Chapter 1
Legal Heritage and the Digital Age

Learning Objectives

1. Define *law*.
2. Describe the functions of law.
3. Explain the development of the U.S. legal system.
4. List and describe the sources of law in the United States.
5. Discuss the importance of the U.S. Supreme Court's decision in *Brown v. Board of Education*.

Teacher to Teacher Dialogue

One of the most common dilemmas faced by instructors of business law is the issue of topic choice. By the very nature of the subjects that these instructors teach, the breadth of materials is so wide that choosing what to focus on in the limited classroom time instructors have with their students can be the most daunting task. This problem is especially worsened when the topics that instructors are dealing with are all of deep interest and can stand alone as separate courses.

In this chapter, for example, instructors are asked to introduce students to topics ranging from the definitions and purposes of law to how the U.S. legal system affects business decisions, to some of the most important provisions found in the U.S. Constitution. Any one of these subparts can provide the raw materials for an entire course at the law school level. An instructor's job must start with a self-evident, but sometimes forgotten, point: this is *not* law school. Instructors are here not to train future lawyers but rather students who need to know enough about these issues to recognize that they *are* issues. The technical legal problems they may be facing later will ultimately need to be resolved using law and other practitioners.

The plus side of this dilemma is that because instructors have such a diverse menu to select from, they are able to pick and choose their areas of emphasis. For example, if an instructor's particular teaching and research interests lie in the area of ethics and the schools of jurisprudential thought from which they are derived, then by all means, take it up. Rather than trying to be all things to all people, it is better to focus one's efforts on their strengths. This does not mean that one can shortchange the other material. All key objectives of the chapter should be completely outline and incorporated in both lecture and materials outline. But if instructors have a particular interest and expertise in, for example, the Law and Economics School of jurisprudential thought then use them as focal points of comparison in the evolutionary process that seeks to distinguish the older schools of jurisprudence from newer approaches to these issues. In any event, remember that philosophical studies of what law is and what its role is in the larger scheme of things, have always posed questions virtually impossible to answer. As mentioned earlier, this chapter

represents the attempts made by great thinkers to answer the unanswerable. It would be far too presumptuous for instructors to think that they can teach, in a few hours, what the great philosophers of the world have tried to do over hundreds of years. Perhaps this is an early lesson in what wisdom is really all about: the more we know of history, the more instructors know of their own limitations. If instructors can get that point across, the course is off to a good start.

Text Materials

I. Introduction to Legal Heritage and the Digital Age

Every society makes and enforces laws that govern the conduct of the individuals, businesses, and other organizations that function within it. For this reason, businesses that are organized in the United States are subject to its laws. They are also subject to the laws of other countries in which they operate. Businesses organized in other countries must obey the laws of the United States when doing business here.

II. What Is Law?

The law consists of rules that regulate the conduct of individuals, businesses, and other organizations in society. It is intended to protect persons and their property against unwanted interference from others.

A. Definition of *Law*

The concept of **law** is broad. Although it is difficult to state a precise definition, *Black's Law Dictionary* gives one that is sufficient for this text:

> *Law, in its generic sense, is a body of rules of action or conduct prescribed by controlling authority, and having binding legal force. That which must be obeyed and followed by citizens subject to sanctions or legal consequences is a law.*

B. Functions of the Law

The law is often described by the function it serves in a society. The primary *functions* served by the law in this country are:

- Keeping the peace
- Shaping moral standards
- Promoting social justice
- Maintaining the status quo
- Facilitating orderly change
- Facilitating planning
- Providing a basis for compromise
- Maximizing individual freedom

C. Fairness of the Law

The U.S. legal system is one of the most comprehensive, fair, and democratic systems of law ever developed and enforced. Nevertheless, some misuses and oversights of our legal system that including abuses of discretion and mistakes by judges and juries, unequal applications of the law, and procedural mishaps, which allow some guilty parties to go unpunished.

D. Flexibility of the Law

U.S. law evolves and changes along with the norms of society, technology, and the growth and expansion of commerce in the United States and the world.

Landmark Law: Brown v. Board of Education

It was not until 1954 that the U.S. Supreme Court decided a case that challenged the "separate but equal" doctrine as it applied to public elementary and high schools. In ***Brown v. Board of Education***, a consolidated case that challenged the separate school systems of four states—Kansas, South Carolina, Virginia, and Delaware—the Supreme Court decided to revisit the "separate but equal" doctrine announced by its forbearers in another century. This time, a unanimous Supreme Court, in an opinion written by Chief Justice Earl Warren, reversed prior precedent and held that the "separate but equal" doctrine violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

III. School of Jurisprudential Thought

The philosophy or science of the law is referred to as **jurisprudence**. There are several different philosophies about how the law developed, ranging from the classical natural theory to modern theories of law and economics and critical legal studies.

A. Natural Law School

The **Natural Law School** of jurisprudence postulates that law is based on what is "correct." Natural law philosophers emphasize a **moral theory of law**—that is, law should be based on morality and ethics.

B. Historical School

The **Historical School** of jurisprudence believes that the law is an aggregate of social traditions and customs. It believes that changes in the norms of society will gradually be reflected in the law.

C. Analytical School

The **Analytical School** of jurisprudence maintains that the law is shaped by logic. The

emphasis is on the logic of the result rather than on how the result is reached.

D. Sociological School

The **Sociological School** of jurisprudence asserts that the law is a means of achieving and advancing certain sociological goals. The followers of this philosophy, known as *realists*, believe that the purpose of law is to shape social behavior.

E. Command School

The philosophers of the **Command School** of jurisprudence believe that the law is a set of rules developed, communicated, and enforced by the ruling party rather than a reflection of the society's morality, history, logic, or sociology.

F. Critical Legal Studies School

The **Critical Legal Studies School** proposes that legal rules are unnecessary and are used as an obstacle by the powerful to maintain the status quo. Under this theory, subjective decision making by judges would be permitted.

E. Law and Economics School

The **Law and Economics School** believes that promoting market efficiency should be the central goal of legal decision making. This school is also called the **Chicago School**, named after the University of Chicago, where it was first developed.

Global Law: Command School of Jurisprudence of Cuba

In 1959, Fidel Castro led a revolution that displaced the existing dictatorial government. Castro installed a communist government which expropriated and nationalized much private property. Under a state-controlled planned economy based on socialist principles, production of goods and food items fell substantially and major shortages of houses, medical supplies, and other goods and services occurred. After more than five decades of a command economy, Cuba is permitting limited free-market measures, but ninety percent of workers are still employed by the government.

IV. History of American Law

When the American colonies were first settled, the English system of law was generally adopted as the system of jurisprudence. This was the foundation from which American judges developed a common law in America.

A. English Common Law

English common law was law developed by judges who issued their opinions when deciding cases. The principles announced in these cases became *precedent* for later judges deciding similar cases. The English Common Law can be divided into cases decided by the *law courts, equity courts*, and *merchant courts*.

Law Courts

Prior to the Norman Conquest of England in 1066, each locality in England was subject to local laws, as established by the lord or chieftain in control of the local area. After 1066, William the Conqueror and his successors to the throne of England began to replace the various local laws with one uniform system of law. To accomplish this, the king or queen appointed loyal followers as judges in all local areas. These judges were charged with administering the law in a uniform manner, in courts that were called **law courts**.

Chancery (Equity) Courts

Because of some unfair results and limited remedies available in the law courts, a second set of courts—the **Court of Chancery** (or **equity court**)—was established. These courts were under the authority of the Lord Chancellor. The *chancellor's remedies* were called equitable remedies because they were shaped to fit each situation.

Merchant Courts

As trade developed during the Middle Ages, merchants who traveled about England and Europe developed certain rules to solve their commercial disputes. These rules, known as the "law of merchants," or the **Law Merchant**, were based on common trade practices and usage. Eventually, a separate set of courts was established to administer these rules. This court was called the **Merchant Court**.

Landmark Law: Adoption of English Common Law in America

All the states of the United States of America except Louisiana base their legal systems primarily on the English common law. In the United States, the law, equity, and merchant courts have been merged. Thus, most U.S. courts permit the aggrieved party to seek both legal and equitable orders and remedies.

Global Law: Civil Law System of France and Germany

One of the major legal systems that developed in the world in addition to the Anglo-American common law system is the **Romano-Germanic civil law system**. This legal system, which is commonly called the **civil law**, dates to 450 BCE, when Rome adopted the Twelve Tables, a code of laws applicable to the Romans. A compilation of Roman law, called the *Corpus Juris Civilis* ("Body of Civil Law"), was completed in CE 534. Later, two national codes—the **French Civil Code of 1804 (the Napoleonic Code)** and the **German Civil Code of 1896**—

became models for countries that adopted civil codes.

V. Sources of Law in the United States

In the more than 200 years since the founding of the United States and adoption of the English common law, the lawmakers of this country have developed a substantial body of law.

A. Constitutions

The **Constitution of the United States of America** is the *supreme law of the land*. This means that any law—whether federal, state, or local—that conflicts with the U.S. Constitution is unconstitutional and, therefore, unenforceable. The U.S. Constitution is often referred to as a "living document" because it is so adaptable.

The U.S. Constitution established the structure of the federal government. It created three branches of government and gave them the following powers:

- The **legislative branch** (**Congress**) has the power to make (enact) the law.
- The **executive branch** (**president**) has the power to enforce the law.
- The **judicial branch** (**courts)** has the power to interpret and determine the validity of the law.

Powers not given to the federal government by the Constitution are reserved for the states. States also have their own constitutions. **State constitutions** are often patterned after the U.S. Constitution, although many are more detailed.

B. Treaties

The U.S. Constitution provides that the president, with the advice and consent of two-thirds of the Senate, may enter into **treaties** with foreign governments. Treaties become part of the supreme law of the land.

C. Federal Statutes

Statutes are written laws that establish certain courses of conduct that covered parties must adhere to. The U.S. Congress is empowered by the Commerce Clause and other provisions of the U.S. Constitution to enact **federal statutes** to regulate foreign and interstate commerce. Federal statutes are organized by topic into **code books**. This is often referred to as **codified law**.

Contemporary Environment: How a Bill Becomes Law

The **U.S. Congress** is composed of two chambers, the **U.S. House of Representatives** and the **U.S. Senate**. Thousands of **bills** are introduced in the U.S. Congress each year, but only a small percentage of them become law. The process of legislation at the federal level is as

follows:

- A member of the U.S. House of Representatives or U.S. Senate introduces a bill in his or her **chamber**.
- The bill is referred to the appropriate **committee** for review and study. The committee can do the following: (1) reject the bill, (2) report it to the full chamber for vote, (3) simply not act on it, in which case the bill is said to have "died in committee"—many bills meet this fate, or (4) send the bill to a **subcommittee** for further study.
- Bills that receive the vote of a committee are reported to the full chamber, where they are debated and voted on. If the bill receives a majority vote of the chamber, it is sent to the other chamber, where the previously outlined process is followed. If the second chamber makes significant changes to the bill, a **conference committee** that is made up of members of both chambers will try to reconcile the differences.
- A bill that is reported to a full chamber must receive the majority vote of the chamber, and if it receives this vote, it is forwarded to the other chamber.
- If the president signs a bill, it becomes law.

D. State Statutes

State legislatures enact **state statutes**. Such statutes are placed in code books. State statutes can be assessed in these hardcopy code books or online.

E. Ordinances

State legislatures often delegate lawmaking authority to local government bodies, including cities and municipalities, counties, school districts, and water districts. These governmental units are empowered to adopt **ordinances**.

F. Executive Orders

The executive branch of government, which includes the president of the United States and state governors, is empowered to issue **executive orders**. This power is derived from express delegation from the legislative branch and is implied from the U.S. Constitution and state constitutions.

G. Regulations and Orders of Administrative Agencies

The legislative and executive branches of federal and state governments are empowered to establish **administrative agencies** to enforce and interpret statutes enacted by Congress and state legislatures. Many of these agencies regulate business.

Congress or the state legislatures usually empower these agencies to adopt **administrative rules and regulations** to interpret the statutes that the agency is authorized to enforce. These rules and regulations have the force of law. Administrative agencies usually have the power to hear and decide disputes. Their decisions are called **orders**.

H. Judicial Decisions

When deciding individual lawsuits, federal and state courts issue **judicial decisions**. In these written opinions, a judge or justice usually explains the legal reasoning used to decide the case.

Doctrine of Stare Decisis

Based on the common law tradition, past court decisions become **precedent** for deciding future cases. Lower courts must follow the precedent established by higher courts. Thus, all federal and state courts in the United States must follow the precedents established by U.S. Supreme Court decisions. Adherence to precedent is called **stare decisis** ("to stand by the decision").

I. Priority of Law in the United States

The U.S. Constitution and treaties take precedence over all other laws in the United States. Federal statutes take precedence over federal regulations. Valid federal law takes precedence over any conflicting state or local law. State constitutions rank as the highest state law. State statutes take precedence over state regulations. Valid state law takes precedence over local laws.

Digital Law: Law in the Digital Age

In a span of about three decades, computers have revolutionized society. Computers, once primarily used by businesses, have permeated the lives of most families as well. In addition to computers, many other digital devices are commonly in use, such as smartphones, tablets, televisions, digital cameras, and electronic game devices. In addition to the digital devices, technology has brought new ways of communicating, such as e-mail and texting, as well as the use of social networks.

VI. Critical Legal Thinking

The U.S. Supreme Court, comprised of nine justices chosen from the brightest legal minds in the country, often reach 5-4 decisions or other non-unanimous decisions. It is because each justice has analyzed the facts of a case and the legal issue presented, applied critical legal thinking to reason through the case, and came up with their own conclusion.

The key is each justice applied critical thinking in reaching their conclusion. Critical thinking is important to all subjects taken by college and university students, no matter what their major or the course being taken. But critical thinking in law courses—referred to as *critical legal thinking*—is of particular significance. This is because in the law there is not always a bright-line answer; in fact, there seldom is.

A. Defining *Critical Legal Thinking*

Critical legal thinking consists of investigating, analyzing, evaluating, and interpreting information to solve simple or complex legal issues or cases. Critical legal thinking improves a person's problem solving skills and helps him or her make clear, logical, rational, and well-reasoned conclusions and judgments.

B. Socratic Method

In class, many law professors use the **Socratic Method** when discussing a case in class. The Socratic Method consists of the professor asking students questions about a case or legal issue to stimulate critical thinking by the students. This process consists of a series of questions and answers and a give-and-take inquiry and debate between a professor and the students.

C. IRAC Method

Legal cases are usually examined using the following critical legal thinking method. First, the *facts* of the case must be investigated and understood. Next, the *legal issue* that is to be answered must be identified and succinctly stated. Then, the *law* that is to be applied to the case must be identified, read, and understood. Once the facts, law, and legal issue have been stated, critical thinking must be used in applying the law to the facts of the case. This requires that the decision maker—whether a judge, juror, or student—*analyze*, examine, evaluate, interpret, and apply the law to the facts of the case. And lastly, the critical legal thinker must reach a *conclusion* and state his or her judgment.

In the study of law, this process is often referred to as the **IRAC method** (an acronym that stands for **Issue**, **Rule**, **Application**, and **Conclusion**) as outlined in the following:

- I—What is the legal *issue* in the case?
- R—What is the *rule (*law) of the case?
- A—What is the court's *analysis* and rationale?
- C—What was the *conclusion* or outcome of the case?

Case 1.1—U.S. Supreme Court Case

Voting Rights Act
Shelby County, Texas v. Holder
133 S.Ct. 2612 (2013)
Supreme Court of the United States

Facts: The Fifteenth Amendment was added to the U.S. Constitution in 1870, following the Civil War. It provides that the right of citizens of the United States to vote shall not be denied or abridged by the federal or state governments on account of race, color, or previous conditions of servitude, and gives Congress the power to enact laws to enforce the Amendment. In 1965 Congress enacted the Voting Rights Act. Section 2 forbids any standard, practice, or procedure that denies or abridges the right of any citizen to vote on account of race or color. Section 4(b)

provides a coverage formula that identified six states—Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia—that maintained illegal voting requirements that substantially reduced minority voter turnout. The Voting Rights Act, which was originally enacted for five years, had been reauthorized by Congress for more than forty years. In 2006, Congress reauthorized the Voting Rights Act for 25 years. Shortly after the 2006 reauthorization, a Texas district challenged the constitutionality of the special coverage provision of the Voting Rights Act. The U.S. district court and the U.S. court of appeals upheld this provision. The U.S. Supreme Court agreed to hear the appeal.

Issue: Is the coverage provision of the Voting Rights Act that singles out several states for the federal preclearance requirement constitutional?

Decision: The U.S. Supreme Court held that the coverage provision of the Voting Right Act that requires preclearance by the federal government for covered states to make changes to voting districts and other voting requirements is unconstitutional.

Reason: The U.S. Supreme Court stated that the coverage formula met the test back in 1965, but no longer does so. Coverage today is based on decades-old data and eradicated practices.

Answers to Critical Legal Thinking Cases

1.1. Fairness of the Law

Many students will react that the statute is unfair as it does not afford women equal status in the workplace. In light of today's standards, that position is well founded. However, it is a useful exercise to consider arguments for the opposite position in the context of the time period. In enacting such a statute, the legislature presumably entertained the view that women had special needs, were subject to certain weaknesses, and therefore the demands made on them had to be accommodated in the workplace. That these premises, i.e., special needs and presumed weaknesses, might be false does not necessarily preclude one from acting morally. Moralists might label this ignorance as excusable in that it is "invincible," i.e., an ignorance that cannot be destroyed or offers no moral reason for doing so. Of course, modern experience and knowledge require that we question these premises. It almost certainly would not be lawful today. Not only have the items relevant to the test of equal protection broadened under present constitutional interpretations, but also Title VII of the Civil Rights Act of 1964 prohibits any discrimination on the basis of sex in the "terms, conditions and benefits of employment." *W. C. Ritchie & Co. v. Wayman, Attorney for Cook Country, Illinois*, 244 Ill. 509, 91 N.E. 695, Web 1910 Ill. Lexis 1958 (Supreme Court of Illinois)

Answers to Ethics Cases

1.2. Ethics Case

Yes, the hunting, fishing, and gathering rights granted to the Mille Lacs Band of the Ojibwe

Indians by the federal government in the 1837 treaty are valid and enforceable. The U.S. Supreme Court held that these rights were not extinguished when the state of Minnesota was admitted as a state in 1858. The state of Minnesota argued that the Ojibwe's rights under the treaty were extinguished when Minnesota was admitted to the Union. There is no clear evidence of federal congressional intent to extinguish the treaty rights of the Ojibwe Indians when Minnesota was admitted as a state in 1858. The language admitting Minnesota as a state made no mention of Indian treaty rights. It was illegal for the state of Minnesota to try to extinguish clearly delineated legal rights granted to the Ojibwe Native Americans more than 150 years before. The hunting, fishing, and gathering rights guaranteed to the Ojibwe Indians in the 1837 treaty are still valid and enforceable.

The state of Minnesota did not ethically when it tried to abolish the hunting, fishing, and gathering rights guaranteed to the Ojibwe Indians by treaty. The Ojibwe relied on the promises of the treaty, which must be kept by the government. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 119 S.Ct. 1187, 143 L.Ed.2d 270, Web 1999 U.S. Lexis 2190 (Supreme Court of the United States)