The aspiring paralegal professional must become familiar with American legal heritage, including how the law developed in this country over the centuries. This includes learning the historical and current sources of law of federal and state law. In addition, a professional paralegal should have knowledge of the Constitution of the United States of America and how it created the federal government, delegating powers to the federal government, reserving powers to the states, and protecting us from unwelcomed government intrusion into our lives. A paralegal professional must have knowledge of the American court system and the process of judicial and non-judicial dispute resolution. A working knowledge of the civil litigation process, criminal litigation and procedure, and administrative law is a necessary part of a paralegal professional’s education. Part II “Introduction to Law” provides the paralegal professional student with this knowledge.
Chapter 5 Digital Resources at www.pearsonhighered.com/goldman

- Video Case Studies:
  - Difference Between a Criminal and a Civil Trial
  - A School Principal Reacts: Student Rights versus School's Duty
  - Confidentiality Issue: Attorney–Client Privilege
- Chapter Summary • Web Links • Court Opinions • Glossary • Comprehension Quizzes
- Technology Resources
We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

Preamble to the Constitution of the United States of America

Paralegals at Work

As a paralegal, you are working for a large law firm that specializes in handling constitutional law issues for clients. You work for Vivian Kang, a senior partner of the law firm. One day Ms. Kang calls you into her office and tells you that a new client, Mr. Hayward Storm, has retained the law firm. Ms. Kang asks you to sit in with her during an interview with Mr. Storm. Mr. Storm arrives on the day of the interview, and Ms. Kang, Mr. Storm, and you go into the conference room.

Mr. Storm tells the following story: For more than twenty years he has been on radio and television, primarily as a disc jockey and talk show host. Mr. Storm most recently hosted television shows where he did outlandish things such as using vulgar language, having guests appear on the show nude, telling disgusting jokes, and doing other things that offend many people. Mr. Storm also hosted a radio show in which he used profanity and offensive language. The Federal Communications Commission (FCC), a federal government agency, is responsible for regulating radio and television. Mr. Storm tells you that the FCC has fined him and his employer for his engaging in such conduct over the television and radio airwaves.

In addition, Mr. Storm explains that he will be leaving regular radio and television, which is regulated by the FCC, and has been hired to be a disc jockey for satellite radio broadcasts. He is making this change because satellite radio

Learning Objectives

After studying this chapter, you should be able to:

1. Recognize the professional opportunities for paralegals in the constitutional law area.
2. Define law and describe the functions of law.
3. Describe the fairness and flexibility of the law.
4. List and describe the sources of law in the United States.
5. Describe and apply important clauses of the U.S. Constitution.
6. Describe and apply the protections of the Bill of Rights and other amendments to the U.S. Constitution.
7. Explain a paralegal’s duty to avoid conflicts of interest.
A paralegal must have a foundation in the basic sources of the law of the United States. Our society makes and enforces laws that govern the conduct of the individuals, businesses, and other organizations that function within it. In the words of Judge Learned Hand, “Without law we cannot live; only with it can we insure the future which by right is ours. The best of men’s hopes are enmeshed in its success” (The Spirit of Liberty, 1960).

Although U.S. law is based primarily on English common law, other legal systems, such as Spanish and French civil law, also influenced it. The sources of law in this country are the U.S. Constitution, state constitutions, federal and state statutes, ordinances, administrative agency rules and regulations, executive orders, and judicial decisions by federal and state courts.

Paralegals should be renaissance men and women, who have an understanding of this country’s founding, its constitutional protections, and the current debates concerning the application of the constitutional language in these modern times. This chapter covers the nature and definition of law, the history and sources of law, and the U.S. Constitution.

The following section discusses the career opportunities for paralegal professionals in the constitutional law area.

CAREER OPPORTUNITIES FOR PARALEGALS IN CONSTITUTIONAL LAW

Some members of the paralegal profession will work on cases that involve constitutional law issues. The Constitution of the United States of America is one of the most important documents ever drafted. The U.S. Constitution created a new country, one that was not ruled by kings, queens, monarchs, or dictators. The country was created as the world’s first democracy—a crucial change in the history of the world.

The Constitution has been continually implemented since its ratification more than two centuries ago. The Constitution is considered a “living document” that has been interpreted by the United States Supreme Court and other courts to apply to an ever-changing society.

Paralegals who work in the constitutional law field will be called upon to conduct legal research relating to provisions and amendments to the U.S. Constitution, find relevant cases that interpret constitutional language, and assist lawyers who present cases to the courts regarding constitutional law issues. This is an exciting field of law to participate in as a paralegal professional. Some members of the paralegal profession will be fortunate to work on cases that will be heard and decided by the U.S. Supreme Court.

Several of the major provisions and protections of the U.S. Constitution and its amendments that paralegals should know, and which are covered in this chapter, are:

- Supremacy Clause
- Commerce Clause
- Freedom of speech
- Freedom of religion
- Due Process Clause
- Equal Protection Clause

The U.S. Constitution has many other important provisions as well. Paralegals should be fully informed citizens, and because of their position, understand how the Constitution created the federal government, built in checks and balances, granted powers to the federal government, and established protections for us against unconstitutional intrusions into our lives by the government. The Constitution of the United States of America is set forth in its entirety in Appendix F to this book.
What Is Law?

The first question a paralegal studying American legal heritage must answer is “What is law?” The law consists of rules that regulate the conduct of individuals, businesses, and other organizations within society. Laws are intended to protect persons and their property from unwanted interference from others and forbid persons from engaging in certain undesirable activities.

The concept of law is broad. Although it is difficult to state a precise definition, Black’s Law Dictionary, 5th edition, 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.

Fairness of the Law

On the whole, the American 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—including abuses of discretion and mistakes by judges and juries, unequal applications of the law, and procedural mishaps—allow some guilty parties to go unpunished.

In Standefer v. United States [447 U.S. 10, 100 S.Ct. 1999 (1980)] the Supreme Court affirmed (let stand) the criminal conviction of a Gulf Oil Corporation executive for aiding and abetting the bribery of an Internal Revenue Service agent. The agent had been acquitted in a separate trial. In writing the opinion of the Court, Chief Justice Warren Burger stated, “This case does no more than manifest the simple, if discomfiting, reality that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system.”

Flexibility of the Law

An important fact for a paralegal professional to learn is that American law is flexible. The law is generally responsive to cultural, technological, economic, and social changes.

Example Laws which are no longer viable—such as those that restricted the property rights of women—are often repealed.

Laws cannot be written in advance to anticipate every dispute that could arise in the future. Therefore, general principles are developed to be applied by courts and juries to individual disputes. This flexibility in the law leads to some uncertainty in predicting

FUNCTIONS OF THE LAW

The law is often described by the functions it serves within a society. The primary functions served by U.S. law are:

1. Keeping the peace (e.g., making certain activities crimes).
2. Shaping moral standards (e.g., enacting laws that discourage drug and alcohol abuse).
3. Promoting social justice (e.g., enacting statutes that prohibit discrimination in employment).
4. Maintaining the status quo (e.g., passing laws that prevent the forceful overthrow of government).
5. Facilitating orderly change (e.g., passing statutes only after considerable study, debate, and public input).
6. Facilitating planning (e.g., designing commercial laws to allow businesses to plan their activities, allocate their productive resources, and assess the risks they take).
7. Providing a basis for compromise (approximately 90 percent of all lawsuits are settled prior to trial).
8. Maximizing individual freedom (e.g., the rights of freedom of speech, religion, and association granted by the First Amendment to the U.S. Constitution).
results of lawsuits. The following quote by Judge Jerome Frank addresses the value of the adaptability of law (*Law and the Modern Mind*, 1930):

The law always has been, is now, and will ever continue to be, largely vague and variable. And how could this be otherwise? The law deals with human relations in their most complicated aspects. The whole confused, shifting helter-skelter of life parades before it—more confused than ever, in our kaleidoscopic age.

Men have never been able to construct a comprehensive, eternalized set of rules anticipating all possible legal disputes and formulating in advance the rules which would apply to them. Situations are bound to occur which were never contemplated when the original rules were made. How much less is such a frozen legal system possible in modern times?

The constant development of unprecedented problems requires a legal system capable of fluidity and pliancy. Our society would be straightjacketed were not the courts, with the able assistance of the lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial, and political conditions; although changes cannot be made lightly, yet rules of law must be more or less impermanent, experimental and therefore not nicely calculable.

Much of the uncertainty of law is not an unfortunate accident; it is of immense social value.

Sometimes it takes years before the law reflects the norms of society. Other times, society is led by the law.

### Schools of Jurisprudential Thought

The philosophy or science of the law is referred to as *jurisprudence*. Several different philosophies have been advanced about how the law developed, ranging from the classical natural theory to modern theories of law and economics and critical legal studies. Legal philosophers can be grouped into the following major categories.

- **The natural law school of jurisprudence** postulates that the 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. People “discover” natural law through reasoning and choosing between good and evil. Documents such as the U.S. Constitution, the Magna Carta, and the United Nations Charter reflect this theory.

- **The historical school of jurisprudence** believes that the law is an aggregate of social traditions and customs that have developed over the centuries. Changes in the norms of society will be reflected gradually in the law. The law is an evolutionary process. Thus, historical legal scholars look to past legal decisions (precedent) to solve contemporary problems.

- **The analytical school of jurisprudence** maintains that the law is shaped by logic. Analytical philosophers believe that results are reached by applying principles of logic to the specific facts of the case. The emphasis is on the logic of the result rather than how the result is reached.

- **The sociological school of jurisprudence** asserts that the law is a means of achieving and advancing certain sociological goals. Followers of this philosophy, known as realists, believe that the purpose of law is to shape social behavior. Sociological philosophers are unlikely to adhere to past law as precedent.

- **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 reflecting the society’s morality, history, logic, or sociology. This school maintains that the law changes when the ruling class changes.

- **The critical legal studies school of jurisprudence** proposes that legal rules are unnecessary and are used as an obstacle by the powerful to
maintain the status quo. Critical legal theorists (the “Crits”) argue that legal disputes should be solved by applying arbitrary rules based on broad notions of what is “fair” in each circumstance. Under this theory, subjective decision making by judges would be permitted.

- The law and economics school proposes that promoting market and economic efficiency should be the central goal of legal decision making. This school is called the “Chicago School” of jurisprudence because it had its roots at the University of Chicago. This school proposes, for example, that free-market principles, cost–benefit analysis, and supply-and-demand theories should be used to determine the passage of legislation and the outcome of lawsuits.

**History of American Law**

Paralegals need to know the history of the law in the United States and how the law developed to be what it is today. Every person in the United States, and paralegals in particular, should have knowledge of this country’s legal history.

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

**English Common Law**

English common law was law developed by judges who issued their opinions when deciding a case. 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 following courts:

- **Law courts.** After 1066, William the Conqueror and his successors to the throne of England replaced various local laws with one uniform system of law. 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 what were called law courts. Law at this time tended to emphasize form (legal procedure) over the substance (merit) of the case. The only relief available in law courts was a monetary award for damages.

- **Chancery (equity) courts.** Because of the sometimes unfair results and the limited remedy available in the law courts, a second set of courts—the Court of Chancery (or equity court)—was established, under the authority of the Lord Chancellor. Those who believed that the decision of the law court was unfair or that the law court could not grant an appropriate remedy could seek relief in the Court of Chancery. The Chancery Court inquired into the merits of the case rather than emphasize legal procedure. The Chancellor’s remedies were called equitable remedies because they were shaped to fit each situation. Equitable orders and remedies of the Court of Chancery took precedence over the legal decisions and remedies of the law courts.

- **Merchant courts.** As trade developed in the Middle Ages, the merchants who traveled around 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 upon common trade practices and usage. Eventually, a separate set of courts, called the merchant court, was established to administer these rules. In the early 1900s, the merchant court was absorbed into the regular law court system of England.
Adoption of the 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 law and equitable orders and remedies.

The importance of common law to the American legal system is described in the following excerpt from Justice William Douglas’s opinion in the 1841 case of *Penny v. Little* [4 Ill. 301, 1841 Ill. Lexis 98 (Ill. 1841)]:

The common law is a beautiful system, containing the wisdom and experiences of ages. Like the people it ruled and protected, it was simple and crude in its infancy, and became enlarged, improved, and polished as the nation advanced in civilization, virtue, and intelligence. Adapting itself to the conditions and circumstances of the people and relying upon them for its administration, it necessarily improved as the condition of the people was elevated. The inhabitants of this country always claimed the common law as their birthright, and at an early period established it as the basis of their jurisprudence.

Civil Law System

In addition to the Anglo-American common law system, one of the other major legal systems that has developed in the world is the Romano-Germanic civil law system. This legal system, commonly called the civil law, dates to 450 B.C., when Rome adopted a code of laws applicable to the Romans. A compilation of Roman law, called the *Corpus Juris Civilis* (the Body of Civil Law), was completed in A.D. 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.

In contrast to the Anglo-American common law, in which laws are created by the judicial system as well as by congressional legislation, the Civil Code and parliamentary statutes that expand and interpret it are the sole sources of the law in most civil law countries. Thus, the adjudication of a case is simply the application of the Code or the statutes to a specific set of facts. In some civil law countries, court decisions do not have the force of law.

Some states in America, particularly states that have a French or Spanish heritage, such as Louisiana and states of the southwestern United States, have incorporated civil law into their legal systems.
Sources of Law in the United States

In more than 230 years since the founding of this country and adoption of the English common law, U.S. lawmakers have developed a substantial body of law. The laws of the United States are extremely complex.

Paralegals must have knowledge of the source of the laws that govern their work assignments. Paralegals often are called upon to conduct legal research to find relevant laws and judicial decisions that affect the cases or projects to which they are assigned. This chapter provides a detailed discussion of the sources of law in this country.

The sources of modern law in the United States are discussed in the following sections.

Constitutions
The Constitution of the United States of America is the supreme law of the land. This means that any law—federal, state, or local—that conflicts with the U.S. Constitution is unconstitutional and, therefore, unenforceable.

The principles enumerated in the Constitution are extremely broad, because the founding fathers intended them to be applied to evolving social, technological, and economic conditions. The U.S. Constitution often is referred to as a “living document” because it is so adaptable.

States also have their own constitutions, often patterned after the U.S. Constitution, though many are more detailed. Provisions of state constitutions are valid unless they conflict with the U.S. Constitution or any valid federal law.

Treaties
The U.S. Constitution provides that the President, with the advice and consent of the U.S. Senate, may enter into treaties with foreign governments. Treaties become part of the supreme law of the land. With increasing international economic relations among nations, treaties will become an even more important source of law affecting business in the future.

Codified Law

Statutes are written laws that establish certain courses of conduct to which the covered parties must adhere. 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.

Examples Federal antitrust laws, securities laws, bankruptcy laws, labor laws, equal employment opportunity laws, environmental protection laws, consumer protection laws, and such.

State legislatures also enact state statutes.


The statutes enacted by the legislative branches of the federal and state governments are organized by topic into code books, often called codified law. Paralegals are often called upon to conduct research to find appropriate codified law for cases that they are assigned to.

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

Examples Traffic laws, local building codes, and zoning laws. Ordinances are also codified.
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.

Example  Congress has created the Securities and Exchange Commission (SEC) and the Federal Trade Commission (FTC), among others.

The U.S. 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. Because of their power, administrative agencies often are informally called the “fourth branch” of government.

Executive Orders

The executive branch of government, which consists of 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.

Example  On October 8, 2001, President George W. Bush by Executive Order established within the Executive Office of the President an Office of Homeland Security to be headed by the Assistant to the President for Homeland Security.

Judicial Decisions

When deciding individual lawsuits, federal and state courts issue judicial decisions. In these written opinions, the judge or justice usually explains the legal reasoning used to decide the case. These opinions often include interpretations of statutes, ordinances, administrative regulations, and the announcement of legal principles used to decide the case. Many court decisions are printed (reported) in books available in law libraries.

ETHICAL PERSPECTIVE

Paralegal’s Duty to Perform an Assignment

Mr. Harrington, a paralegal, works for attorney Ms. Zhou. Ms. Zhou represents a client who has been charged with insider trading in violation of federal securities laws. Ms. Zhou assigns Mr. Harrington the responsibility of conducting research and finding any relevant court decisions that would apply to the case and any administrative agency rules of the Securities and Exchange Commission (SEC) that might apply to the case as well. Mr. Harrington is to prepare a memorandum summarizing his findings for Ms. Zhou.

Mr. Harrington conducts computer research using Lexis and finds the U.S. Supreme Court and U.S. Court of Appeals decisions that are relevant to the case. But because researching of administrative agency rules is more difficult to conduct, Mr. Harrington fails to check these sources. Mr. Harrington reports his findings of relevant case law to Ms. Zhou, but reports that he has found no relevant SEC administrative rules relevant to the case.

Here, Mr. Harrington has been derelict in his duties in not performing the task he has been given. He has also engaged in deceit by reporting to Ms. Zhou, his supervising attorney, that he has found no relevant SEC agency rules when in fact he has not conducted such research at all. And finally, Mr. Harrington may cause damage to the client who may suffer a loss in court because the supervising attorney Ms. Zhou does not have all of the relevant information to properly prepare her defense for her client.
Priority of Law in the United States

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

The following feature discusses a paralegal’s ethical duty to perform lawful duties that are assigned to him or her.

The 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. That is why all federal and state courts in the United States must follow the precedents established by U.S. Supreme Court decisions.

The courts of one jurisdiction are not bound by the precedent established by the courts of another jurisdiction, although they may look to each other for guidance. Thus, state courts of one state are not required to follow the legal precedent established by the courts of another state.

Adherence to precedent is called *stare decisis* ("to stand by the decision"). The doctrine of *stare decisis* promotes uniformity of law within a jurisdiction, makes the court system more efficient, and makes the law more predictable for individuals and businesses. A court may change or reverse its legal reasoning later if a new case is presented to it and change is warranted.

The doctrine of *stare decisis* is discussed in the following excerpt from Justice Musmanno’s decision in *Flagiello v. Pennsylvania* [208 A.2d 193, 1965 Pa. Lexis 442 (Pa.1965)].

> Without *stare decisis*, there would be no stability in our system of jurisprudence. *Stare decisis* channels the law. It erects lighthouses and flies the signals of safety. The ships of jurisprudence must follow that well-defined channel which, over the years, has been proved to be secure and worthy.

Constitution of the United States of America

Prior to the American Revolution, each of the thirteen original colonies operated as a separate sovereignty under the rule of England. In September 1774, representatives of the colonies met as a Continental Congress. In 1776, the colonies declared their independence from England, and the American Revolution ensued.

The Constitutional Convention was convened in Philadelphia in May 1787, with the primary purpose of strengthening the federal government. After substantial debate, the delegates agreed to a new U.S. Constitution, reported to Congress in September 1787. State ratification of the Constitution was completed in 1788. Since that time, many amendments, including the Bill of Rights, have been added to the Constitution.

The U.S. Constitution serves several major functions:

1. It creates the three branches of the federal government (executive, legislative, and judicial) and allocates powers to these branches.
2. It grants the federal government certain authority to enact laws and enforce those laws.
3. It protects individual rights by limiting the government’s ability to restrict those rights.

The Constitution itself provides that it may be amended to address social and economic changes. The first page of the Constitution of the United States of America is provided in Exhibit 5.1.
Federalism and Delegated Powers
The U.S. form of government is referred to as federalism, which means that the federal government and the 50 state governments share powers. When the states ratified the Constitution, they delegated certain powers to the federal government. These delegated powers, also called enumerated powers, authorize the federal government to deal with national and international affairs. State governments have powers that are not specifically delegated to the federal government by the Constitution and are empowered to deal with local affairs.

Doctrine of Separation of Powers
The first three Articles of the Constitution divide the federal government into three branches:

1. Article I of the Constitution establishes the legislative branch of government, which is bicameral—consisting of the Senate and the House of Representatives—collectively referred to as Congress. Each state is allocated two senators. The number of representatives to the House of Representatives is determined by the population of each state. The current number of representatives is determined from the 2000 census.

2. Article II of the Constitution establishes the executive branch of government by providing for the election of the President and Vice President. The President is not elected by popular vote but, instead, by the electoral college, whose representatives are appointed by state delegations.

3. Article III establishes the judicial branch of the government in the Supreme Court and provides for the creation of other federal courts by Congress.
**Checks and Balances**

Certain **checks and balances** are built into the Constitution to ensure that no one branch of the federal government becomes too powerful. Some of the checks and balances in our system of government are as follows:

1. The judicial branch has authority to examine the acts of the other two branches of government and determine whether these acts are constitutional.
2. The executive branch can enter into treaties with foreign governments only with the advice and consent of the Senate.
3. The legislative branch is authorized to create federal courts and determine their jurisdiction and to enact statutes that change judicially made law.
4. The President has veto power over bills passed by Congress. The bill goes back to Congress, where a vote of two-thirds of each the Senate and the House of Representatives is required to override the President’s veto.
5. The President nominates persons to be U.S. Supreme Court justices, and many other federal judges, but the U.S. Senate must confirm the candidate before he or she becomes a judge.
6. The House of Representatives has the power to impeach the President for certain activities, such as treason, bribery, and other crimes. The Senate has the power to try the impeachment case, which requires a two-thirds vote of the Senate to impeach the President.

**Supremacy Clause**

The **Supremacy Clause** establishes that the federal Constitution, treaties, federal laws, and federal regulations are the supreme law of the land [Article VI, Section 2]. State and local laws that conflict with valid federal law are unconstitutional. The concept of federal law taking precedence over state or local law is called the **preemption doctrine**.

Congress may expressly provide that a specific federal statute **exclusively** regulates a specific area or activity. No state or local law regulating the area or activity is valid if there is such a statute. More often, though, federal statutes do not expressly provide for exclusive jurisdiction. In these instances, state and local governments have **concurrent jurisdiction** to regulate the area or activity. But any state or local law that “directly and substantially” conflicts with valid federal law is preempted under the Supremacy Clause.

**Example**  The United States government entered into treaties with other countries that established the size and length of oil tanker ships. Thus, oil tankers can transport oil between different countries using the same oil tankers. The state of Washington enacted a law that only permitted smaller oil tankers to enter its Puget Sound watercourse, which flows from waters of the Pacific Ocean. Oil tanker companies sued the state of Washington, arguing that the state law was unconstitutional. The U.S. Supreme Court held that the state law conflicted with federal law and was therefore preempted by the Supremacy Clause.

**Commerce Clause**

The **Commerce Clause** of the U.S. Constitution grants Congress the power “to regulate commerce with foreign nations, and among the several states, and with Indian tribes” [Article I, Section 8, Clause 3]. Because this clause authorizes the federal government to regulate commerce, it has a greater impact on business than any other provision in the Constitution. Among other things, this clause is intended to foster the development of a national market and free trade among the states.
The U.S. Constitution grants the federal government the power to regulate three types of commerce. These are:

1. Commerce with Indian tribes
2. Commerce with foreign nations
3. Interstate commerce

Native Americans

Before Europeans arrived in the “New World,” the land had been occupied for thousands of years by what we now refer to as Native Americans. When the United States was first founded over two centuries ago, it consisted of the original thirteen colonies, all located in the east, primarily on the Atlantic Ocean. At that time, these colonies (states), in the U.S. Constitution, delegated to the federal government the authority to regulate commerce with the Indian tribes. This included the original thirteen states as well as the territory that was to eventually become the United States of America.

Example The federal government enacted the Indian Gaming Regulatory Act \(^1\) wherein the federal government authorized Native American tribes to operate gaming facilities. This act sets the terms of casino gambling and other gaming activities on tribal land. Today, casinos operated by Native Americans can be found in many states. Profits from the casinos have become an important source of income for members of certain tribes.

Foreign Commerce

The Commerce Clause gives the federal government the exclusive power to regulate commerce with foreign nations. Direct or indirect regulation of foreign commerce by state or local governments violates the Commerce Clause and is therefore unconstitutional.

Example Suppose the state of Michigan imposes a 20 percent sales tax on foreign automobiles sold in Michigan but only 6 percent tax on domestic automobiles sold in Michigan. This state act violates the Commerce Clause because Michigan has regulated foreign commerce differently than state commerce. If Michigan placed a 20 percent sales tax on all automobiles sold in Michigan, this would not violate the Commerce Clause. Under its Foreign Commerce Clause power, the federal government could enact a federal law that places a 20 percent tax on foreign automobiles sold in the United States.

Interstate Commerce

The Commerce Clause gives the federal government the authority to regulate interstate commerce. Originally, the courts interpreted this clause to mean that the federal government could regulate only commerce that moved in interstate commerce. The modern rule, however, allows the federal government to regulate activities that affect interstate commerce.

Under the effects on interstate commerce test, the regulated activity does not itself have to be in interstate commerce. Thus, any intrastate (local) commerce that has an effect on interstate commerce is subject to federal regulation. Theoretically, this test subjects a substantial amount of business activity in the United States to federal regulation.

Example In the famous case of Wickard, Secretary of Agriculture v. Filburn [317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122, 1942 U.S. Lexis 1046 (U.S.)] a federal statute limited the amount of wheat a farmer could plant and harvest for home consumption. Filburn, a farmer, violated the law. The U.S. Supreme Court

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\(^1\) 25 U.S.C. Sections 2701–2721.
upheld the statute on the grounds that it prevented nationwide surpluses and shortages of wheat. The Court reasoned that wheat grown for home consumption would affect the supply of wheat available in interstate commerce.

**State Police Power**

The states did not delegate all power to regulate business to the federal government. They retained the power to regulate intrastate and much interstate business activity that occurs within their borders. This is commonly referred to as states’ police power.

Police power permits states (and, by delegation, local governments) to enact laws to protect or promote the public health, safety, morals, and general welfare. This includes the authority to enact laws that regulate the conduct of business.

**Examples** State environmental laws, corporation and partnership laws, property laws, and local zoning ordinances and building codes are enacted under this power.

**Bill of Rights and Other Amendments**

In 1791, the states approved the 10 amendments commonly referred to as the Bill of Rights, and they became part of the U.S. Constitution (see Exhibit 5.2). The Bill of Rights guarantees certain fundamental rights to natural persons and protects these rights from intrusive government action. Most of these rights, or “freedoms,” also have been found applicable to so-called artificial persons (i.e., corporations).

The First Amendment to the Constitution guarantees the rights of free speech, assembly, and religion. In addition to the Bill of Rights, seventeen amendments have been added to the Constitution. Two important clauses from these amendments are the Due Process Clause and the Equal Protection Clause. Because these amendments are continually litigated and are frequent subjects of U.S. Supreme Court opinions, they are singled out for discussion in the following paragraphs.
Freedom of Speech

One of the most honored freedoms guaranteed by the Bill of Rights is the freedom of speech of the First Amendment. Many other constitutional freedoms would be meaningless without it. The First Amendment’s Freedom of Speech Clause protects speech only, not conduct. The U.S. Supreme Court places speech into three categories: (1) fully protected, (2) limited protected, and (3) unprotected speech.

Fully Protected Speech

Fully protected speech is speech that the government cannot prohibit or regulate. Political speech is an example of such speech.

Example The government could not enact a law that forbids citizens from criticizing the current President.

The First Amendment protects oral, written, and symbolic speech.

Example If a person burns the American flag in protest of a current government policy, this is symbolic speech that is protected by the First Amendment.

Limited Protected Speech

The Supreme Court has held that certain types of speech are only limited protected speech under the First Amendment. Although the government cannot forbid this type of speech, it can subject this speech to restrictions of time, place, and manner. The following types of speech are accorded limited protection:

- Offensive speech is speech that offends many members of society. (It is not the same as obscene speech, however.) The Supreme Court has held that offensive speech may be restricted by the government under time, place, and manner restrictions.

  Example The Federal Communications Commission (FCC) can regulate the use of offensive language on television by limiting such language to times when children would be unlikely to be watching (e.g., late at night).

- Commercial speech is speech such as advertising and business solicitation. The Supreme Court has held that commercial speech is subject to proper time, place, and manner restrictions.

  Example A city could prohibit billboards along its highways for safety and aesthetic reasons as long as other forms of advertising (e.g., print media) are available to the commercial advertiser.

Unprotected Speech

There are certain types of speech that the U.S. Supreme Court has held has no protection under the Freedom of Speech Clause. These types of speech may be entirely prohibited by the government. The Supreme Court has held that the following types of speech are unprotected speech under the First Amendment and may be totally forbidden by the government:

- Dangerous speech (including such things as yelling “fire” in a crowded theater when there is no fire)
- Fighting words that are likely to provoke a hostile or violent response from an average person
- Speech that incites the violent or revolutionary overthrowing of the government; the mere abstract teaching of the morality and consequences of such action is protected
- Defamatory language
- Child pornography
- Obscene speech
**Definition of Obscene Speech**

The definition of *obscene speech* is quite subjective. One Supreme Court justice stated, “I know it when I see it” [Justice Stewart in *Faubelis v. Ohio*, 378 U.S. 184, 84 S.Ct. 1676 12 L.Ed.2d 793, 1964 U.S. Lexis 822 (U.S.)]. In *Miller v. California*, the Supreme Court determined that speech is obscene under the following circumstances.

1. The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest.
2. The work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.
3. The work, taken as a whole, lacks serious literary, artistic, political, or scientific value. [413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419, 1973 U.S. Lexis 149 (U.S.)]

States are free to define what constitutes obscene speech. Movie theaters, magazine publishers, Web operators, and so on are often subject to challenges that the materials they display or sell are obscene and, therefore, not protected by the First Amendment.

**Free Speech in Cyberspace**

Paralegals are at the forefront of witnessing development and application of traditional laws to the digital age. This is nowhere more relevant than the application of constitutional provisions—drafted centuries ago—to the modern age. Once or twice a century a new medium seems to come along that presents new problems in applying freedom-of-speech rights. This time it is the Internet. The following is a U.S. Supreme Court case that addressed free speech in cyberspace.

The U.S. Congress enacted the *Computer Decency Act* to regulate the Internet. This statute made it a felony to knowingly make “indecent” or “patently offensive” materials available on computer systems, including the Internet, to persons under 18 years of age. The Act provided for fines, prison terms, and loss of licenses for anyone convicted of violating its terms.

Immediately, cyberspace providers and users filed lawsuits challenging these provisions of the Act as violating their free speech rights granted under the First Amendment to the Constitution. Proponents of the Act countered that these provisions were necessary to protect children from indecent materials.

The U.S. Supreme Court decided to hear this issue. The Supreme Court came down on the plaintiff's side, overturning the challenged provisions of the Computer Decency Act. The Court found that the terms “indecent” and “patently offensive” were too vague to define and criminally enforce. The Supreme Court reasoned that limiting the content on the Internet to what is suitable for a child resulted in unconstitutional limiting of adult speech. The Court stated that parents can regulate their children's access to the Internet and can install blocking and filtering software programs to protect their children from seeing adult materials.

The Supreme Court declared emphatically that the Internet must be given the highest possible level of First Amendment free-speech protection. The Supreme Court stated,

> As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from government intrusion.

The Court also reasoned that because the Internet is a global medium, there would be no way to prevent indecent material from flowing over the Internet from abroad.2

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Protest, Los Angeles, California. The Freedom of Speech Clause of the First Amendment to the U.S. Constitution protects the right to engage in political speech. Freedom of speech is one of Americans’ most highly prized rights.

**Freedom of Religion**

The U.S. Constitution requires federal, state, and local governments to be neutral toward religion. The First Amendment actually contains two separate religion clauses:

1. The **Establishment Clause** prohibits the government from either establishing a state religion or promoting one religion over another. Thus, it guarantees that there will be no state-sponsored religion.

   **Example** The U.S. Supreme Court ruled that an Alabama statute that authorized a one-minute period of silence in school for “meditation or voluntary prayer” was invalid. The Court held that the statute endorsed religion.

   **Example** The U.S. Supreme Court held that copies of the Ten Commandments that were prominently displayed in large, gold-frames, and hung alone in the McCr Grey County courthouse and the Pulaski County courthouse in Kentucky, so that visitors could see them, violated the Establishment Clause.

2. The **Free Exercise Clause** prohibits the government from interfering with the free exercise of religion in the United States. Generally, this clause prevents the government from enacting laws that either prohibit or inhibit individuals from participating in or practicing their chosen religion.

   **Example** The federal, state, or local governments could not enact a law that prohibited all religions or that prohibited churches, synagogues, mosques, or temples. The government could not prohibit religious practitioners from celebrating their major holidays and high holy days. Of course, this right to be free from government intervention in the practice of religion is not absolute.

   **Example** Human sacrifices are unlawful and are not protected by the First Amendment.

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Due Process Clause

The Due Process Clause provides that no person shall be deprived of “life, liberty, or property” without due process of the law. It is contained in both the Fifth and the Fourteenth Amendments. The Due Process Clause of the Fifth Amendment applies to federal government action; that of the Fourteenth Amendment applies to state and local government action. The government is not prohibited from taking a person’s life, liberty, or property, but the government must follow due process to do so. There are two categories of due process: substantive and procedural.

Substantive Due Process

Substantive due process requires that government statutes, ordinances, regulations, or other laws be clear on their face and not overly broad in scope. The test of whether substantive due process is met is whether a “reasonable person” could understand the law to be able to comply with it. Laws that do not meet this test are declared void for vagueness.

Example A city ordinance that makes it illegal for persons to wear “clothes of the opposite sex” would be held unconstitutional as void for vagueness because a reasonable person could not clearly determine whether his or her conduct violates the law.
Procedural Due Process

Procedural due process requires that the government give a person proper notice and hearing of the legal action before that person is deprived of his or her life, liberty, or property. The government action must be fair.

Example If the federal government or a state government brings a criminal lawsuit against a defendant for the alleged commission of a crime, the government must notify the person of its intent (by charging the defendant with a crime) and provide the defendant with a proper hearing (a trial).

Example If the government wants to take a person’s home by eminent domain to build a highway, the government must (1) give the homeowner sufficient notice of its intention, and (2) provide a hearing. Under the Just Compensation Clause of the Fifth Amendment, the government must pay the owner just compensation for taking the property.

Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment to the Constitution, as interpreted by the U.S. Supreme Court, provides that state, local, and federal governments cannot deny to any person the “equal protection of the laws.” The clause prohibits governments from enacting laws that classify and treat similarly situated persons differently. The clause is designed to prohibit invidious government discrimination. Natural persons and businesses are protected.

The Equal Protection Clause has not been interpreted literally by the U.S. Supreme Court. The Supreme Court has held that some government laws that treat people or businesses differently are constitutional. The Supreme Court has adopted three different standards for determining whether a government action that treats some persons or businesses differently than others is lawful:

1. **Strict scrutiny test.** Any government activity or regulation that classifies persons based on a **suspect class** (i.e., race) is reviewed for lawfulness using a strict scrutiny test. Under this standard, most government classifications of persons based on race are found to be unconstitutional.

   Example A government rule that permitted persons of one race, but not of another race, to receive government benefits such as Medicaid, would violate this test. But affirmative action programs that give racial minorities a “plus factor” when considered for public university admission is lawful, as long as it does not constitute a quota system.

2. **Intermediate scrutiny test.** The lawfulness of government classifications based on **protected classes** other than race (such as sex or age) is examined using an intermediate scrutiny test. Under this standard, the courts determine whether the government classification is “reasonably related” to a legitimate government purpose.

   Example A rule prohibiting persons over a certain age from military combat would be lawful, but a rule prohibiting persons over a certain age from acting as government engineers would not be. With regard to a person’s gender, the U.S. Supreme Court has held that the federal government can require males, but not females, to register with the military for a possible draft.
3. **Rational basis test.** The lawfulness of all government classifications that do not involve suspect or protected classes is examined using a rational basis test. Under this test, the courts will uphold government regulation as long as there is a justifiable reason for the law. This standard permits much of the government regulation of business.

**Example**  Providing government subsidies to farmers but not to those in other occupations is permissible.

The ethical duty and social responsibility of a paralegal professional to avoid conflicts of interest is discussed in the following feature.

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**ETHICAL PERSPECTIVE**

**Paralegal’s Duty to Avoid Conflicts of Interest**

Ms. Jennifer Adams is hired as a paralegal at a law firm with expertise in real estate development law. She recently left a paralegal position at another law firm to take the new paralegal position with the current law firm.

At the new firm, Ms. Adams is assigned to work as the paralegal for Mr. Humberto Cruz, a senior partner of the law firm. Mr. Cruz is an expert in complex real estate transactions representing clients in the purchase, development, and leasing of large shopping malls. One client whom Mr. Cruz represents is Modern Properties L.P., a limited partnership that constructs and operates retail shopping malls across the country.

One day Mr. Cruz asks Ms. Adams to attend a meeting with himself and the president of Modern Properties L.P. At the meeting, the president discloses a dispute that the partnership has with a tenant, Third National Bank, concerning the lease of a building by Third National Bank at a mall constructed and operated by Modern Properties L.P. The president explains that Third National Bank has filed a lawsuit against Modern Properties L.P. concerning this dispute. The president further explains that the partnership wants Mr. Cruz to represent the partnership in this lawsuit.

Ms. Adams realizes that her prior law firm represented Third National Bank in many lawsuits, and that she had worked as the paralegal on several of the cases involving Third National Bank. During the course of this work, she became privy to confidential information about Third National Bank, including its financial condition, operations, and legal strategy.

Does Ms. Adams have a conflict of interest? If so, what should she do?

Model and state paralegal Code of Ethics and Professional Responsibility provide that a paralegal is under a duty to avoid conflicts of interest. Thus, a paralegal cannot conduct work on any matter where there would be a conflict of interest with a present or past employer or with a client.

**PARALEGAL’S ETHICAL DECISION**

Thus, Ms. Adams must immediately disclose the fact that she previously worked on cases involving Third National Bank at the prior law firm where she was employed, and that because of that employment she possesses confidential information about Third National Bank. Because of this conflict of interest, Ms. Adams must excuse herself from working on the *Third National Bank v. Modern Properties L.P.* case.
**Concept Review and Reinforcement**

**LEGAL TERMINOLOGY**

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<th>Federal statutes</th>
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<th>Full protected speech</th>
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<th>Merchant court</th>
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<th>Obscene speech</th>
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<th>Unprotected speech</th>
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**SUMMARY OF KEY CONCEPTS**

**What Is Law?**

**Definition**

Law consists of a body of rules of action or conduct prescribed by controlling authority and having binding legal force.

**Functions of Law**

1. Keep the peace
2. Shape moral standards
3. Promote social justice
4. Maintain the status quo
5. Facilitate orderly change
6. Facilitate planning
7. Provide a basis for compromise
8. Maximize individual freedom

**Fairness**

Although the American legal system is one of the fairest and most democratic systems of law, abuses and mistakes in the application of the law still occur.

**Flexibility**

The law must be flexible to meet social, technological, and economic changes.
### Schools of Jurisprudential Thought

<table>
<thead>
<tr>
<th>School</th>
<th>Belief</th>
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<tbody>
<tr>
<td>Natural Law</td>
<td>Postulates that law is based on what is “correct”; it emphasizes a moral theory of law—that is, law should be based on morality and ethics.</td>
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<tr>
<td>Historical</td>
<td>Believes that law is an aggregate of social traditions and customs.</td>
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<td>Analytical</td>
<td>Maintains that law is shaped by logic.</td>
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<td>Sociological</td>
<td>Asserts that the law is a means of achieving and advancing certain sociological goals.</td>
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<td>Command</td>
<td>Believes that the law is a set of rules developed, communicated, and enforced by the ruling party.</td>
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<tr>
<td>Critical Legal Studies</td>
<td>Maintains that legal rules are unnecessary and that legal disputes should be solved by applying arbitrary rules based on fairness.</td>
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<tr>
<td>Law and Economics</td>
<td>Believes that promoting market efficiency should be the central concern of legal decision making.</td>
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### History of American Law

**English Common Law**

English common law (judge-made law) forms the basis of the legal systems of most states in this country. Louisiana bases its law on the French civil code.

### Sources of Law in the United States

**Constitutions**

The U.S. Constitution establishes the federal government and enumerates its powers. Powers not given to the federal government are reserved to the states. State constitutions establish state governments and enumerate their powers.

**Treaties**

The President, with the advice and consent of the Senate, may enter into treaties with foreign countries.

**Codified Law**

1. **Statutes** are enacted by Congress and state legislatures.
2. **Ordinances** and statutes are passed by municipalities and local government bodies to establish courses of conduct that must be followed by covered parties.

**Administrative Agencies**

Administrative agencies are created by the legislative and executive branches of government; they may adopt rules and regulations that govern the conduct of covered parties.

**Executive Orders**

Executive orders, issued by the President and governors of states, regulate the conduct of covered parties.

**Judicial Decisions**

Courts decide controversies by issuing decisions that state the holding of each case and the rationale the court used to reach that decision.

### Doctrine of Stare Decisis

**Definition**

*Stare decisis* means “to stand by the decision.” This doctrine provides for adherence to precedent.

### Constitution of the United States of America

**Scope**

The Constitution consists of seven articles and 27 amendments. It establishes the three branches of the federal government, enumerates their powers, and provides important guarantees of individual freedom. The Constitution was ratified by the states in 1788.
## Basic Constitutional Concepts

1. **Federalism:** The Constitution created the federal government, which shares power with the state governments.

2. **Delegated powers:** When the states ratified the Constitution, they delegated certain powers, called **enumerated powers**, to the federal government.

3. **Reserved powers:** Those powers not granted to the federal government by the Constitution are reserved to the states.

4. **Separation of powers:** Each branch of the federal government has separate powers.
   - Legislative branch—power to make the law
   - Executive branch—power to enforce the law
   - Judicial branch—power to interpret the law

5. **Checks and balances:** Certain checks and balances are built into the Constitution to ensure that no one branch of the federal government becomes too powerful.

## Supremacy Clause

The Supremacy Clause stipulates that the U.S. Constitution, treaties, and federal law (statutes and regulations) are the **supreme law of the land**. State or local laws that conflict with valid federal law are unconstitutional. This is called the **preemption doctrine**.

## Commerce Clause

1. **Commerce Clause:** Authorizes the federal government to regulate commerce with foreign nations, among the states, and with Indian tribes.

2. **Interstate commerce:** Under the broad **effects test**, the federal government may regulate any activity (even intrastate commerce) that affects interstate commerce.

3. **Police Powers:** Power reserved to the states to regulate commerce.

## Bill of Rights and Other Amendments

1. **Bill of Rights:** The Bill of Rights consists of the first 10 amendments to the Constitution. They establish basic individual rights. The Bill of Rights was ratified in 1791.

2. **Other amendments:** In addition to the 10 amendments of the Bill of Rights, there are seventeen other amendments to the U.S. Constitution.

## Freedom of Speech

**Freedom of Speech Clause** of the First Amendment guarantees that the government shall not infringe on a person’s right to speak. Protects oral, written, and symbolic speech. This right is not absolute—that is, some speech is not protected and other speech is granted only limited protection. The U.S. Supreme Court has placed speech in the following three categories:

1. **Fully protected speech:** Speech that cannot be prohibited or regulated by the government

2. **Limited protected speech:** Types of speech that are granted only limited protection under the Freedom of Speech Clause—that is, they are subject to governmental **time, place, and manner restrictions**:
   - Offensive speech
   - Commercial speech

3. **Unprotected speech:** Speech that is not protected by the Freedom of Speech Clause:
   - Dangerous speech
   - Fighting words
   - Speech that advocates the violent overthrow of the government
   - Defamatory language
   - Child pornography
   - Obscene speech
**Freedom of Religion**

There are two religion clauses in the First Amendment. They are:

1. **Establishment Clause.** Prohibits the government from establishing a state religion or promoting religion
2. **Free Exercise Clause.** Prohibits the government from interfering with the free exercise of religion. This right is not absolute: for example, human sacrifices are forbidden.

**Due Process Clause**

Due Process Clause provides that no person shall be deprived of “life, liberty, or property” without due process. There are two categories of due process:

1. **Substantive due process:** Requires that laws be clear on their face and not overly broad in scope. Laws that do not meet this test are *void for vagueness*.
2. **Procedural due process:** Requires that the government give a person proper notice and hearing before that person is deprived of his or her life, liberty, or property. An owner must be paid *just compensation* if the government takes his or her property.

**Equal Protection Clause**

Equal Protection Clause prohibits the government from enacting laws that classify and treat “similarly situated” persons differently. This standard is not absolute and the government can treat persons differently in certain situations. The U.S. Supreme Court has applied the following tests to determine if the Equal Protection Clause has been violated:

1. **Strict scrutiny test.** Applies to *suspect classes* (e.g., race, national origin)
2. **Intermediate scrutiny test.** Applies to other *protected classes* (e.g., sex, age)
3. **Rational basis test.** Applies to government classifications that do not involve a suspect or protected class

**WORKING THE WEB**

1. Go to the website http://www.usconstitution.net/const.html. Scroll down to “Amendment 7.” When was this amendment ratified? What does this amendment provide? Explain.
2. Visit the website http://www.archives.gov/exhibits/charters/charters.html. A page entitled “The Charters of Freedom—A New World is at Hand” will appear on your computer screen. Do the following exercises:
   b. On the page shown, click on the sixth icon from the left. Read the article “The Constitutional Convention—Creation of the Constitution.” How many states were required to ratify the Constitution for it to be enacted?
   c. At the top of the page shown, click on the second-to-the-last icon from the right. Read the article “Expansion of Rights and Liberties—The Right of Suffrage.” What amendment to the U.S. Constitution gave women the right to vote? What year was this amendment ratified?
3. Visit the website http://www.senate.gov/. Click on the word “Senators.” Who are the two senators who represent your state in the U.S. Senate? Go to each senator’s website and email the senator, expressing your view on a legal issue in which you are interested.
4. Visit the website http://www.house.gov/. Who is the person who represents your home district? Go to that representative’s website and read about his or her position on a current legal issue. What is the issue, and what is your representative’s view on it?
5. Go to http://google.com. Choose a country in which you are interested and search for a treaty of this country (e.g., “China treaty”). Briefly describe this treaty.
CRITICAL THINKING & WRITING QUESTIONS

1. Define the “law.” Is this an easy concept to define? Why?
2. What functions does the law serve? Which of these functions do you think is the most important?
3. Is the law always fair? Give an example of where you think the law was applied unfairly.
4. Should the language of the U.S. Constitution be applied in its original meaning, or should it be applied in a more expansive sense? Explain.
5. What is the power of the legislative branch of government? What is a statute?
6. Do you think that the U.S. Supreme Court makes law when it interprets the U.S. Constitution? Explain.
7. What is the doctrine of stare decisis? Why is this doctrine important?
8. What does the doctrine of federalism provide?
9. What does the doctrine of separation of powers provide? Can you give any examples where the separation of the powers of the three branches of government is blurred?
10. What does the doctrine of checks and balances provide? Can you give any examples where one branch of the government checks the power of another branch of the government?
11. What does the Supremacy Clause provide? What would be the consequences if the Supremacy Clause did not exist? Explain.
13. The First Amendment to the U.S. Constitution contains the Freedom of Speech Clause. Explain the difference between fully protected speech, partially protected speech, and unprotected speech.
14. The U.S. Constitution guarantees freedom of religion. Explain the difference between the Establishment Clause and the Free Exercise Clause. Can you give an example of a legitimate government restriction of a possible religious practice?
15. What is the difference between substantive due process and procedural due process? Explain.
16. What does the Equal Protection Clause provide? Explain the differences between the (a) strict scrutiny test, (b) intermediate scrutiny test, and (c) rational basis test.

Building Paralegal Skills

VIDEO CASE STUDIES

Difference Between a Criminal and a Civil Trial

An interview with Judge Kenney, a trial court judge, who discusses the difference between a civil and a criminal trial.

After viewing the video case study at www.pearsonhighered.com/goldman answer the following:

1. What are the differences in the burden of proof between a criminal and civil matter?
2. What protections does the U.S. Constitution afford those accused of criminal acts?

Confidentiality Issue: Attorney–Client Privilege

Paralegal Alicia Jackson meets with a client to review answers to documents that must be sent to opposing counsel. While reviewing the answers he tells her about a potentially fraudulent claim.

After viewing the video case study at www.pearsonhighered.com/goldman answer the following:

1. Does the attorney–client privilege apply to information given to a paralegal?
2. To whom does the privilege belong?
3. How is the attorney–client privilege different from the duty of confidentiality?

A School Principal Reacts: Student Rights Versus School’s Duty

As the result of an altercation in a school bus, and a claim that the student involved had a contraband knife on his person, the principal has ordered that he be searched for the knife.

After viewing the video case study at www.pearsonhighered.com/goldman answer the following:

1. Does a student have a constitutional right of privacy?
2. Does the school have a right to search a student?
3. Is the school district and those working for it immune from suit for the actions taken?
1. Are there any ethical issues in allowing one’s personal feelings to be expressed in working on a case? What if you have strong feelings against the client’s position?

2. Does the American system of law depend on the legal team to put aside its personal beliefs and work diligently on unpopular cases or issues? How does this ensure equal justice and allow for change in the system?

3. You are working in a law firm for an attorney who has had a series of strokes that have caused a permanent reading disability and memory impairment. Do you have any ethical obligation to the attorney’s clients? Do you have any ethical obligation to the firm and to the attorney? [Philadelphia Ethics Opinion 2002-12 (2000); also, see Texas Ethics Opinion 522 (1997)].

DEVELOPING YOUR COLLABORATION SKILLS

With a group of other students, selected by you or as assigned by your instructor, review the facts of the following case. As a group, discuss the following questions.

1. What does the federal Driver’s Privacy Protection Act mandate?

2. Was the federal Driver’s Privacy Protection Act (DPPA) properly enacted by the U.S. Congress pursuant to the Commerce Clause power granted to the federal government by the U.S. Constitution?

3. Did the sale of drivers’ personal information by the states violate a driver’s right to privacy?

Reno, Attorney General of the United States v. Condon, Attorney General of South Carolina

State Departments of Motor Vehicles (DMVs) register automobiles and issue driver’s licenses. State DMVs require automobile owners and drivers to provide personal information, which includes a person’s name, address, telephone number, vehicle description, Social Security number, medical information, and a photograph, as a condition for registering an automobile or obtaining a driver’s license.

Many states’ DMVs sold this personal information to individuals, advertisers, and businesses which then used this information to solicit business from the registered automobile owners and drivers. Sales of automobile owners’ and drivers’ personal information generated significant revenues for the states.

After receiving thousands of complaints from individuals whose personal information had been sold, the Congress of the United States enacted the Driver’s Privacy Protection Act of 1994 (DPPA). This federal statute prohibits a state from selling the personal information of a person unless the state obtains that person’s affirmative consent to do so. South Carolina sued the United States, alleging that the federal government did not have power under the Commerce Clause of the U.S. Constitution to adopt the federal DPPA that prohibits the state from selling personal information of its registered automobile owners and drivers.


PARALEGAL PORTFOLIO EXERCISE

Research and find an article that discusses a Federal Communications Commission (FCC) clash with a radio, cable, or television station regarding the subject matter that it may broadcast. Write a memorandum, no longer than two pages, that discusses this dispute and the outcome of the case.
PART II  Introduction to Law

LEGAL ANALYSIS & WRITING CASES

Youngstown Co. v. Sawyer, Secretary of Commerce  
343 U.S. 579, 72 S.Ct. 863, 96 L.Ed.2d 1153,  
Web 1952 U.S. Lexis 2625

Supreme Court of the United States
In 1951, a dispute arose between steel companies and their employees about the terms and conditions that should be included in a new labor contract. At the time, the United States was engaged in a military conflict in Korea that required substantial steel resources from which to make weapons and other military goods.

On April 4, 1952, the steelworkers’ union gave notice of a nationwide strike called to begin at 12:01 A.M. on April 9. The indispensability of steel as a component in weapons and other war materials led President Dwight D. Eisenhower to believe that the proposed strike would jeopardize the national defense and that governmental seizure of the steel mills was necessary to ensure the continued availability of steel. Therefore, a few hours before the strike was to begin, the President issued Executive Order 10340, which directed the Secretary of Commerce to take possession of most of the steel mills and keep them running. The steel companies obeyed the order under protest, and brought proceedings against the President.

Question
1. Was the seizure of the steel mills constitutional?

Bonito Boats, Inc. v. Thunder Craft Boats, Inc.  
489 U.S. 141, 109 S.Ct. 971, 103 L.Ed.2d 118,  
Web 1989 U.S. Lexis 629

Supreme Court of the United States
Article 1, Section 8, Clause 8 of the U.S. Constitution grants Congress the power to enact laws to give inventors the exclusive right to their discoveries. Pursuant to this power, Congress enacted federal patent laws that establish the requirements to obtain a patent. Once a patent is granted, the patent holder has exclusive rights to use the patent.

Bonito Boats, Inc. developed a hull design for a fiberglass recreational boat that it marketed under the trade name Bonito Boats Model 5VBR. The manufacturing process involved creating a hardwood model that was sprayed with fiberglass to create a mold. The mold then served to produce the finished fiberglass boats for sale. Bonito did not file a patent application to protect the utilitarian or design aspects of the hull or the manufacturing process.

After the Bonito 5VBR was on the market for six years, the Florida legislature enacted a statute prohibiting the use of a direct molding process to duplicate unpatented boat hulls and forbade the knowing sale of hulls so duplicated. The protection afforded under the state statute was broader than that provided for under the federal patent statute.

Subsequently, Thunder Craft Boats, Inc. produced and sold boats made by the direct molding process. Bonito sued Thunder Craft under Florida law.

Question
1. Is the Florida statute valid?

Rostker, Director of the Selective Service v. Goldberg  
453 U.S. 57, 101 S.Ct. 2646, 69 L.Ed.2d 478, 69 L.Ed.2d 478,  
Web 1981 U.S. Lexis 126

Supreme Court of the United States
In 1975, after the war in Vietnam, the U.S. government discontinued draft registration for men in this country. In 1980, after the Soviet Union invaded Afghanistan, President Jimmy Carter asked Congress for funds to reactivate draft registration. President Carter suggested that males and females alike be required to register. Congress allocated funds only for the registration of males. Several men who were subject to draft registration brought a lawsuit that challenged the law as being unconstitutional in violation of the Equal Protection Clause of the U.S. Constitution. The U.S. Supreme Court upheld the constitutionality of the draft registration law, reasoning as follows:

This is not a case of Congress arbitrarily choosing to burden one of two similarly situated groups, such as would be the case with an all-black or all-white, or an all-Catholic or all-Lutheran, or an all-Republican or all-Democratic registration. Men and women are simply not similarly situated for purposes of a draft or registration for a draft.

Justice Marshall dissented, stating that “The Court today places its imprimatur on one of the most potent remaining public expressions of ‘ancient canards about the proper role of women.’ It upholds a statute that requires males but not females to register for the draft, and which thereby categorically excludes women from a fundamental civic obligation. I dissent.”

Question
1. Was the decision fair? Was the law a “progressive science” in this case? Was it ethical for males, but not females, to have to register for the draft?
CHAPTER 5 American Legal Heritage and Constitutional Law


Supreme Court of the United States

Read the following case, excerpted from the U.S. Supreme Court’s opinion. Review and brief the case. In your brief, answer the following questions.

1. Who are the plaintiff and defendant?
2. What does the Establishment Clause provide?
3. What test did the court use to determine if the practice violates the Establishment Clause?
4. Was the fact that the prayer was nonsectarian important to the Supreme Court’s decision?
5. Is nonsectarian prayer permitted under the Establishment Clause?
6. How close was the vote by the justices in this case?

Van Orden v. Perry, Governor of Texas, 125 S.Ct. 2854 162 L.Ed.2d 607, Web 2005 U.S. Lexis 5215

Supreme Court of the United States

The 22 acres surrounding the Texas State Capital contains seventeen monuments and twenty-one historical markers. The monuments and markers commemorate the people and historical events of Texas. Some of the monuments are: Heroes of the Alamo, confederate Soldiers, a Texas Cowboy, Texas Pioneer Women, Disabled Veterans, and Texas Police Officers. One monument is a 6-feet high and 3-feet wide monument on which is carved an eagle grasping an American flag, an eye inside a pyramid, Stars of David, Greek letters, and the Ten Commandments. This monument has been on the grounds for more than 40 years.

Thomas Van Orden, a native Texan and resident of Austin, Texas, where the Texas State Capitol is located, sued to have the Ten Commandments’ monument removed, alleging that the monument violated the Establishment Clause of the U.S. Constitution. The U.S. District Court held that the monument did not violate the Establishment Clause, finding that the monument had a secular purpose. The U.S. Court of Appeals affirmed. Van Orden appealed to the U.S. Supreme Court.

Grutter v. Bollinger, Dean of the University of Michigan Law School, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304, Web 2003 U.S. Lexis 4800

Grutter brought a class action lawsuit against the Law School of the University of Michigan, alleging that its use of a minority’s race as a plus factor in admissions violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The District Court held that the Law School’s use of race as a factor in admissions violated the Equal Protection Clause. The Court of Appeals reversed. The U.S. Supreme Court granted certiorari to hear the appeal.

Question

1. Does the University of Michigan Law School’s use of race as a plus factor in accepting minority applicants for admission to the Law School violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution?
Kennedy, Justice (joined by Blackmun, Stevens, O'Connor, and Souter)

Deborah Weisman graduated from Nathan Bishop Middle School, a public school in Providence, Rhode Island, at a formal ceremony in June 1989. She was about 14 years old. For many years it has been the policy of the Providence school committee and the Superintendent of Schools to permit principals to invite members of the clergy to give invocations and benedictions at middle school and high school graduations. Many, but not all, of the principals elected to include prayers as part of the graduation ceremonies. Acting for himself and his daughter, Deborah's father, Daniel Weisman, objected to any prayers at Deborah's middle school graduation, but to no avail. The school principal, petitioner Robert E. Lee, invited a rabbi to deliver prayers at the graduation exercises for Deborah's class. Rabbi Leslie Gutterman, of the Temple Beth El in Providence, accepted.

It also has been the custom of Providence school officials to provide invited clergy with a pamphlet entitled “Guidelines for Civic Occasions,” prepared by the National Conference of Christians and Jews. The Guidelines recommended that public prayers at nonsectarian civic ceremonies be composed with “inclusiveness and sensitivity,” though they acknowledge that “prayer of any kind may be inappropriate on some civic occasions.” The principal gave Rabbi Gutterman the pamphlet before the graduation and advised him that the invocation and benediction should be nonsectarian.

Deborah's graduation was held on the premises of Nathan Bishop Middle School on June 29, 1989. Four days before the ceremony, Daniel Weisman, in his individual capacity as a Providence taxpayer and as next friend of Deborah, sought a temporary restraining order in the United States District Court for the District of Rhode Island to prohibit school officials from including an invocation or a benediction in the graduation ceremony. The court denied the motion for lack of adequate time to consider it. Deborah and her family attended the graduation, where the prayers were recited.

In July 1989, Daniel Weisman filed an amended complaint seeking a permanent injunction barring petitioners, various officials of the Providence public schools, from inviting the clergy to deliver invocations and benedictions at future graduations.

The case was submitted on stipulated facts. The District Court held that petitioners’ practice of including invocations and benedictions in public school graduations violated the Establishment Clause of the First Amendment, and it enjoined petitioners from continuing the practice. The court applied the three-part Establishment Clause test. Under that test, to satisfy the Establishment Clause a governmental practice must (1) reflect a clearly secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) avoid excessive government entanglement with religion. On appeal, the United States Court of Appeals for the First Circuit affirmed.

These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

The controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here that the policy of the city of Providence is an unconstitutional one. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which “establishes a state religion or religious faith, or tends to do so.”

We are asked to recognize the existence of a practice of nonsectarian prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.

The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.

For the reasons we have stated, the judgment of the Court of Appeals is affirmed.