implied powers. The former category includes those powers that are mentioned specifically in the Constitution, such as the power to tax and the power to regulate interstate commerce. The latter category includes those powers that are deemed to be “necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested ... in the Government of the United States, or in any Department or Officer thereof.” Under the doctrine of implied powers, scarcely any area exists over which Congress is absolutely barred from legislating, because most social and economic problems have a conceivable relationship to the broad powers and objectives contained in the Constitution. Of course, Congress may not enact laws that violate constitutional limitations such as those found in the Bill of Rights.

**How a Bill Becomes Law**

Congress is made up of two chambers, the House of Representatives and the Senate. Laws enacted by Congress begin as bills introduced by members of either chamber. (The only exception is that bills to raise revenue must originate in the House of Representatives.) Once introduced, a bill is assigned to a committee for discussion and possible approval. Most bills never make it out of committee. Those that do are sent to the floor for a vote. For ordinary legislation, a simple majority is needed to pass a bill. To become law, both houses of Congress must pass a bill in the identical form. Once this happens, the bill is sent to the President, who has several options: (1) sign the bill into law, which is what usually occurs; (2) veto the bill, which veto can be overridden by a two-thirds majority of both houses of Congress; or (3) neither sign nor veto the bill, thus allowing it to become law automatically after ten days.

**Publication of Federal Statutes**

Once a bill has become law, it is published in United States Statutes at Large, an annual publication dating from 1789 in which federal statutes are arranged in order of their adoption. Statutes are not arranged by subject matter nor is there any indication of 'how they affect existing laws.

To find federal law as it currently stands, arranged by subject matter, one must consult the latest edition of the Official Code of the Laws of the United States, generally known as the U.S. Code. The U.S. Code is broken down into fifty subjects, called "titles." It is indexed by subject matter and by statutes' popular names, making it relatively easy to find what the U.S. Code currently has to say on a given matter.

**State Legislatures**

Under the U.S. Constitution, each state must have a democratically elected legislature because that is the most fundamental element of a “republican form of government." State legislatures for the most part resemble the U.S. Congress. Each is composed of representatives chosen by the citizens of their respective states. All of them, except that of Nebraska, are bicameral (i.e., two-house) institutions. In adopting statutes, they all follow the same basic procedures. When state legislatures adopt statutes, the statutes are published in volumes known as session laws. Then statutes are integrated into state codes. Annotated versions of all fifty state codes are available to anyone who wishes to see how state statutes have been interpreted and applied by the state courts.

**JUDICIAL SYSTEMS**

Law evolves not only through the legislative process but also through a process of judicial interpretation in particular cases. These cases may arise in either federal or state courts. The federal government and each of the fifty state governments maintain their own systems of courts. These systems include both trial courts and appellate courts. Trial courts conduct civil and criminal trials and various types of hearings. Trial courts make factual determinations and are the primary settlers of legal disputes. Appellate courts hear appeals from the trial courts. The appellate courts are not fact-finding bodies. Rather, their role is to review the proceedings of lower courts, correct errors, and settle unresolved legal issues.

**The Federal Court System**

Article III of the United States Constitution provides that " judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” Beginning with the landmark Judiciary Act of 1789, Congress has used this authority to create, empower, and regulate the federal court system. Congress determines the structure of the federal judiciary, sets the number of federal judges, determines the jurisdiction of the lower federal courts, and provides for the funding of the federal judiciary.

**Federal Court Jurisdiction**

The jurisdiction of the US Supreme Court is provided for in Article III of the Constitution. The jurisdiction of the lower federal courts is determined solely by Congress. There are two basic categories of federal jurisdiction. First is federal question jurisdiction -- that is, a case that arises under the United States Constitution, a federal statute, regulation, executive order, or treaty.

The second broad category, diversity of citizenship jurisdiction, applies only to civil suits where the case involves parties from different states and an amount in controversy that exceeds $75,000.

**United States District Courts**

The US District Courts are the major trial courts in the federal system. These courts are granted authority to conduct trials and hearings in civil and criminal cases meeting the previously discussed jurisdictional requirements. Each of the federal district courts also has its own bankruptcy court, given that the Constitution gives the federal government exclusive power over bankruptcies.

There are currently 94 federal judicial districts, with each state being allocated at least one. North Carolina, for example, has three federal judicial districts corresponding to the traditional eastern, middle, and western "divisions" of the state. California, New York, and Texas are the only states with four federal judicial districts.

Today, there are 646 judgeships in the federal district courts. The number of judges assigned to a district depends primarily on caseload, which is in turn largely a function of population within the district. For example, there are currently 12 judges assigned to the Northern District of Texas, based in Dallas; 21 judges assigned to the Southern District, based in Houston; 13 judges assigned to the Western District, based in San Antonio; and 8 judges assigned to the Eastern District, based in Tyler – 54 judges in total.

In 2007, 189,094 civil cases and 68,413 criminal cases were filed in the federal district courts, compared to 206,193 civil cases and 31,623 criminal cases in 1982. Thus, over the 25-year period, civil filings fell slightly while criminal cases more than doubled. The increase in the criminal caseload was the result of the "war on drugs" launched during the 1980s and the expansion of other federal law enforcement activities.

**The United States Courts of Appeals**

The US Courts of Appeal are the intermediate appellate courts in the federal system. These courts are commonly referred to as "circuit courts,” because each one presides over a geographical area known as a circuit. The United States is divided into twelve circuits, with each circuit comprising one or more federal judicial districts (there is also a "federal circuit," which is authorized to grant appeals from decisions of specialized federal courts). The circuit courts hear appeals from the federal districts within their circuits. For example, the United States Court of Appeals for the Eleventh Circuit, based in Atlanta, hears appeals from the District Courts located in Alabama, Georgia, and Florida. The Court of Appeals for the District of Columbia Circuit, based in Washington, D.C., has the very important additional function of hearing appeals from numerous "quasi-judicial" tribunals in the federal bureaucracy.

Appeals in the circuit courts are normally decided by rotating panels of three judges, although under exceptional circumstances these courts will decide cases en bane, meaning that all of the judges assigned to the court will participate in the decision. On average, 14 judges are assigned to each circuit, but the number varies from six judges in the First Circuit (Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico) to 28 judges in the Ninth Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands).

**The United States Supreme Court**

The US Supreme Court is explicitly recognized in Article III of the Constitution. The Judiciary Act of 1789 provided for a Court composed of a Chief Justice and five Associate Justices. In 1807 the Court was expanded to seven justices, and in 1837 Congress increased the number to nine.

As the Nation has become more populous, more complex, and more litigious, the Supreme Court's agenda has swelled. The Court now receives more than seven thousand petitions each year from parties seeking review.

Article III of the Constitution declares that the Supreme Court shall have original jurisdiction “in all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a state shall be a party.” These cases, while important in themselves, represent a minute proportion of the Court's caseload.

The Supreme Court's appellate jurisdiction extends to all federal cases “with such Exceptions, and under such Regulations as the Congress shall make." Congress has made the appellate jurisdiction of the Supreme Court almost entirely discretionary through the writ of certiorari. This broad discretion permits the Court to set its own agenda, facilitating its role as a policymaker, but allowing the Court to avoid certain issues that may carry undesirable institutional consequences. The Court uses this flexible jurisdiction to expand or limit its policymaking role, depending on the issue at hand.

**Selection, Tenure, and Removal of Federal Judges**

As provided by the Constitution, the President, subject to the consent of the Senate, appoints all federal judges. With the exception of those serving on the Article I courts, the appointments are for life. Normally, the Senate consents to presidential judicial appointments with a minimum of controversy. However, Senatorial approval is by no means pro forma, especially when it involves appointments to the Supreme Court. In fact, historically, the Senate has rejected about 20 percent of presidential nominations to the Supreme Court.

Article III, Section 1 of the Constitution states that “judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour." This grant of life tenure to federal judges was intended to make the federal courts independent of partisan forces and transitory public passions so that they could dispense justice impartially, according to the law.

The only means of removing a federal judge is through the impeachment process provided in the Constitution. First, the House of Representatives must approve one or more articles of impeachment by at least a majority vote. Then, a trial is held in the Senate presided over by the Chief Justice of the Supreme Court. To be removed from office, a judge must be convicted by a vote of at least two-thirds of the Senate.

Since 1789 the House of Representatives has initiated impeachment proceedings against only thirteen federal judges, and only seven of these have been convicted in the Senate. The first federal judge to be impeached was John Pickering, a district judge from New Hampshire, who was impeached and removed from office in 1803 for reasons of mental instability and intoxication. The most recent impeachment was that of fudge Walter L. Nixon from. the Southern District of Mississippi, who was impeached and removed from office'in 1989 for committing perjury before a federal grand jury.

**State Court Systems**

Each of the fifty states has its own court system, responsible for cases arising under the laws of that state, which include the state constitution, statutes enacted by the state legislature, orders issued by the governor, regulations promulgated by various state agencies, and ordinances (local laws) adopted by cities and counties. State courts have jurisdiction over most criminal cases, because most crimes are offenses against state laws.

State courts address most questions of property law, including real estate, probate, and inheritance questions. State courts handle most torts and most contract disputes. Finally, state courts resolve almost all family law cases, including issues of divorce, child custody, guardianship, and juvenile delinquency. Indeed, the great majority of cases are decided not by the federal courts but by state courts.

Although no two state court systems are identical, all of them contain trial and appellate courts. Trial courts go by many names: county court, superior court, district court, circuit court, court of common pleas, and so forth. Many states have trial courts of limited jurisdiction to handle minor or specialized matters. They, too, have many names: probate court, juvenile court, municipal court, sessions court, mayor's court, and so forth.

Each state has a court of last resort, usually called the state supreme court, which speaks with finality on matters of state law. Most states now have intermediate appellate courts to handle routine appeals, which allows the state supreme court to focus on the most important cases.

**Selection and Retention of State Judges**

State judges are selected in a variety of ways. Most are elected, though some run on partisan ballots and others run in non-partisan races. Many state judges are appointed by governors, either directly or through a nominating process known as merit selection. Even appointed judges typically must face the voters eventually in a contested election or a merit-retention election in which voters are asked whether a judge should be given another term.

There is considerable controversy over judicial selection and retention. Advocates of judicial accountability to the people usually support some sort of elective system. Proponents of judicial independence generally argue for an appointive process with life tenure (the federal model) or at least long terms of office. A compromise approach that has been steadily gaining acceptance since it was first adopted in 1940 is known as the Missouri Plan under which, when a judicial vacancy occurs, qualified persons submit applications to a non­partisan judicial nominating commission. The commission then reviews the applications, conducts interviews, and submits a “short list" to the governor, who appoints an individual from the commission’s list. When the judge's term of office expires, the judge faces the voters in a retention election. The voters are asked simply, “Should Judge X be retained in office for another term?"

**How Cases Begin**

All court cases can be divided into two basic categories: criminal prosecutions and civil suits. Criminal cases begin when a federal or state prosecutor files criminal charges against a defendant. The defendant is brought before the appropriate court of law to answer the charges. Most criminal cases are resolved by guilty pleas, which are often obtained through plea bargaining. When the defendant pleads knot guilty," a trial is conducted to determine guilt or innocence.

All non-criminal cases are by definition civil cases. A civil case typically begins when one party files suit against another, alleging some wrong and seeking some remedy. Many civil suits are settled through negotiation. Those that are not settled or dismissed result in a civil trial.

**THE CHIEF EXECUTIVE**

Chief executives at all levels of government, that is, mayors, governors, and presidents, play an important role in the US legal system. Chief executives can issue executive orders based on statutory provisions and, in some instances, direct constitutional authority. Executive orders have the force of law—they must be obeyed in the same way that statutes and court decisions command obedience.

Presidents and most governors can also veto bills enacted by their respective legislatures. For the U.S. Congress and most state legislatures to override a veto, more than a simple majority vote is required. This ensures that controversial legislation will not be enacted without a sufficiently strong consensus in the government.

Presidents and governors play more than a negative role in the legislative process. They also propose legislation. At the federal level, the President outlines a legislative agenda in the annual state of the union speech. Much of the effort expended by the White House on a day-to-day basis involves frying to persuade Congress to enact this agenda. Much the same thing happens at the state level.

Executives also perform a critical function in the enforcement of the law. Legislation and judicial decisions are not self-enforcing. Oftentimes the chief executive or other officials within the executive branch are called upon to carry out the will of courts and legislatures. Of course, in deciding how to implement statutes and court decisions, executive officials shape the laws it is applied in concrete circumstances.

**REGULATORY AND ADMINISTRATIVE AGENCIES**

The modem chief executive sits atop a massive bureaucracy—a panoply of departments, boards, commissions, and other agencies. These agencies have various functions. Some are law enforcement agencies that serve to investigate crimes, apprehend offenders, and assist in their prosecution. Others are purely administrative agencies—their job is to carry out government programs like social security, Medicaid, or public housing programs. Still others are regulatory agencies, whose role is to create and enforce regulations in specific policy areas. They do this by invoking authority granted to them by the legislature, which has delegated power to agencies to act as, in effect, miniature legislatures. For example, Congress has created the Environmental Protection Agency and vested it with the authority to make and enforce regulations to give specific content to the Nation's environmental laws. In making these regulations, EPA and other regulatory agencies follow a rulemaking procedure outlined by Congress.

Agencies vary not only in their functions but also in their relationship to the chief executive. Most agencies are located within the major departments of the executive branch, which means that the President or governor has a good deal of control over them, Others, called independent agencies, are freestanding entities over which presidents and governors have less control. These agencies are typically directed by boards whose members are appointed for set terms of office and can only be removed for good cause.

**LAW ENFORCEMENT AGENCIES**

In the United States today there are nearly forty thousand law enforcement agencies. Located within the executive branches of local, state, and federal governments, these agencies have the power to investigate criminal activity, to arrest suspects, and to detain arrested persons until their cases come before the appropriate courts of law. These agencies also play an important role in gathering evidence that prosecutors use in obtaining convictions.

There are more than sixty federal agencies that have law enforcement authority, including the Environmental Protection Agency, the Internal Revenue Service, the Bureau of Indian Affairs, the Federal Bureau of Prisons, the National Park Service, the U.S. Capitol Police, and the U.S. Mint. As of 2004, there were more than.100,000 federal law enforcement personnel empowered to carry firearms and make arrests.

**The FBI**

The Federal Bureau of Investigation is the primary agency empowered to investigate violations of federal criminal laws. Located in the Depaltment of Justice, the FBI is by far the most powerful of the federal law enforcement agencies, with broad powers to enforce the many criminal laws adopted by Congress. The FBI is perhaps best known for its Ten Most Wanted Fugitives program, which was inaugurated by the FBI's longtime Director, J. Edgar Hoover, in 1950. In the fifties, the Ten Most Wanted list mainly included bank robbers and car thieves. Today, it features alleged terrorists, serial killers, international drug dealers, and organized crime kingpins.

**PROSECUTORIAL AGENCIES**

While law enforcement agencies are the "gatekeepers' of the criminal justice system, prosecutors are central to the administration of criminal justice. They determine whether to bring charges against suspected criminals. They have enormous prosecutorial discretion, not only in determining whether to prosecute but also in determining what charges to file. Moreover, prosecutors frequently set the tone for plea bargaining and have a powerful voice in determining the severity of sanctions imposed on persons convicted of crimes. Accordingly, prosecutors play a crucial role in the criminal justice system.

The chief prosecutor at the federal level is the Attorney General, who is the head of the Department of Justice. Below the Attorney General are a number of United States Attorneys, each responsible for prosecuting crimes within a particular federal district. The United States Attorneys in turn have a number of assistants who handle most of the day-to-day criminal cases brought by the federal government. The Attorney General and the United States Attorneys are appointed by the President, subject to the consent of the Senate. The assistant U.S. Attorneys are federal civil service employees.

**THE. LEGAL PROFESSION**

The US legal profession has its roots in English common-law practice. In England, trial lawyers were (and are) called “barristers," while attorneys who provided other legal services were (and are) known as "solicitors.” In the United States, we do not use that nomenclature. We only have “lawyers,” although the distinction between “trial lawyers" and "transactional lawyers” remains relevant. Indeed, lawyers in the United States have become extremely specialized. As in medicine, the general practitioner is becoming increasingly rare. Lawyers today specialize in torts, estate planning, corporate law, taxation, civil rights, contracts, real estate, criminal defense work, and every other conceivable area of the law.

**Legal Education and Admission to the Bar**

About half the Framers of the U.S. Constitution were lawyers who “read laws” and held apprenticeships with those who practiced law. Today the predominant path to becoming a lawyer is to successfully complete a three-year JD degree from one of the 184 law schools accredited by the US Bar Association. Indeed, all but a few states now require that to take a bar examination for admission to the practice of law after completing the JD degree.

The number of applicants who annually seek admission to law schools grew in the 1960s and 1970s, a time of social upheaval when many students were inspired to channel social and economic changes through law. Lately applications to law school have declined after the 2008 Financial Crisis. A prospective law student must have a four-year college degree and generally score well on a Law School Aptitude Test (LSAT) and have a credible grade point average (CPA). Law schools are selective but do not demand that pre-legal education be in a particular field. Business, history, political science, and economics have been popular undergraduate majors. Admission committees often employ various criteria beyond LSAT and GPA scores to enroll a diverse group. Prior to 1960 women and minority students represented a very small percentage of law students. Today, they represent a substantial percentage of the enrollment in most law schools.

Law schools usually require completion of basic courses in contracts, property, torts, criminal law, civil procedure, constitutional law, legal research and writing, evidence, and professional responsibility. Electives are available in fields such as corporations, estates and trusts, taxation, administrative law, and commercial law and often include skills courses in trial and appellate advocacy and clinical training in client counseling.

Since first introduced at the Harvard Law School in the 1870s the “case method" has been the principal method of instruction in law school. Casebooks today contain not only reported appellate court cases but also related materials. Professors frequently employ the “Socratic method," with students reciting cases and responding to in-depth questions posed concerning analysis of a case and its implications in the law. Most basic law courses culminate in a written examination requiring a detailed analysis of hypothetical factual situations with discussion of applicable rules of law.

**The Organized Bar**

State laws govern the admission requirements to be a licensed attorney in the state and require passage of a written bar examination. Usually the highest court in the state has oversight of the bar admission policies and requires a thorough check of the applicant's background. Successful applicants take an oath to support the federal and state constitution and adhere to the ethical requirements of being a lawyer.

Being admitted to the bar in one state does not permit a lawyer to practice in another state. Nevertheless, a lawyer can usually be admitted to practice in another state on a limited basis when accompanied by a lawyer admitted in that state. Admission to the practice of law in a state does not carry with it admission to practice in a federal court. Instead each federal trial and appellate court has its own requirements.

**Legal Assistance for Indigent Persons**

In most areas bar associations have established legal aid offices to assist persons of limited means in obtaining legal advice. Assistance is often provided for persons of limited income. Congress has provided limited federal funds, and state and local agencies, including bar associations, often assist in funding these offices. These offices often employ staff lawyers, and in many areas law students assist as interns. In many instances a legal aid office will refer a case to a practicing attorney who agrees to handle a case on a pro bona (for benefit of the public) basis without charge to the client. Of course, indigent criminal defendants are furnished legal counsel.

**Professional Responsibility**

Professional responsibility of lawyers has become a major topic. Lawyers are regulated by codes of professional conduct often patterned after the Model Code of Professional Conduct promulgated by the US Bar Association (ABA), a voluntary association of lawyers. The Model Code has no legal effect because the ABA is a private organization, but many state legislatures and the highest court of the states have adopted the ABA Model Code with some variations. Because lawyers are deemed to be "officers of the court,' judges exercise inherent power to discipline them and even hold them in contempt of court for violations of ethical standards in the conduct of litigation.

**THE ADVERSARIAL SYSTEM OF JUSTICE**

The US court system follows the historic adversarial system this nation inherited from the English common law. Unlike the system that prevails in civil law countries, the adversarial system separates the function of gathering evidence from the judge's role in pretrial and trial processes. The theory of the common-law approach is that a judge's not having participated in the investigative process assures the parties that their case will be heard before a neutral decision-maker.

In the adversary process the competing parties develop the evidence through investigation. Parties, usually through their lawyers, present their evidence and arguments in support of their positions and seek to demonstrate the weakness of the other side of the case. This affords each party an opportunity to have a lawyer-conducted examination and cross-examination of witnesses, and challenges to the evidence and argument presented by the opposing sides. An important aspect of the adversarial system is the development of detailed procedural rules that a judge must apply impartially irrespective of the merits of a party's 'case.

**Juries**

In the United States juries are a vital component of the adversarial system and deeply rooted in Anglo-US tradition. In the late eighteenth century, William Blackstone called the jury a “strong barrier between the liberties of the people and the prerogative of the crown." Today, USs continue to regard the jury as an important check on government.

In America juries are selected from a cross-section of the adult community without regard to educational attainments. Thus, a college professor may be seated next to an elementary school dropout. To ensure an impartial jury, parties have the right to challenge jurors as to their basic qualifications to render a fair and impartial verdict. Although a prospective juror is not usually disqualified by having heard or read about a case, a juror who has formed an opinion about a pending case or who may have an interest in the litigation will be disqualified from serving. Juries decide the facts in a case and must apply the law as instructed by the presiding judge.

**Trial Procedures**

We also explain the procedures in civil and criminal trials in later chapters. Many of these adversary processes such as depositions and other discovery processes occur during pretrial phases of litigation, but for now it is helpful to become acquainted with the basic steps at trial.

Opening Statements: The plaintiff's attorney or the prosecutor and the defendant's attorney outline their theories of the case and the evidence to be presented.

Direct Examination by Plaintiff or Prosecutor: The plaintiff’s attorney or prosecutor questions witnesses and presents documentary and physical evidence.

Cross-Examination by Defense: The defendant's attorney may cross-examine the plaintiffs or prosecutor's witnesses in an attempt to discredit their testimony.

Motions by Defense: The judge rules on any defense motions to dismiss the plaintiff’s case or to grant acquittal and discharge the defendant.

Direct Examination by Defense: The defendant's attorney proceeds along the lines outlined in 2 above.

Cross-Examination by the Plaintiff or Prosecutor: The plaintiff or prosecutor proceeds as outlined in 3 above.

Closing Arguments: The plaintiff or prosecutor and the defense attorney present their closing arguments summarizing the evidence and seeking to persuade the jury (or the court in a non-jury trial) of their respective positions.

Jury Instructions: In a jury trial the court instructs the jury as to the law applicable to the case and their responsibilities in arriving at a verdict.

Verdict and Judgment: The jury returns its verdict and the court subsequently enters a judgment in favor of the prevailing party in a civil case or enters a judgment of conviction and proceeds to sentence the defendant or to discharge the defendant if acquitted. In a non-jury case the court makes a disposition of the case and enters judgment accordingly.

**CONCLUSION**

The US legal system is extremely complicated, due in large part to federalism: the division of political and legal authority among one national government and fifty state governments. No two sets of state laws are identical. Even where states have emulated laws of other states, there are likely to be nuances. No two state court systems are exactly alike. Even those that are superficially similar are likely to have significant jurisdictional, procedural, and administrative differences. And of course the federal system is quite unique in many respects.

The US legal system depends on the contributions of many different actors, most notably the legislators who write statutes, the chief executives and other executive officials who enforce them, and the judges who apply them to specific cases. The system also depends on litigants, people who are willing to subject their disputes to courts of law for orderly and peaceful resolution, as well as the lawyers who help litigants navigate a legal maze that can be at times maddening. Ultimately, though, the US legal system depends on the faith and support of average USs who are asked to believe that our legal system represents a sincere effort to achieve the rule of law in this country.

[**CORPORATIONS: A CONTEMPORARY APPROACH**](http://www.interactivecasebook.com/title.aspx?casebookid=9) **(2009)**

**Alan R. Palmiter & Frank Partnoy**

**Chapter 3**

**Corporate Federalism**

**C. Vertical federalism: federal view of corporate law**

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| **What’s that?**  A tender offer is the offer by a bidder to buy shares (typically at a premium above the market price) on certain conditions, such as the tender of 51% of the outstanding shares. The tender offer permits a bidder to acquire control of the corporation without dealing with the incumbent board of directors.  Normally, to acquire control of a corporation, the acquiror must approach the board of directors, which then has the power to structure a merger, subject to shareholder approval. The tender offer sidesteps the board. The acquiror goes directly to the shareholders, and after acquiring voting control replaces the board with its own nominees, who are more willing to structure a merger.  The back-end merger can be accomplished without the vote of the shareholder minority who did not sell their shares in the tender offer. For this reason, shareholders when confronted by a tender offer feel coerced to tender their shares at the premium price – rather than face an uncertain price in the back-end merger. |

Corporate transactions (such as the sale of corporate shares) can affect the control of a corporation – and thus the people and communities who the corporation touches. For this reason, states have sought to regulate the internal affairs of corporations that operate or have shareholders in the state. Normally, such regulation would seem to fall within the state’s regulatory powers over behavior affecting the state and its citizens. But interference in commercial transactions occurring outside the state can violate the implicit (dormant) limitations of the federal Commerce Clause.

**1. Limits on State Regulation of Corporate Takeovers**

What are the federal limits on state corporate law? In two cases from the 1980s, the Supreme Court defined the powers of states to regulate the internal affairs of multi-state corporations. Without explicitly resolving whether the internal affairs doctrine is constitutionally mandated, the Court nonetheless made clear the doctrine’s vaunted place in U.S. corporate law. States have broad authority to choose the corporate rules that apply to corporations incorporated in the state.

The two Supreme Court cases involved challenges to state statutes that sought to regulate corporate takeovers. During the 1980s there was a wave of bids to takeover companies. These bids were known as “hostile” bids, because the acquirers bypassed managers and went directly to the shareholders. The mechanism for going directly to a company’s shareholders was the “tender offer,” a bid made to shareholders at a substantial premium to the current share price.

**First generation antitakeover laws**. Corporate managers argued that tender offers posed a threat to the long-term interests of the corporation. They claimed that hostile bidders would restructure the business, lay off employees, and abandon communities where the corporation operated – not to mention move the corporation’s tax base elsewhere. Several states responded by adopting “first generation” antitakeover laws designed to protect corporations conducting business in the state from takeover bids opposed by the corporation’s management. In particular, these laws gave state regulators the power to decide if tender offers could be made to residents in their states.

For example, an Illinois statute required offerors to give the Secretary of State twenty days advance notice of any bid and authorized the Secretary to hold a hearing to determine the fairness of the offer. In a splintered opinion, the Supreme Court held in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), that such a statute was unconstitutional on one or more grounds. The Court rejected Illinois's claim that the internal affairs doctrine protected the law from constitutional attack, noting that the law was not limited to Illinois corporations but also covered foreign corporations that had the requisite proportion of Illinois shareholders and either their principal office or 10 percent of their assets in Illinois.

**Second generation antitakeover laws.** Following *Edgar v. MITE*, many states (often at the behest of corporate managers) began adopting “second generation” antitakeover statutes. Rather than regulate the sale of shares, which had been the approach of the “first generation” statutes, the states focused on the internal affairs of domestic corporations. Among the first of these “second generation” antitakeover laws was the Indiana Control Shares Acquisition Chapter, which differed from the Illinois law in *MITE* by revising the state’s corporation statute. The law applied only to Indiana-incorporated corporations, provided they had (1) at least 100 shareholders, (2) their principal place of business or substantial assets in Indiana, and (3) a significant portion of Indiana shareholders.

The Indiana “control share” law provided that any person who acquired a control block of shares would not be entitled to vote those shares unless a majority of that corporation's disinterested shareholders voted to approve the acquisition. The Indiana law called for a special shareholders’ meeting within 50 days after a control-share acquisition began, thus giving the target corporation's managers almost two month to defeat the hostile bid. The Indiana law thus gave the target shareholders a chance to vote against enfranchising an acquiror, thus providing some protection against coercive takeover bids.

Dynamics, the owner of 9.6 percent of CTS, an Indiana corporation covered by the Indiana “control share” law, announced a tender offer for sufficient shares to increase its ownership interest to 27.5 percent, thus triggering the law. Dynamics simultaneously sued to enjoin enforcement of the law, claiming it was preempted by the Williams Act ( a federal statute that specifies disclosure and time frames for tender offers in public corporations) and violated the Commerce Clause. The Seventh Circuit, relying on *MITE*, agreed that the Indiana law was unconstitutional on both grounds.

The Supreme Court was confronted with some important choices. On one hand, it could decide the Indiana law conflicted with the time deadlines imposed by the Williams Act and was thus preempted. But this would have made federal law the primary regulator of hostile tender offers. On the other hand, the Court could decide the Indiana law interfered with interstate commerce under the Commerce Clause and thus could impose federal judge-made guidelines on state corporate rules that interfered with corporate takeovers.

The Court decided, as you will see, that corporate law is best left to the states – provided it comes from the state of incorporation. That is, the Court concluded that federal courts should abstain from regulating the internal affairs of U.S. corporations, unless there is federal statute that applies.

CTS Corp. v. Dynamics Corp. of America

481 U.S. 69 (1987)

Justice Powell delivered the opinion of the Court.

[The Court first held that the Indiana law was not preempted by the federal Williams Act, since the state law was consistent with the shareholder protection philosophy of the federal statute and imposed a waiting period consistent with the timetables for a tender offer under the federal statute.]

As an alternative basis for its decision, the Court of Appeals held that the Act violates the Commerce Clause of the Federal Constitution. On its face, the Commerce Clause is nothing more than a grant to Congress of the power "[t]o regulate Commerce … among the several States.” But it has been settled for more than a century that the Clause prohibits States from taking certain actions respecting interstate commerce even absent congressional action.

**Statute’s discriminatory effects.**  The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce. The Indiana Act is not such a statute. It has the same effects on tender offers whether or not the offeror is a domiciliary or resident of Indiana. Thus, it visits its effects equally upon both interstate and local business.

Dynamics nevertheless contends that the statute is discriminatory because it will apply most often to out-of-state entities. This argument rests on the contention that, as a practical matter, most hostile tender offers are launched by offerors outside Indiana. But this argument avails Dynamics little. The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce. Because nothing in the Indiana Act imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors, we reject the contention that the Act discriminates against interstate commerce.

**Risk of inconsistent regulation**. This Court's recent Commerce Clause cases also have invalidated statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations. The Indiana Act poses no such problem. So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State. No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders. Accordingly, we conclude that the Indiana Act does not create an impermissible risk of inconsistent regulation by different States.

**Balancing of costs and benefits.** The Court of Appeals did not find the Act unconstitutional for either of these threshold reasons. Rather, its decision rested on its view of the Act's potential to hinder tender offers. We think the Court of Appeals failed to appreciate the significance for Commerce Clause analysis of the fact that state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law. Every State in this country has enacted laws regulating corporate governance. By prohibiting certain transactions, and regulating others, such laws necessarily affect certain aspects of interstate commerce. This necessarily is true with respect to corporations with shareholders in States other than the State of incorporation. Large corporations that are listed on national exchanges will have shareholders in many States and shares that are traded frequently. The markets that facilitate this national and international participation in ownership of corporations are essential for providing capital not only for new enterprises but also for established companies that need to expand their businesses. This beneficial free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation.

These regulatory laws may affect directly a variety of corporate transactions. Mergers are a typical example. In view of the substantial effect that a merger may have on the shareholders' interests in a corporation, many States require supermajority votes to approve mergers. By requiring a greater vote for mergers than is required for other transactions, these laws make it more difficult for corporations to merge. State laws also may provide for "dissenters' rights" under which minority shareholders who disagree with corporate decisions to take particular actions are entitled to sell their shares to the corporation at fair market value. By requiring the corporation to purchase the shares of dissenting shareholders, these laws may inhibit a corporation from engaging in the specified transactions.1[[1]](#footnote-1)2

It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. A State has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs.

There can be no doubt that the Act reflects these concerns. The primary purpose of the Act is to protect the shareholders of Indiana corporations. It does this by affording shareholders, when a takeover offer is made, an opportunity to decide collectively whether the resulting change in voting control of the corporation, as they perceive it, would be desirable. A change of management may have important effects on the shareholders' interests; it is well within the State's role as overseer of corporate governance to offer this opportunity. The autonomy provided by allowing shareholders collectively to determine whether the takeover is advantageous to their interests may be especially beneficial where a hostile tender offer may coerce shareholders into tendering their shares.

Appellee Dynamics responds to this concern by arguing that the prospect of coercive tender offers is illusory, and that tender offers generally should be favored because they reallocate corporate assets into the hands of management who can use them most effectively. As indicated, Indiana's concern with tender offers is not groundless. Indeed, the potentially coercive aspects of tender offers have been recognized by the SEC, and by a number of scholarly commentators. The Constitution does not require the States to subscribe to any particular economic theory. We are not inclined to second-guess the empirical judgments of lawmakers concerning the utility of legislation. In our view, the possibility of coercion in some takeover bids offers additional justification for Indiana's decision to promote the autonomy of independent shareholders.

Dynamics argues in any event that the State has "no legitimate interest in protecting the nonresident shareholders." Dynamics relies heavily on the statement by the *MITE* Court that "insofar as the law burdens out-of-state transactions, there is nothing to be weighed in the balance to sustain the law." But that comment was made in reference to an Illinois law that applied as well to out-of-state corporations as to in-state corporations. We agree that Indiana has no interest in protecting nonresident shareholders of *nonresident corporations*. But this Act applies only to corporations incorporated in Indiana. We reject the contention that Indiana has no interest in providing for the shareholders of its corporations the voting autonomy granted by the Act. Indiana has a substantial interest in preventing the corporate form from becoming a shield for unfair business dealing.

**Potential harm to takeover markets.** Dynamics' argument that the Act is unconstitutional ultimately rests on its contention that the Act will limit the number of successful tender offers. There is little evidence that this will occur. But even if true, this result would not substantially affect our Commerce Clause analysis. We reiterate that this Act does not prohibit any entity—resident or nonresident—from offering to purchase, or from purchasing, shares in Indiana corporations, or from attempting thereby to gain control. It only provides regulatory procedures designed for the better protection of the corporations' shareholders. We have rejected the notion that the Commerce Clause protects the particular structure or methods of operation in a market.. The very commodity that is traded in the securities market is one whose characteristics are defined by state law. Similarly, the very commodity that is traded in the "market for corporate control"—the corporation—is one that owes its existence and attributes to state law. Indiana need not define these commodities as other States do; it need only provide that residents and nonresidents have equal access to them. This Indiana has done. Accordingly, even if the Act should decrease the number of successful tender offers for Indiana corporations, this would not offend the Commerce Clause.

**[Conclusion]**

On its face, the Indiana Control Share Acquisitions Chapter evenhandedly determines the voting rights of shares of Indiana corporations. The Act does not conflict with the provisions or purposes of the Williams Act. To the limited extent that the Act affects interstate commerce, this is justified by the State's interests in defining the attributes of shares in its corporations and in protecting shareholders. Congress has never questioned the need for state regulation of these matters. Nor do we think such regulation offends the Constitution. Accordingly, we reverse the judgment of the Court of Appeals.

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**c. Third generation antitakeover laws**

After *CTS* a number of states, reassured by the Supreme Court that their efforts would not be in vain, adopted antitakeover laws that were even more protective of local management than the Indiana law. Some of these new “third generation” statutes used the Indiana law as a model to strengthen the less restrictive “second generation” statutes, and others tested the limits in *CTS* by mandating constraints on bidders that went further than the Indiana law.

Perhaps the most important reaction to *CTS* happened in Delaware, the leading state for public corporations, which enacted a relatively mild “third generation” statute. Delaware seemed to have been motivated, at least in part, by the fear that some Delaware corporations would reincorporate in states with antitakeover laws if Delaware did not act. Delaware feared, rightly or wrongly, that inaction would hurt its preeminence in the incorporation business.

The Delaware antitakeover law imposed a three-year moratorium on any merger by the target corporation after a hostile takeover, unless the bidder acquired 85% control in the initial tender offer. The effect of the Delaware law was to force bidders to offer significant premiums for shares in a tender offer – to reach the 85% threshold. Or bidders that did not borrow money to make their takeover bid (and thus did not need to engage in a back-end merger to repay debt) could simply wait the three years before consolidating control in a merger.

Relying on *CTS*, courts have uniformly upheld Delaware's antitakeover law and all other antitakeover laws that apply to domestic corporations as constitutional regulation of corporate internal affairs. That is, courts have uniformly understood *CTS* as creating a blueprint for antitakover laws, requiring only that the state limit its regulation to corporations incorporated in the state. Additional business or shareholder connections to the state, which typically do not exist for Delaware and its corporations, were generally dropped from the “third generation” statutes – without any constitutional effect.

Likewise, no “third generation” law that regulates takeover bids for foreign corporations has survived a challenge under the Commerce Clause, even where the law's substantive provisions closely track the Indiana law at issue in *CTS*. Courts have reasoned that such laws subject corporations to potentially inconsistent state regulation under the incorporating state’s corporate laws and under the antitakeover law.

1. 12 Numerous other common regulations may affect both nonresident and resident shareholders of a corporation. Specified votes may be required for the sale of all of the corporation's assets. The election of directors may be staggered over a period of years to prevent abrupt changes in management. Various classes of stock may be created with differences in voting rights as to dividends and on liquidation. Provisions may be made for cumulative voting. Corporations may adopt restrictions on payment of dividends to ensure that specified ratios of assets to liabilities are maintained for the benefit of the holders of corporate bonds or notes. Where the shares of a corporation are held in States other than that of incorporation, actions taken pursuant to these and similar provisions of state law will affect all shareholders alike wherever they reside or are domiciled. [↑](#footnote-ref-1)