The American Legal System

Foundations, Processes, and Norms

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Chapter 1

Law in Perspective

Chapter Objectives

Students are encouraged not only to learn the formal legal rules but also to discern who benefits from the law in the broader societal context. It is important to understand that legal actors possess discretion and make choices, in some part, based on their values and attitudes. Readers should become familiar with the main outlines of competing schools of jurisprudence, and they should become aware of the branches and functions of law in society. Because the power to persuade is real, students are urged to take legal reasoning seriously, for example, by learning how to read and analyze court opinions. Students are provided with guidelines for briefing court opinions, and they are urged to apply these guidelines to the edited opinions as presented throughout this book.

Human relationships are governed by informal and formal standards of conduct called norms. Law is the political mechanism by which those who are in charge of society create and enforce social, economic, and political norms. Well-meaning persons often debate whether particular norms are in the interest of the many or just a few. For the ancient Greeks, a good democracy meant that the government be responsive to the interest of the whole people. Today we refer to this as the common interest, public good, justice, and general will.

It is well understood, however, that the ancient Greek ideal of a good democracy is not easily obtained in real life. Organized political forces operate in all societies to impose their own view of the public interest on weaker interests, the dispossessed,

and the powerless. In democratic polities, majorities are better situated to combat the selfish demands of special interests than they are in authoritarian or totalitarian regimes. But, even in democracies such as the United States, there is no guarantee that special interests will not get their way. Often they do. Laws are frequently the result of clashing competing interests that in the end bear little relation to the "public good."

Thus, civic realities require students, politicians, and realists of all ideological stripes to cast democratic theory and the role of law in terms related to specific contexts. Though this text asks students to read and to comprehend many court opinions in all their parts, readers are also prodded to look beyond the details of particular facts, issues, holdings, and reasoning to consider the following: who gets what, when, and how. Yes, discerning legal rules is important, but understanding the legal system itself is our fundamental goal. In sum, one needs to analyze legal issues in the broader context of political, social, and economic reality.

Consider, for example, the problem of adjudication from the lawyers' viewpoint. Attorneys try to justify or shape their clients' conduct under often ambiguous and uncertain sets of rules. Typically, they help solve problems for interest groups in society by representing them before administrative, legislative, and judicial bodies. They are asked to engage in a complex process of predicting what a court as an institution will decide given certain facts. Yet, facts are often in dispute, and what set of legal rules might be applicable to those particular facts is not always easily discernable. To make a complex problem even more problematical, the decision-making process must deal with ideas influenced by attitudes and values. Judges and juries do not always act in a dispassionate and objective manner because attitudes and values color their perception of social events. Thus, judicial reasoning is not simply an objective matter in which a mechanical formula, such as facts multiplied by rules equals decisions ($f \times r = d$), will suffice.

Then, too, judges must exercise their discretion because rules are often imprecise. What is the meaning of such words and phrases as "legal consideration," "negligence," "due process of law," "unreasonable search and seizure," and "commerce among the states"? Each concept needs interpretation, and there is no consensus about the best way to accomplish the task. Moreover, although judges are expected to be neutral toward the litigants before them, it is asking the improbable if not the impossible for them not to have attitudes toward the great issues of the day. They are, after all, products of their environments with different ideas of what is just in any given situation.

Indeed, the politics of judicial selection presupposes that attitudes and values profoundly affect case outcomes. If we were serious about recruiting judges on the basis of who knows the legal rules best, we might select them exclusively on the results of specially designed com-

petitive examinations, ranking candidates by their test results. Instead, in many U.S. jurisdictions, political criteria are openly employed when selecting judges and justices because it is well understood that they possess considerable discretion and that their attitudes make a profound difference when deciding cases.

Nevertheless, most law and law-related courses offered at institutions of higher learning require students to carefully read and analyze the logic of judicial opinions. If judicial decision-making is not simply a matter of logic, however, why then is it important to read court opinions with a view toward understanding the legal logic inherent in the case law? The answer is that judges are constrained by institutional norms prescribing the limits of their conduct. That is, legal institutions grant legal professionals leeway, but judges do not have license to do as they please. Therefore, it is important to understand legal professionals on their own terms and in their own institutional environment. This insight permits us a realistic picture of what the legal rule is on given subjects, the rhetoric of legal reasoning, and how law changes within the U.S. legal system.

With the foregoing in mind, students are well advised to carefully study each case and to brief court opinions found in this text as the instructor may require. It is also critical that students exercise their sociological imagination—to place themselves in the shoes of decision makers—so as to comprehend the factors influencing any given judicial opinion. Carefully writing case briefs will not ensure such an outcome, but it is a valuable exercise toward this end. See the final pages of this chapter for instructions on how to brief court opinions.

Origins of Law

Ordinarily when the word *law* is used in a legal (i.e., not a scientific or a theological) context, one is referring to norms made by a sovereign to govern relations among individuals and between individuals and government in its various configurations. This is called *positive law*: rules and regulations made by executives, legislators, bureaucrats, and judges. On the other hand, it is said that *natural law* exists independent of humankind; it takes various forms as commands of the natural order in the universe. Often it is portrayed as God's law, which is known by human reason. To advocates of natural law, lawmakers ought to apply the natural law to the positive law in the implementation of justice.

In this text, your authors do not dwell on the natural law. Yet, the natural law may be a source for guidance. For example, some people claim that abortion violates God's law to protect human life and human law ought to reflect this value. Or, at the turn of the twentieth century, U.S. Supreme Court justices elevated the "liberty of contract" to a natural law, forbidding government in some cases to regulate working con-

ditions. The justices thereby embedded *laissez-faire* economics within the constitutional system. (For example, see the summary of *Lochner v. New York* below.)

Box 1.1 Summary of Lochner v. New York
U.S. Supreme Court
198 U.S.45 (1905)

A New York bakery owner was convicted for violating a state statute prohibiting bakery employees from working more than 10 hours a day or more than 60 hours per week. The majority opinion of the U.S. Supreme Court found that although health and safety laws are permissible limitations on contracts, this particular law did not bear a reasonable relationship to public health or the health of bakers. Consequently, the legislation violated the liberty provision of the Due Process Clause of the Fourteenth Amendment. This and related decisions of the high court were criticized as a usurpation of legislative authority and excessively subjective, allowing justices to substitute their social philosophy for those of elected legislative officials. In dissent, Justice Oliver Wendell Holmes epitomized this criticism, writing in part:

> The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*. . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

Positive law makes no claims to moral superiority, however. Its authority rests either in legislation made by a duly constituted legislative or parliamentary body, administrative rules and regulations made pursuant to statutory authorization, and by judges who make law when creating new rules from preexisting rules or legal principles. Judges also make new law when there is no law to guide them, such as when no credible preexisting precedent or legislation can inform their decision in a present case.

Because a considerable number of basic legal rules have been created by judges and not by legislators, the Anglo-American legal system is often referred to as being in the *common law* tradition. In truth, the Anglo-American system is a combination of judge-made law and legislative-made law. Both types of lawmaking bodies are regarded as legitimate norm creators and interpreters. However, if legislative bodies do not approve of the law made by courts, they have the authority to re-

write the law. Ordinarily, when they do so, it effectively overrules what the judges have decided the legal rules to be.

In America, when judges and justices make rules for interpreting the meaning of the U.S. Constitution and legislators seek to overturn these court interpretations, the relationship between the legislative and judicial branches becomes less certain and interinstitutional conflict can and does occur. For example, in 1993 Congress enacted the *Religious Freedom Restoration Act* to overturn the substance of a 1990 U.S. Supreme Court decision (Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872) that had used a constitutional test making it relatively easy for states to interfere with the First Amendment right to the free exercise of religion. And, in City of Boerne v. Flores, 521 U.S. 507 (1997), the U.S. Supreme Court held that Congress may not define how the Court itself exercises its own authority to determine what the Constitution means. The Court's majority used the occasion to echo John Marshall's pronouncement in Marbury v. Madison, 5 U.S. (Cranch) 137 (1803), that "it is emphatically the province and duty of the judicial department to say what the law is."

Box 1.2 Summary of City of Boerne v. Flores
U.S. Supreme Court
521 U.S. 507, 138 L.Ed.2d, 117 S.Ct. 2157 (1997)

The diocese of San Antonio, Texas, unsuccessfully sought a building permit to expand its church in the city of Boerne. City officials justified their denial by citing the historic mission style of the existing structure. Archbishop Flores then brought suit under the *Religious Freedom Restoration Act of 1991* (RFRA). The congressional enactment was passed with broad bipartisan support in an explicit attempt to reverse a prior divided Supreme Court decision [*Employment Division of the Department of Human Resources of Oregon v. Smith* (1990)]. The high court in that case employed the *rational basis test* instead of the previously accepted, but tougher, pro-civil liberties–preferred freedoms approach of *compelling state interest* when deciding free exercise of religion cases. A federal district court found in favor of the city, but the U.S. Court of Appeals reversed the lower court.

Writing for the majority, Justice Anthony Kennedy held that the RFRA provision requiring a *compelling state interest test* rather than a *rational basis test* is beyond the power of Congress under the Enforcement Clause of the Fourteenth Amendment. It is the task of the Supreme Court to say what the Constitution means, not the Congress.

In contrast to the common law system born in England, the *civil law* tradition is a system of jurisprudence based on Roman law found today in European nations and many other countries around the world.

In this family of laws, judges are said to be completely subservient to legislative institutions. Traditional adherents to this particular family of laws maintain that the only legitimate role of judges is to find and then to apply the appropriate legal rule to the case at hand. Rules are made by the legislature, usually in the form of extensive codes that systematically arrange the law into various substantive or procedural topics; for example, the criminal code, the code of civil procedure, and the tax code. The judge's task is to find and then apply an appropriate rule to particular sets of facts.

Actually, there is a growing consensus that the civil law and common law legal families have much more in common than our description suggests. In both systems, judges have opportunities to create legal rules and in both systems legislators have considerable influence over the content of the law.[1]

Most countries of Western and Eastern Europe employ the civil law system. Latin America and parts of Asia and Africa are profoundly influenced by this tradition because of the European influence of their former colonial rulers. In the United States, the state of Louisiana with its strong French ties is steeped in the civil law tradition by virtue of the application of *Code Napoleon* principles. In particular, the community property laws in California, Texas, and Louisiana are heavily influenced by the original Spanish and French settlers' ideas about family relationships, which were different from most states of the union (i.e., they were not of British origin). Washington, Nevada, New Mexico, Arizona, Idaho, and Wisconsin also adopted community property laws after they became disenchanted with the common law property system inherited from England.[2]

Schools of Jurisprudence

Jurisprudence is the philosophy or science of law. Throughout the centuries, many thoughtful persons have expressed the need to justify judicial decision-making in terms of higher principles—principles transcending petty self-interest that reflect consistent moral and ethical standards of conduct. Consequently, legal thinkers endeavor to address the question of what is law from a variety of philosophical perspectives. Although few practicing legal professionals are thoroughly consistent in their broad philosophical orientations toward the meaning of law, a number of historically important perspectives will guide students during the course of their study. These schools of thought include but are not limited to natural law jurisprudence, historical jurisprudence, utilitarianism, analytical (positivism) jurisprudence, mechanical jurisprudence, sociological jurisprudence, legal realism, and critical legal studies.

Natural Law

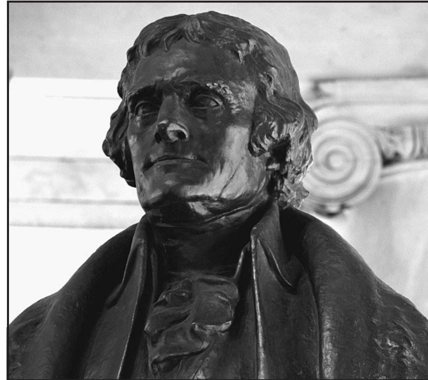
Natural law jurisprudence posits that humankind possesses an innate sense of right and wrong. This sense exists in the nature of the universe or in an understanding of God's will or plan that can be known through our reason. In Western thought, the ancient Greeks and Romans—for example, Plato (427–347 B.C.), Aristotle (384–322 B.C.), and Cicero (106–43 B.C.)—each articulated somewhat different views of the matter, but each contributed to the foundation of our current thinking. Aristotle in particular is responsible for the idea that humans are "political animals," meaning that our happiness and self-understanding are tied to the nature of our political community. Therefore, life outside civil society is unthinkable.

St. Thomas Aquinas (1226–1274) was a leading figure of the philosophical movement called Medieval scholasticism. This system of logic, philosophy, and theology (prominent from the tenth to the fifteenth century) synthesized the Medieval view of religious faith with the Greco-Roman emphasis upon reason as articulated especially by Aristotle. He is the author of *Summa Theologica,* a widely accepted view of natural law as a guide to human law. This work applies to specific circumstances the precepts of reason contained in natural law. St. Thomas argued that when human law departs from natural reason, it lacks the quality of law, becoming instead analogous to an act of violence.[3]

The Age of Enlightenment was an eighteenth-century European philosophical movement characterized by rationalism, skepticism, and empiricism in social and political matters. As part of the movement, natural law philosophers of the seventeenth and eighteenth centuries—including Thomas Hobbes (1588–1679), John Locke (1632–1704), and to a lesser extent Jean-Jacques Rousseau (1712–1778)—had a profound impact on the founders and early leaders of the American republic.[4] In contrast to the classical thinkers of Greek and Roman antiquity, modern Liberal-Lockean theory begins with the individual as the fundamental unit of political analysis. Aristotle's political man is rejected in favor of the view that humankind can exist independent from civil society. In the state of nature, a place without formal government, people need only consult the laws of nature to discover that they are independent and capable of reason. Natural law informs them that one ought not to deprive another of life, liberty, or possessions.

The natural state had some inherent shortcomings, however, including the lack of neutral third parties to adjudicate conflicts, based on the premise that persons should not be judges in their own case. People need a mechanism for the protection of life, liberty, and property. Therefore, civil society is formed to secure the natural rights endangered in the less than perfect state of nature. By agreement, the people consummate a contract limiting the authority of government. If

the covenant is broken, then revolution is justified and a new government may be created in its place. Thomas Jefferson's Declaration of Independence is the quintessential expression of this natural law view. Consider paragraph one and part of the second paragraph of this great document, which are reproduced below (Box 1.3).



Thomas Jefferson, author of the Declaration of Independence and third President of the United States.

Natural law precepts have a profound impact on contemporary policy debates concerning the content of American law. Arguments about racial, religious, and gender discrimination, for example, often come down to an interpretation of natural law principles. The law has long recognized that the obligation parties owe one another to abide by their promises may be mitigated by equitable principles of natural justice, prohibiting the enforcement of contracts that afford unfair advantages of stronger parties over weaker parties. Today, there are serious legislative attempts to control the high cost of money damage awards to plaintiffs injured by negligent defendants. Such proposals are often countered with the argument that harmed persons have a "right" to compensation. In other words, they deserve to be made whole again or to be placed in a position they were before the tortious (wrongful) conduct of the defendant.

Box 1.3 From the *Declaration of Independence* (July 4, 1776)

When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth the separate and equal station to which the *Laws of Nature* and of *Nature's God* entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these *truths* to be self-evident, that all men are created equal, that they are *endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness*. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. . . [emphasis added]

Though the natural law school of jurisprudence is appealing, critics point out that we cannot always agree on what the natural law really means in particular situations. For example, sincere persons of good will and equally deep religious convictions disagree about the "rightness" of capital punishment, and the abortion issue continues to divide the nation along moral lines. Although arguments are forcefully made, the discussion about punishment for homosexual conduct is likewise difficult to resolve by an agreement about what natural law commands.

Historical School

The *historical school of jurisprudence* may be viewed as an attempt to overcome the vagaries of natural law with more concrete guidance about the human origins and evolution of the law. The basic assumption is that judges find the law in the history, culture, and customs of a people. For example, modern political conservatives assert that the intentions of the framers of the U.S. Constitution can be known, and the task of jurists is to ascertain these intentions when adjudicating actual cases and controversies. Proponents of this view also mark the delivery of the 1789 U.S. Constitution as a high point in American and world history.

A competing variant of the historical perspective views history as revealing patterns of change, if not improvement, based on the experiences of a people within legal and political institutions. In this respect, it is the responsibility of jurists to view law as a series of social experiments. The law is subject to constant testing in the laboratory of the courts. This results in a body of formal norms, producing proximate solutions to difficult situations requiring conflict resolution.

The antecedents to contemporary views of historical jurisprudence in America are traceable to continental Europe and England. Friedrich Karl von Savigny (1779–1861) launched the German school, arguing that the law of a nation attains its fixed character even before recorded history. Such law is found in the *Volksgeist,* defined as the spirit of the people, otherwise known as the national character of a people. Custom is the overt manifestation of the *Volksgeist,* and the role of jurists is to let the law grow as part of the people's history, a view incompatible with universal and fixed laws of nature. Moreover, codification of the law is unnecessary, even dangerous. Hence, because we know what the law is through the *Volksgeist,* it does not have to be written down. Codification runs the risk of misinterpreting the *Volksgeist.*[5]

Among the proponents of historical jurisprudence, Sir Henry Maine (1822–1888) is probably the most cited of English legal thinkers that include Lord Chief Justice Edward Coke and Sir William Blackstone. Maine departs from Savigny in two significant ways. First, he describes stages of legal evolution whereby old ideas are discarded in favor of modern legal norms. Second, he used comparative studies to

determine what ideas all legal systems have in common. Maine found two types of societies: “static” and “progressive.” *Static societies* start with the personal law of the law-making ruler. The legitimate right of the ruler stems from tradition, and his commands crystallize into law through custom. As is the case for feudal cultures, in this type of society everyone has a fixed status and legal relationships are well understood by all. In *progressive societies,* relationships are not based on status. Rather, contract orders human relationships. Relationships in the family and on the job are conceptualized in terms of the freedom of contract, and the right of persons to freely bargain for goods and services is respected as a legally enforceable norm of conduct.[6]

Maine teaches that the movement in society from status to contract is accomplished in law through legal fiction, the application of equity principles, and by the passage of legislation. A legal fiction is a falsity that for legal purposes is treated as true. In feudal England, for example, adopted children had no right of inheritance. A legal fiction was created to get around this obvious injustice by treating adopted children as if they were natural blood relations. Principles of natural justice are employed within the equity jurisdiction of courts, alongside the legal rules articulated by the ordinary common law courts. Thus, while an otherwise valid contract is enforceable between parties of unequal power in courts possessing only legal jurisdiction, courts with equitable jurisdiction may intervene to nullify the ill effects of fundamentally unfair provisions. Legislation promulgated by representative bodies is perhaps the most desirable form of change, according to Maine, because it is widely viewed as the legitimate expression of the will of the people.[7] To the extent that legislation approximates the will of the majority, it is a superior form of change to that depending upon judicial inventions and interpretations of unelected or otherwise unaccountable judges.

A clear manifestation of the influence of historical jurisprudence of Europe and England in America is the *case-method* approach to legal education; credit for its creation is usually given to Christopher Columbus Langdell, although others paved the way before him. For example, in 1810, Judge Zephariah Swift of Connecticut prepared for the use of his office students a short treatise on evidence that included cases. And Elihu Root studied cases at New York University between 1865 and 1867 under the tutelage of John Norton Pomeroy. As happens today, students were expected to read cases and then to answer questions about them in class. In the preface to his 1871 textbook, Harvard Law School Dean C. C. Langdell set out the historical assumptions underlying the case method of legal education (see Box 1.4).[8]

The case method was carried from Harvard to other law schools by members of the Harvard faculty and by students trained there. By the beginning of the twentieth century, several of the leading law schools were using this approach. Casebooks in almost every division of civil,

Box 1.4 Preface to *Selection of Cases on the Law of Contracts* (1871) by Christopher Columbus Langdell

Law considered as a science consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer, and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is growth extending in many cases through centuries. Thus growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied. But the cases which are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that is reported. The vast majority are useless, and worse than useless, for any purpose of systematic study. Moreover, the number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treaties are a repetition of each other, being a cause of much misapprehension. If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number.

criminal, and constitutional law were prepared for classroom use. By 1938, the case method had been adopted by nearly all the full-time and by some of the part-time law schools.[9] Although for decades critics have attacked the case method, it remains today a central tool of legal pedagogy. Further, the everyday practice of law requires attorneys to interpret and to cite precedents to justify their clients' conduct, reinforcing in the process the assumptions underlying historical jurisprudence.

Utilitarianism

Jeremy Bentham (1748–1832), an eccentric British philosopher, was the founder of *utilitarianism.* This doctrine evaluates human law in terms of utility, or in other words, by its social consequence. Whether a law is good or bad depends upon its consequences to all individuals in society, both at present and in the future. Bentham's great contribution to law was the creation of a philosophical justification for challenging existing legal institutions and a rationale for improving them.

Based upon the ethical theory that equates good with pleasure and evil with pain, Bentham's utility principle of the greatest good for the greatest number is designed as a guide for legislators when considering proper sanctions imposed on lawbreakers. Legislators are urged to calculate, for example, the consequences of proposed penal laws that may

create more harm than good. Bentham and his reform-minded followers urged milder penalties, more efficient police forces, speedy trials, and the creation of legal codes that could make the law readily understandable and accessible to citizens.[10]

Utilitarianism assumes that human beings are rational actors capable of knowing and following their own self-interest in terms of maximizing pleasure and avoiding the opposite. For example, criminal penalties need to fit the crime with a view to deterring wrongdoers and repeat offenders. Yet, we know that individuals are not always rational in their motivations or conduct, often rendering informed self-interest inoperable; indeed, individuals are not always aware of their own self-interest, let alone capable of making such calculations. Moreover, when lawmakers, including legislators and judges, are called upon to make decisions based upon the principle of the greatest good for the greatest number, the rights of minorities may be sacrificed in the weighing process.

Analytical Jurisprudence

Nineteenth- and twentieth-century leading proponents of *analytical jurisprudence* include John Austin, John Chipman Gray, Wesley Newcomb Hohfeld, Hans Kelsen, and H. L. A. Hart. Although they had their disagreements, each took a positivistic view toward law as established or recognized by governmental authorities in an attempt to distinguish law from morals, ethics, or custom.[11] In this sense, analytical jurisprudence was and remains today a response to the perceived anarchy of natural law, historical jurisprudence, and ethical theories of the just society. Natural law, they argue, is hardly a guide for law, because we cannot locate a concrete sovereign, as is also the case for international law. According to leading analytical jurists, law, to be properly so-called, must have a determinate sovereign, must operate on inferiors, must compel a habit of obedience, and must be enforceable.[12] The analytical jurists insist upon a distinction between what law ought to be and what it is in fact. Specifically, the law must be obeyed and faithfully interpreted by jurists if it is made consistent with the law-making rules of society. Individuals may not disobey a law with which they may disagree on moral or policy grounds, nor, for that matter, may lay jurors seek to nullify an unjust law by ignoring the instructions given them by presiding professional judges.

Adopting, perhaps unwittingly, a positivist approach, while silently rejecting arguments about natural justice, Texas Governor George W. Bush justified going ahead with the scheduled execution of Gary Graham on June 22, 2000, because the condemned African American man, a convicted murderer, had been afforded all the legal appeals permitted by the law. Execution opponents argued that because considerable doubt remained that Graham had received a fair trial, given contradic-

tory eyewitness accounts and flawed legal representation, natural justice and fundamental principles of due process of law required the governor's intervention so that an innocent person not be wrongly put to death. Nevertheless, Bush claimed that the law allowed no discretion in such matters, and it was his legal responsibility as Governor to enforce the laws of the state of Texas.[13]

Mechanical jurisprudence is closely aligned with the principles of analytical jurisprudence, which in turn are associated with constitutional absolutism. This philosophical variation on the legal positivism theme of analytical jurisprudence views the U.S. Constitution as the highest norm within a clearly defined hierarchy of norms. For example, if an ordinary law of Congress or a state legislature contradicts constitutional norms, then the judges, who have taken an oath to uphold the Constitution as the highest law of the land, must declare the statute null and void. In short, judges are not free to apply universal principles of justice, balance competing social interests, or consider the social consequences of their decisions. The Supreme Court used its power of judicial review to strike down major legislation which had been introduced by the administration of Franklin D. Roosevelt, designed to combat the Great Depression of the 1930s. The duty of the justices is clear, as articulated by Justice Owen Roberts in the following excerpt from his famous 1936 anti-New Deal, U.S. Supreme Court opinion. Judicial decisions made in this analytical fashion are said by advocates of mechanical jurisprudence to be principled or otherwise objective and not the subjective judgments of mere unelected judges.

Box 1.5

From the Majority Opinion of Justice Owen Roberts in United States v. Butler U.S. Supreme Court 297 U.S. 1, 62–63 (1936)

There should be no misunderstanding as to the function of this court. . . . It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. The court neither approves nor condemns any legislative policy.

> Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or is in contravention of, the provisions of the Constitution; and having done that, its duty ends.

Both the analytical and mechanical schools of jurisprudence have been widely criticized because proponents tend to confuse a normative prescription with a factual description. That is, most positivists believe that because judges and justices should behave in an objective and neutral manner, they in fact do behave in such a manner. Yet, as we all know, people do not always behave in ways that they should. In the 1990s, a movement within the positivist camp led by Professor Tom Campbell of Australia gave this approach new intellectual life. Campbell argues forcefully for the ethical view that judges should behave impartially through the subjugation of their own moral beliefs to the will of the people as revealed through legislative enactment. As a corollary, consistent with Sir Henry Maine, Campbell argues that legislation is a source of law superior to the creative acts of judges in discerning the common law. Although plainly derivative, his version of positivism is not based on the notion of a clearly discernable sovereign, as is the case for the proponents of analytical jurisprudence. Rather, Campbell argues that positivism in the postmodern world can be regarded as a way to enhance democracy and is not in conflict with democratic values. He proposes that judges must behave in ways that will better approximate the union between how they ought to behave and how they behave in fact. The clear articulation of rules by legislative authorities that are followed carefully by judges will create greater political legitimacy for the system as a whole.[14]

Sociological Jurisprudence

Adherents of *sociological jurisprudence* are especially critical of both the analytical and historical schools of thought. They reject the command notion of law favored by the analytical jurists because law is more than enforceable norms set down by an identifiable sovereign. Rather, law springs from social customs that the government attempts to enforce. In other words, the government does not make the law. Rather, it guarantees it. The real origins of the law can be found in the study of anthropology, history, psychology, and political science. Unlike the proponents of historical jurisprudence, sociological jurists tend to view legal trends not in terms of long legal epochs, such as Maine's centuries-long status-to-contract conceptualization. Rather, sociological jurists note how law reflects changing social relations in the short run, for example, how changing attitudes toward gender equality affect court interpretations of statutory and constitutional law.

Proponents of sociological jurisprudence included prominent twentieth-century luminaries Dean Roscoe Pound of the Harvard Law School and Justice Benjamin Cardozo of the U.S. Supreme Court. They viewed sociological jurisprudence as describing and explaining how the law changes, as well as explaining the law can be used to promote needed change in society. In this sense, sociological jurisprudence is both descriptive and prescriptive.[15]

Legal Realism

Legal realism emerged as a school of jurisprudence in the 1930s and remains popular in many intellectual circles. It is closely related to the sociological school but is a more radical departure from the historical assumptions implicit in the case method taught in law schools since the first half of the twentieth century. Legal realists, such as Professor Karl Llewellyn, federal judge Jerome Frank, and Supreme Court Justice William O. Douglas, were concerned less with the origins and precedents of the law than with its current impact. Realists view law as an academic discipline closely related to the social sciences, needing evidence and facts supplied by the disciplines of economics, sociology, psychology, and political science. Legal realists center much of their attention on judges and lawyers as decision makers, insisting that the law is not found or discovered in natural law, or in the customs and traditions of a people. Nor is law a matter of logic. More exactly, legal opinions exhibit the attitudes and values of legal professionals. They make the law in ways that tend to reflect their attitudes and the relative power relations of larger social interests that lurk behind litigation as well as the interpersonal relations of judges on and off multimember courts.[16]

Critical Legal Studies

The *critical legal studies (CLS)* movement began in the 1970s and remains active today. CLS has substantial similarities with the earlier legal realism movement of the first half of the twentieth century. Both the legal realists and modern proponents of critical legal studies (often referred to as "crits") seek the reform of the law school curriculum. Both reject the notion that legal decision-making is an objective enterprise, in which judges merely find the law but do not make it. Both schools of jurisprudence want to make law students and others cognizant of the many subjective factors that enter into legal processes. CLS professors, however, make an additional claim that legal realists generally did not. Although not united in their approach, CLS proponents generally view the law as a political tool in the hands of the dominant forces in society, used to enforce their view of the world upon the powerless.

For example, members of the neo-Marxist segment of CLS argue that the law is an instrument of class oppression operated by lawyers in the service of the capitalist class in American society and the world. Critical race theorists maintain that American law is not the law of all the people but is an overwhelmingly white man's enterprise that has served historically to keep African Americans in their lowly place. Some critical race theorists argue for bans on so-called racial hate speech and have attempted to devise new approaches to civil rights, including the payment of reparations to contemporary African Americans for the injustice of slavery imposed upon their African ancestors, who were imported to these shores to make white men rich from the ill-gotten proceeds of their Southern plantations. Feminist critical theorists claim that law is a product of white males. This gives the law a patriarchal character resulting in the perpetuation of the oppressive pattern of dominance and submission found in family, social, economic, and political life. Despite objections of civil libertarians, some feminist theorists have actively sought the creation and enforcement of laws against pornography, which they claim degrades women. Both African American and feminist proponents of CLS argue for greater diversity and affirmative action programs in legal institutions, including law schools, the bench and bar (judges and lawyers), and the greater economic, social, and political world.[17]

A common criticism leveled by opponents of CLS scholars is that "crits" do not believe in law, which they consider a subjective process for which there are no objective standards for ascertaining justice. CLS proponents are thus accused of practicing nihilism (i.e., the denial of any basis for the existence of knowledge or truth). Although emphasizing equality and serving as a tool in the deconstruction of central legal principles, CLS advocates are said to offer little in terms of alternative ways to understand the law that all persons regardless of class, race, or gender might agree upon. Instead, it is argued, they have busied themselves advancing their own agendas at the expense of the wider community.[18]

Nevertheless, many but not all of today's social scientists who study law-related subjects concentrate their efforts on describing and explaining law in society. They strive to offer, for example, relatively objective empirical theories about the puzzle of judicial decision-making. They spend relatively little effort in prescribing changes in particular laws, but they do explore the functions of law in society and how legal institutions and actors contribute to the overall stability of the political system and to its change. At the same time, more politically conservative scholars are rediscovering natural law and historical jurisprudence as vehicles for expressing their policy preferences and viewpoints. Still other conservatives have embraced *law and economics jurisprudence,* which favors abandoning the traditional focus on what the Constitutional framers might have intended by "rights" in favor of allowing the

market system to promote economic efficiency and the maximization of wealth.[19]

Branches of Law

It is a common and useful practice to divide the law into two great categories—public and private law. *Public law* involves the relationship among government institutions, and between government and private parties in society. Constitutional law, administrative law, and criminal law are conventional subsets of this division. *Constitutions* describe the authority of public institutions as they exercise authority within their jurisdiction. In the American governmental system, the U.S. Constitution is regarded as the fundamental law that guides all ordinary legislation and executive actions. It supersedes all actions that may contradict the basic law that the people ordained and established in 1789, as amended. *Administrative law* is the branch of public law dealing with the rules and regulations promulgated by government agencies. Because of the growing complexity of society, legislative institutions delegate to administrative agencies considerable authority to deal with problems ranging from health and welfare concerns to regulation of commercial intercourse in transportation and the trading of stocks and bonds. *Criminal law* articulates offenses against society and not simply violations of another's individual rights. Murder, robbery, rape, larceny, assault, and burglary come immediately to mind as prime examples of this important branch of the public law.

Private law is a generic term referring generally to the law governing conflicts among private parties in society. Governments have an interest in adjudicating these conflicts because the enforcement of norms contributes to the overall stability of society. For example, stable business intercourse is unthinkable without the expectation that contracts are enforceable by the government acting as a neutral third party. Ownership of real and personal property is necessary if the materialistic assumptions of capitalism are to be fulfilled. Compensation for injuries resulting from the wrongful conduct of others is the hallmark of the law of torts. Most litigation in America involves private law disputes and is the bread and butter of the legal profession.

Although it is a useful distinction, one should not draw too bright a line between public and private law. The categories sometimes overlap, such as when an assault is both a criminal offense warranting criminal penalties (e.g., jail time) and tortious conduct (e.g., where an injured party may sue for the recovery of money damages). The case of O. J. Simpson is a convenient example. He was acquitted on the criminal charges of the murder of his former wife, Nicole Brown Simpson, and her friend, Ronald Goldman. Yet, O. J. Simpson lost a civil suit for wrongful death, requiring the payment of damages to family members

of the deceased. Likewise, a prosecution by the attorney general for a violation of the antitrust laws may warrant both criminal and civil penalties. Private parties injured by conspiracies in the restraint of trade may sue conspirators for money damages. When various states sued tobacco companies for physical injuries to their citizens resulting from smoking, they acted on behalf of the citizens of their states to redress private wrongs that have public consequences.

Functions of Law

With basic definitions understood, we turn to the task of articulating in more formal terms the various functions performed by legal institutions in society. The famous legal anthropologist E. Adamson Hoebel spelled out four functions of law: (1) to define relationships among members of society, (2) to allocate authority within society, (3) to resolve conflict when it arises in society, and (4) to redefine relationships as societal conditions change.[20] We adopt his classification scheme with some modification and elaboration.

Defining Relationships

Societal norms prescribe power relationships among persons and institutions in society. Although many informal relationships exist that are dictated by custom and tradition, the law formalizes relationships with the full force of the state behind it. Children may be made to obey their parents. The rights and duties of parties in marriage are legally prescribed. Employer-employee relations are often defined formally, particularly with respect to working conditions and minimum wages and benefits. Pedestrians may safely cross the street on a green light because there is a legally defined relationship between themselves and drivers of automobiles.

At a higher level of abstraction, the relationship between religious institutions and government is circumscribed by the Free Exercise and Establishment Clauses of the First Amendment in the U.S. Constitution. The division of powers between the central government and the state governments in the U.S. federal system is defined broadly by the Supremacy Clause (Article VI, paragraph 2) and the Tenth Amendment. Because many provisions of the U.S. Constitution are broadly worded as statements of principles and not precise legal rules, the courts have played a central role in defining relationships among institutions, and between individuals and government itself. Given this reality, the exercise of discretion is a necessary element in fashioning judicial opinions.

Allocation of Authority in Society

The legitimate exercise of physical force distinguishes government from a band of hoodlums. There are many injustices perpetrated every day in society. But to allow individuals to decide for themselves that they have been wronged and what penalty ought to be exacted can result in chaos and, in some instances, considerable injustice. Consider the classic scene in Mario Puzo's novel, *The Godfather.* An immigrant mortician asks Don Corelone to avenge the rape of his daughter because he has not received satisfaction from the police. Although the desire for justice seems reasonable, the particular remedy sought is not. Due process, including protecting innocent parties from wrongful prosecution, to say nothing of protections against cruel and unusual punishment, is unlikely in gangland settings. It denies the government's monopoly over the use of force and acknowledges the existence of plural elites with the power over life and death. In modern America, however, criminal courts are increasingly permitting aggrieved parties to take the stand to recommend to juries and judges what penalties ought to be imposed upon the person convicted of a crime against themselves or their loved ones. These victim impact statements openly acknowledge personal revenge as a legitimate goal of law in the exercise of physical force.

When a rueful King John in 1215 was made to sign the Magna Carta, written by disgruntled barons, the principle that no person is above the law became a central feature of our legal system. Hoebel points out that in a law-governed state, the power to enforce the law is "transpersonalized." It resides in the office and not the man. The phrase "This is a nation of laws and not of men" means that no person, including a legitimate leader, is above the law. Law is for both rulers and the ruled.

When presidents, for example, abuse their authority for their own personal gain, it is regarded as anathema. Thoughtful persons of all political persuasions were appalled when it became evident that President Nixon had attempted to use the office of the presidency to punish his enemies and conspired to cover-up the burglary at the Watergate Hotel. The federal judge who presided over the lawsuit of Paula Jones against President Bill Clinton imposed a monetary fine on the president for the lies he told during a deposition about his relations with various women including Monica Lewinsky. And a bar committee recommended to the Arkansas Supreme Court that Clinton be disbarred so that he may not practice law in that state. Though he was acquitted by the U.S. Senate of the charges contained in a bill of impeachment filed by the House of Representatives, Clinton remained vulnerable to prosecution for criminal conduct after he left office. Richard Ray, the special prosecutor, and attorneys for the president finalized a negotiated settlement the day before the inauguration of the new president,

George W. Bush. In exchange for the special prosecutor's agreement not to criminally prosecute the president, Bill Clinton admitted that he knowingly made false and misleading statements to the court in the Paula Jones deposition. He also agreed to the suspension of his Arkansas law license for five years, a payment of a $25,000 fine to the Arkansas Bar Association, and not to seek reimbursement of attorney fees from the government.

Resolution of Conflict When It Arises

The peaceful settlement of conflict is an important function of the law. A basic operating principle of law is: Where there is a wrong, there must be a remedy. In other words, the law renders unnecessary an appeal to arms. Personal vendetta is likewise unnecessary if not redundant, and it is clearly dangerous to the peace and stability of the community. Moreover, legal institutions purport to provide a more or less neutral forum where objective or principled decisions are rendered without fear or favor. Fundamentally, the system works because, either tacitly or overtly, parties to disputes agree to observe the rule of civilization—to submit their dispute to a third party for resolution. This system encourages losers in legal contests to remain cooperative and law-abiding members of society even though the system has decided against them. After all, they had a fair chance to win.

Courts function to resolve conflicts, but the parties to the dispute must believe at some level that the judiciary is neither friend nor foe; at the very least, one party must not believe that the judiciary is an ally of his or her opponent. As Martin Shapiro pointed out, however, the perception that courts are objective extends not only to a feeling that they are neutral toward the parties but also that the legal norms applied to resolve conflicts do not bias the result in advance. These norms must not favor one interest over the other, and the rules are broadly understood to be the result of mutually agreed upon norms of behavior.[21]

Sometimes, however, objectivity and neutrality are lost in the legal system. For example, the riots that broke out after the not guilty verdict in the trial of the Los Angeles police officers charged with the videotaped beating of Rodney King reinforced the belief among many African Americans that the criminal justice system treats them in an unfair manner. On the other hand, the acquittal of O. J. Simpson for the murder of his former wife and her male companion was viewed by most polled white citizens as an example of jury nullification. African Americans viewed the result in the Simpson criminal trial as a vindication of their perception that members of their race are unfairly and routinely subject to criminal prosecutions.[22] Both white and African American negative perceptions threaten widespread mass support, what political scientists term "diffuse citizen support," undermining the legitimacy of the law.

There is strong opposition to the U.S. Supreme Court decision on abortion.

Then, too, it is evident that as judicial offices become institutionalized, the interests of the third party become an element in decision-making. The interest of the regime becomes an important value, although this interest was not part of the original dispute brought by the private parties. The result can be a decision that is unsatisfactory to all parties. For example, the U.S. Supreme Court for years avoided judging the constitutionality of the Connecticut birth control statute. In two cases, the Court claimed that the parties lacked standing to sue because there had not first been an actual prosecution under the state statute. But physicians, patients, and the state clearly wanted a resolution of this dispute. Finally, they staged an arrest so that the courts could address the constitutional issue. The matter was resolved with a finding by the high court in *Griswold v. Connecticut* (1965) that the statute in question violated the plaintiff's right to privacy.

Why did members of the Supreme Court seek to avoid resolving this issue? In the name of judicial self-restraint, the Court sought not to entangle itself in the sensitive social issue of marital rights and birth control to avoid institutional attacks upon itself. To be sure, they were correct in their fear that squarely facing the constitutional issue would cause difficulties for the institution. Indeed, the decision in *Griswold v. Connecticut* (1965) is viewed by some pro-life advocates as the intellectual precursor to *Roe v. Wade* (1973), which protects a woman's right to an abortion as fundamental. Certainly, both decisions have earned the Court considerable political opposition. See Boxes 1.6 and 1.7 for greater detail.

Box 1.6 Summary of Griswold v. Connecticut
U.S. Supreme Court
381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965)

Estelle Griswold, the executive director of the Planned Parenthood League, and others were convicted of violating a Connecticut statute for providing information and instruction to married persons on the use of birth control devices. She lost her case in the state courts, but the U.S. Supreme Court reversed the judgment against her.

Justice William O. Douglas penned the opinion of the majority, but only one other justice fully accepted Douglas's reasoning. First, Douglas explicitly avoided the subjective implications of substantive due process as illustrated by

Lochner v. New York (1905). He insisted that the right to marital privacy is established by the specific guarantees in the Bill of Rights that have penumbras, "formed by emanations from those guarantees that help them give life and substance." Five different constitutional amendments create the zone of privacy that renders the Connecticut statute null and void. They are as follow: the First Amendment guarantees the right of association protection; the Third Amendment prohibits the quartering of soldiers in any house in time of peace without the owner's consent; the Fourth Amendment protects against unreasonable search and seizure; the Fifth Amendment protects against self-incrimination; and finally, the Ninth Amendment provides that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Box 1.7 Summary of Roe v. Wade
U.S. Supreme Court
410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973)

An unmarried pregnant woman and a physician, who had suffered past prosecutions and was presently facing additional criminal charges, challenged a Texas anti-abortion statute. A U.S. District Court held that the pregnant woman had standing to sue but the physician did not. Yet, this federal court ruled that the statute was unconstitutionally vague and overly broad.

Justice Harry Blackmun, writing for the Supreme Court, held that a woman's decision to terminate her pregnancy is a fundamental right guaranteed by the liberty provision of the Due Process Clause of the Fourteenth Amendment. However, although the privacy right is fundamental, it may be limited by a compelling state interest. During the first trimester of pregnancy the state cannot demonstrate a compelling state interest. Yet, for the stage [of pregnancy] beginning with the end of the first trimester, the state has a valid interest in promoting the health of the mother. Thereafter, it may regulate the abortion procedure in ways that are reasonably related to maternal health. But in the last trimester of pregnancy, the state may regulate and even prohibit abortion, except where it may be necessary for the preservation of the life or the health of the mother.

Redefining Relations of Individuals and Groups in Society

The law may or may not adapt as the social norms, customs, traditions, and conditions in society change. Clearly, the law by its nature is conservative. It tends to enforce the power and privileges of the dominant elites in society. The social, economic, and political values of ruling elites are enforced by lawmakers in legislative, executive, and judicial institutions. Yet, the law reflects a change in these relationships as

power is redistributed within political systems—either abruptly, as in revolutionary regimes, or incrementally, as is common in more or less stable societies.

In the early nineteenth century, a husband possessed the legal right to use what physical force was reasonably necessary to compel the obedience of his wife. Courts generally avoided intervention in family matters, preferring to grant considerable discretion to husbands in the governance of their households. Without evidence of malice, cruelty, or dangerous violence, courts allowed husbands to "correct" their wives. Today, however, the physical chastisement of a wife is grounds for divorce and criminal prosecution for domestic violence. Moreover, in a growing number of communities, police no longer attempt to reconcile couples engaged in physical confrontations. Reflecting changing societal values, husbands are increasingly being carted off to jail for attacking their spouses, with few questions asked.

In the nineteenth century, labor unions were often denied the right to strike by so-called "injunction judges" because the common law viewed worker organizations as conspiracies in the restraint of trade. But in the twentieth century, as political power shifted away from business domination to a more balanced appreciation for the rights of working men and women, laws were enacted and interpreted by judges to protect the right of workers to organize and to collectively bargain with employers.

The U.S. Supreme Court's 1954 opinion in *Brown v. Board of Education,* which struck down segregation in the public schools, is an example of a judicial body helping to redefine relations of individuals and groups in society. Neither Congress nor the chief executive was ready to lead the charge for racial equality. Yet, the Court stuck out its institutional neck by proclaiming that separate but equal facilities are inherently unequal and thus in violation of the Equal Protection Clause of the Fourteenth Amendment. As this case illustrates, courts may pay a price for being ahead of the attitudes of powerful groups in society. There was considerable resistance to the Court's opinion in the South and with southern representatives in Congress. President Eisenhower did not do the cause of racial equality a favor when at one point he indicated that he did not think laws could change the hearts and minds of people. It was not until after the enactment of the Civil Rights Act of 1964, some ten years after the *Brown* decision, that substantial integration in public schools and other public accommodations took place. This result took the full cooperation of the executive branch to attack the vestiges of *de jure* (legal) segregation in America (see Box 1.8).

Then, too, when in 1999 the Supreme Court of Vermont ruled that same-sex marriages are protected by a state constitutional provision, its ruling was clearly inconsistent with prevailing social mores. It caused state legislators to fashion a new law affording gay and lesbian

Box 1.8 Summary of
Brown v. Board of Education of Topeka
U.S. Supreme Court
347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954)

This case involved several other cases coming before the Supreme Court at the same time, where African American plaintiffs alleged that segregation of the races in public schools violated the Equal Protection Clause of the Fourteenth Amendment. In all but one of the consolidated cases, the lower courts found that the segregated schools satisfied the separate but equal rule first announced by the Supreme Court in the 1896 case of *Plessy v. Ferguson.*

Writing for a unanimous Supreme Court, Chief Justice Earl Warren directly overruled the *Plessy* doctrine. Citing social science evidence, Warren concluded that segregating children "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." He also concluded, "In the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." Thus, the Equal Protection Clause of the Fourteenth Amendment prohibits *de jure* segregation of public schools.

couples some legal rights without approving the institution of same-sex marriages.

Law and attitude change. The nineteenth-century sociologist and philosopher William Graham Sumner argued that "stateways cannot change folkways."[23] This means that society cannot legislate social mores and patterns of behavior. The failure of prohibition laws to end the sale and consumption of alcoholic beverages is often cited as a prime example of the futility of laws that contradict existing attitudes and values. Essentially, this view holds that the fundamental role of law in society is to reinforce existing values and minimize deviance from the dominant norms of the age. Social stability is accomplished when legitimate political institutions punish unlawful conduct consistent with uniform rules.

A contrary view asserts that law is not only a means to achieve social control but also has the potential to influence and change attitudes and behaviors. That is, when norms are institutionalized by legitimate government organs, there is a good chance that many people will internalize the norms as their own. This occurs in part because the population already possesses deeply seated values suggesting they should obey law and that the new norm is part of an already existing norm in society. Thus, for example, laws outlawing racial segregation are not the result of a new value of equality imposed by some upstart political elite. Rather, the new norm may be traced to the Declaration of Independence and even further back to Judeo-Christian beliefs about God

creating humans in his/her own image. Further, a reason to fight the bloody Civil War was to end slavery, and the Fourteenth Amendment was enacted to erase the badges incident to slavery.

Although, no doubt, bigotry toward African Americans endures, the dramatic changes in formal law—beginning with the 1954 Supreme Court decision in *Brown v. Board of Education* and later with the Civil Rights Acts of 1964 and the Voting Rights Act of 1965—went a long way toward changing racial attitudes. By the same token, when a law is enacted that contradicts the basic understanding of a people about its values, the new norm will not be internalized and it may even be resisted. Most Americans, for example, accept the proposition that unequal treatment of African Americans is wrongheaded. Yet, many Americans question the proposition that to make up for years of past discrimination, African Americans should be afforded preference over whites in public and private employment and in admissions to public universities.[24] In recent years, citizen-initiated campaigns have been successfully conducted in the states of California and Washington to remove affirmative action programs from the statute books; and in Florida, Governor Jeb Bush decreed an end to such programs in university admission programs.

The Method of the Common Law

Though the courts may contribute to change in society and court opinions may help to internalize new norms of conduct in the hearts and minds of a people, it is a mistake to view courts as a panacea for righting all the wrongs in society. Many Americans view the courts as a primary vehicle for change. They take their lessons from the civil rights movement and the application of the national Bill of Rights to the states by the federal courts during the 1960s as prototypical of what can be accomplished. This optimism about the ability of law courts to bring about change rests upon the natural law assumption that persons possess inalienable rights, which courts will automatically protect. But history shows that courts in America are relatively conservative institutions. The intellectual schema in which the legal profession must operate constrains their ability to behave otherwise.

The principle of *stare decisis* guides American courts to apply the rule employed in previous cases to the case at hand. That is, if the facts in the present case are the same as those in previous cases, then the previous legal rule ought to be applied to the present controversy. Simply put, this intellectual process is reasoning by example or by analogy. Whether judges are applying the common law, interpreting a statute, or giving meaning to vague constitutional provisions, they compare the facts and results in a number of controversies to justify a result in the present case.

The experimental nature of the common law is thus evident. The law learns from the application of previous results. If the rule works, then it is applied again and again. It is an inductive system that depends upon a sufficient number of observations before a general rule is enunciated.

The body of previously decided cases with similar fact patterns as the present case is known as legal *precedent*. A *rule of law* is established when a number of cases are decided in a similar way; courts declare that when certain facts are present, more or less precise legal norms apply. For example, when a person takes the life of another with premeditation and no extenuating circumstances, then the rule of first degree murder applies. If a jury finds these facts to be true, then as a matter of law they are obliged to bring in a verdict of first-degree murder.

In human experience, however, seldom do the facts in different cases exactly mirror each other. Consequently, courts must decide whether a present case is sufficiently similar to past cases to warrant the application of the same legal rule with similar legal results. This variability in life provides legal professionals with considerable room for argument and the creation of conditional rules that permeate the law. Furthermore, judges are free to interpret precedents either "strictly" or "loosely," depending upon their view of justice in the particular case. If judges want to narrowly interpret a precedent, they will strictly apply it in the present, insisting that the facts in the past and the present be as nearly alike as human experience will permit. On the other hand, if judges want to apply the previous precedent broadly, then they will apply the rule loosely. They will ignore fact pattern discrepancies between previous and present cases, choosing instead to focus on the commonalities between and among the cases under study. As Karl N. Llewellyn teaches, sometimes judges will apply both a *loose view of precedent* and a *strict view of precedent* to different aspects of the same opinion. When neither statutes nor previously decided cases serve as a guide, judges are left to their own devices. At times, they directly overrule precedent, proclaiming that the previous rule is no longer applicable.[25]

Throughout this text, readers will encounter cases in which judges must decide whether to apply precedents strictly or loosely. Sometimes, however, judges have no precedents to guide their decision-making. Hence, we see that judges possess considerable discretion. In the process, they contribute to the overall stability and orderly change in society.

The task for legal professionals is a daunting one, no matter how they apply precedent. The following case illustrates some difficult choices that judges face when exercising their discretion and the means they employ to achieve what they believe are the most desirable ends.

Board of Regents v. Southworth
U.S. Supreme Court
529 U.S. 217; 120 S. Ct. 1346; 146 L. Ed. 2d 193 (2000)

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, THOMAS, and GINSBURG, JJ., joined.

For the second time in recent years we consider constitutional questions arising from a program designed to facilitate extracurricular student speech at a public university. Respondents are a group of students at the University of Wisconsin. They brought a First Amendment challenge to a mandatory student activity fee imposed by petitioner Board of Regents of the University of Wisconsin and used in part by the University to support student organizations engaging in political or ideological speech. Respondents object to the speech and expression of some of the student organizations. Relying upon our precedents which protect members of unions and bar associations from being required to pay fees used for speech the members find objectionable, both the District Court and the Court of Appeals invalidated the University's student fee program. The University contends that its mandatory student activity fee and the speech which it supports are appropriate to further its educational mission.

We reverse. The First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral. We do not sustain, however, the student referendum mechanism of the University's program, which appears to permit the exaction of fees in violation of the viewpoint neutrality principle. As to that aspect of the program, we remand for further proceedings. . . .

We must begin by recognizing that the complaining students are being required to pay fees which are subsidies for speech they find objectionable, even offensive. The *Abood* and *Keller* cases, then, provide the beginning point for our analysis. Abood v. Detroit Bd. of Ed., 431 U.S. 209, 52 L. Ed. 2d 261, 97 S. Ct. 1782 (1977); Keller v. State Bar of Cal., 496 U.S. 1, 110 L. Ed. 2d 1, 110 S. Ct. 2228 (1990). While those precedents identify the interests of the protesting students, the means of implementing First Amendment protections adopted in those decisions are neither applicable nor workable in the context of extracurricular student speech at a university.

In *Abood*, some nonunion public school teachers challenged an agreement requiring them, as a condition of their employment, to pay a service fee equal in amount to union dues. 431 U.S. at 211-212. The objecting teachers alleged that the union's use of their fees to engage in political speech violated their freedom of association guaranteed by the First and Fourteenth Amendments. The Court agreed and held that any objecting teacher could "prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." 431 U.S. at 234. The principles outlined in *Abood* provided the foundation for

our later decision in *Keller*. There we held that lawyers admitted to practice in California could be required to join a state bar association and to fund activities "germane" to the association's mission of "regulating the legal profession and improving the quality of legal services." 496 U.S. at 13-14. The lawyers could not, however, be required to fund the bar association's own political expression.

The proposition that students who attend the University cannot be required to pay subsidies for the speech of other students without some First Amendment protection follows from the *Abood* and *Keller* cases. Students enroll in public universities to seek fulfillment of their personal aspirations and of their own potential. If the University conditions the opportunity to receive a college education, an opportunity comparable in importance to joining a labor union or bar association, on an agreement to support objectionable, extracurricular expression by other students, the rights acknowledged in *Abood* and *Keller* become implicated. It infringes on the speech and beliefs of the individual to be required, by this mandatory student activity fee program, to pay subsidies for the objectionable speech of others without any recognition of the State's corresponding duty to him or her. Yet recognition must be given as well to the important and substantial purposes of the University, which seeks to facilitate a wide range of speech.

In *Abood* and *Keller* the constitutional rule took the form of limiting the required subsidy to speech germane to the purposes of the union or bar association. The standard of germane speech as applied to student speech at a university is unworkable, however, and gives insufficient protection both to the objecting students and to the University program itself. Even in the context of a labor union, whose functions are, or so we might have thought, well known and understood by the law and the courts after a long history of government regulation and judicial involvement, we have encountered difficulties in deciding what is germane and what is not. The difficulty manifested itself in our decision in Lehnert v. Ferris Faculty Assn., 500 U.S. 507, 114 L. Ed. 2d 572, 111 S. Ct. 1950 (1991), where different members of the Court reached varying conclusions regarding what expressive activity was or was not germane to the mission of the association. If it is difficult to define germane speech with ease or precision where a union or bar association is the party, the standard becomes all the more unmanageable in the public university setting, particularly where the State undertakes to stimulate the whole universe of speech and ideas.

The speech the University seeks to encourage in the program before us is distinguished not by discernable limits but by its vast, unexplored bounds. To insist upon asking what speech is germane would be contrary to the very goal the University seeks to pursue. It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning.

Just as the vast extent of permitted expression makes the test of germane speech inappropriate for intervention, so too does it underscore the high potential for intrusion on the First Amendment rights of the objecting students. It is all but inevitable that the fees will result in subsidies to speech which some students find objectionable and offensive to

their personal beliefs. If the standard of germane speech is inapplicable, then, it might be argued the remedy is to allow each student to list those causes which he or she will or will not support. If a university decided that its students' First Amendment interests were better protected by some type of optional or refund system it would be free to do so. We decline to impose a system of that sort as a constitutional requirement, however. The restriction could be so disruptive and expensive that the program to support extracurricular speech would be ineffective. The First Amendment does not require the University to put the program at risk.

The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.

The University must provide some protection to its students' First Amendment interests, however. The proper measure, and the principal standard of protection for objecting students, we conclude, is the requirement of viewpoint neutrality in the allocation of funding support. Viewpoint neutrality was the obligation to which we gave substance in Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995). There the University of Virginia feared that any association with a student newspaper advancing religious viewpoints would violate the Establishment Clause. We rejected the argument, holding that the school's adherence to a rule of viewpoint neutrality in administering its student fee program would prevent "any mistaken impression that the student newspapers speak for the University." While *Rosenberger* was concerned with the rights a student has to use an extracurricular speech program already in place, today's case considers the antecedent question, acknowledged but unresolved in *Rosenberger:* whether a public university may require its students to pay a fee which creates the mechanism for the extracurricular speech in the first instance. When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others. There is symmetry then in our holding here and in *Rosenberger:* Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program's operation once the funds have been collected. We conclude that the University of Wisconsin may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle. . . .

It remains to discuss the referendum aspect of the University's program. While the record is not well developed on the point, it appears that by majority vote of the student body a given RSO may be funded or defunded. It is unclear to us what protection, if any, there is for viewpoint neutrality in this part of the process. To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality

is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent. That principle is controlling here. A remand is necessary and appropriate to resolve this point; and the case in all events must be reexamined in light of the principles we have discussed.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion. In this Court the parties shall bear their own costs.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE BREYER join, concurring in the judgment.

. . . I agree that the University's scheme is permissible, but do not believe that the Court should take the occasion to impose a cast-iron viewpoint neutrality requirement to uphold it. Instead, I would hold that the First Amendment interest claimed by the student respondents . . . here is simply insufficient to merit protection by anything more than the viewpoint neutrality already accorded by the University, and I would go no further.

The parties have stipulated that the grant scheme is administered on a viewpoint neutral basis, and like the majority I take the case on that assumption. The question before us is thus properly cast not as whether viewpoint neutrality is required, but whether Southworth has a claim to relief from this specific viewpoint neutral scheme. . . .

Southworth's objection has less force than it might otherwise carry because the challenged fees support a government program that aims to broaden public discourse. As I noted in *Rosenberger v. Rector and Visitors of Univ. of Va.,* . . . the university fee at issue is a tax. The state university compels it; it is paid into state accounts; and it is disbursed under the ultimate authority of the State. Although the facts here may not fit neatly under our holdings on government speech, (and the university has expressly renounced any such claim), our cases do suggest that under the First Amendment the government may properly use its tax revenue to promote general discourse.

. . . [T]he weakness of Southworth's claim is underscored by its setting within a university, whose students are inevitably required to support the expression of personally offensive viewpoints in ways that cannot be thought constitutionally objectionable unless one is prepared to deny the University its choice over what to teach. No one disputes that some fraction of students' tuition payments may be used for course offerings that are ideologically offensive to some students, and for paying professors who say things in the university forum that are radically at odds with the politics of particular students. Least of all does anyone claim that the University is somehow required to offer a spectrum of courses to satisfy a viewpoint neutrality requirement. . . . The University need not provide junior years abroad in North Korea as well as France, instruct in the theory of plutocracy as well as democracy, or teach Nietzsche as well as St. Thomas. Since uses of tuition payments (not optional for anyone who wishes to stay in college) may fund offensive speech far more

obviously than the student activity fee does, it is difficult to see how the activity fee could present a stronger argument for a refund.

In sum, I see no basis to provide relief from the scheme being administered, would go no further, and respectfully concur in the judgment.

Case Questions for Discussion

1. Should procedures be instituted at colleges and universities to ensure that student funds are not used to facilitate ideological and political speech that some students find objectionable?
2. How does the Supreme Court distinguish cases involving teachers unions and bar associations from this case? Is the Court employing a strict or a loose view of precedent and what difference does it make?
3. Under what circumstances should a judge feel free to disregard previous precedents?
4. Why does Justice Souter write a concurring opinion? How does his approach differ from that of Justice Kennedy?

Reading and Briefing Court Opinions

Board of Regents v. Southworth is the first of many abbreviated court opinions you will be asked to read, analyze, and brief. Learning to do this is an important step in understanding the legal mind. Although nearly everyone is able to master this skill, developing such an ability requires considerable effort and patience. Do not become discouraged if after briefing a few cases the task seems difficult. With practice you will become proficient. We provide below a sample brief of the case you just read. Note the various elements of the brief.

(A). The first line contains the name of the parties to the suit (i.e., *Board of Regents v. Southworth*). If you look up this case in one of the U.S. Supreme Court reporters, however, you will find the complete name of the case and not the abbreviated form we have provided. It is: BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM v. SCOTT HAROLD SOUTHWORTH, ET AL. Note that the board appealing this case (i.e., in the U.S. Court of Appeals) is the university system board which is responsible for the administration of all the campuses of the University of Wisconsin system, including the Madison campus. That is, the Board of Regents is the appellant and Scott Harold Southworth and others are, therefore, the appellees. They won the case in the court immediately below the U.S. Supreme Court, a U.S. court of appeals. As it so happened, they also won the case in the court of first instance, a U.S. federal district court.

The facts as presented in the court opinion do not relate to readers the fact that Southworth and others are politically conservative stu-

dents, who oppose their fees being used to support groups to which they are ideologically opposed (e.g., Amnesty International, Students of the National Organization for Women, the Campus Women's Center, the UW Greens, the Madison AIDS Support Network, the Lesbian, Gay, and Bisexual Campus Center, and others). Although the Supreme Court fails to mention this fact, and therefore it is not part of the presented fact pattern one should present in the brief, this information helps nonetheless to explain the motivation for bringing the suit in the first place. Yet, brief writers should provide only that information about the case that the court's opinion writers care to relate.

(B). The second line contains the case citation. It indicates where in the court reporter system the printed opinion for *Board of Regents v. Southworth* is found. The identical case opinion is reported in at least three places; that is, in volume 529 of the *U.S. Reports* beginning on page 217 (529 U.S. 217), in volume 120 of the *Supreme Court Reporter* beginning on page 1346 (120 S.Ct. 1346), and in volume 146 of the *United States Reports, Lawyers' Edition—Second Series* beginning on page 193 (146 L. Ed. 2d 193). The citation also indicates that this opinion was delivered in the year 2000.[26]

It is also possible to read cases online. See: <FindLaw.com>, <Lexis-Nexis.com>, and other widely used and accessible websites. At some point, one may wish to read the entire court opinion in its full unedited version. For example, to shorten *Board of Regents v. Southworth* to the most appropriate points for instruction, we deleted several pages and the original footnotes were eliminated. This common procedure used by writers and editors allows them to keep the size of textbooks within manageable word and page lengths.

(C). The statement of *Facts* should include those circumstances giving rise to the lawsuit as well as the disposition of the case in the courts below. As a general rule, try to put the facts in your own words and keep it *brief*. The brief writer should also stick to the facts articulated by the court without trying to identify the truth or falsity of its recitation. In *Board of Regents v. Southworth,* the facts are easily recited: Student activity fees were used by the University to facilitate speech on campus by funding a diverse group of ideological and political student entities that some students found offensive. The students sought to prevent the University from using student fees in this way because they felt the program violated their First Amendment rights. A federal district court and a court of appeals agreed with the objecting students, but the case was subsequently appealed to the U.S. Supreme Court. It is customary to conclude the facts section with procedural matters, such as what the courts decided below and how the case found its way to the Supreme Court. Though it is not indicated in the text, the U.S. Supreme Court in this case granted the appellant petition for a writ of certiorari ordering the Court of Appeals to send the entire record of the case to the Su-

preme Court. A writ is granted only if at least four members of the Supreme Court are in agreement.

(D). The *Issue* statement(s) is the next major element of a brief. This is a recitation of a legal question the opinion writer treats as necessary in order to resolve the matter before the court. In *Board of Regents v. Southworth*, the opinion writer poses more than one issue for decision, which is common. Sometimes, the brief writer may also include more than one issue in a single question.

When composing issue statements, keep two rules in mind. First, issue statements should appear in the form of questions that may be answered "yes" or "no." Second, you should phrase issues precisely and specifically with reference to concrete and not abstract legal problems. American courts do not treat hypothetical issues. They resolve real legal issues involving live disputes that affect relationships among people and their property.

(E). Place on one line the *Decision and Action*. Write "yes" or "no" to each issue question listed above in the issue statement(s). Do not attempt at this point to explain the reasons for the court's decision. The action is the court-ordered disposition of the case. In *Board of Regents v. Southworth,* the court of appeals decision is "reversed and remanded." Opinion writers are explicit about such matters, and such statements usually appear at the end of the majority's opinion.

(F). The *Reasoning of the Court* is the heart of the court's legal opinion because it contains the written justification for its disposition of the case. In *Board of Regents v. Southworth*, Justice Kennedy, writing for the majority, has a heavy burden because he contradicts two courts below that relied on the Supreme Court's previous opinions to fashion their decisions. Kennedy indicates that the precedents cited by the courts below are inappropriately applied because the facts are different in those cases. College students objecting to pay for the dissemination of views they dislike by their peers is very different from unions and bar associations forcing their members to contribute to political causes not particularly germane to collective bargaining or the regulation of attorneys in their practice of the law. Rather, Kennedy points to another precedent that is more appropriate—the University of Virginia prohibition of funding a student religious publication. Specifically, in *Rosenberger v. Rector and Visitors of the University of Virginia,* the Court employed the constitutional principle of viewpoint neutrality to strike down the University's prohibition. Sometimes, courts overrule their own previous precedents, but when they do so, justification is provided to assure the legal community and the public that they are not acting arbitrarily. However, in *Board of Regents,* the Supreme Court skillfully distinguished one case from another, fashioning an exception to a general rule based upon the particular facts in the case at hand.

Again, a brief writer should attempt to remain *brief!* Do not include all the words written by the author of the court's opinion. Indeed,

sometimes opinion writers become unnecessarily long-winded, inserting arguments that are unnecessary for the conclusions they reach. Such utterances are commonly referred to as *obiter dictum*, or simply *dicta*. It is easy to confuse dicta pronouncements for reasoning when composing written briefs. Stick to the point, though judges and justices do not always abide by the same admonition. It is useful to insert the opinion writer's name at the beginning of this section of the brief so that during classroom discussion one may easily distinguish among a number of opinion authors [e.g., (Reasoning per Kennedy)].

(G). Include a *Concurring Opinion,* if appropriate. Sometimes one or more members of a court agree with the result of a decision but not with the intellectual justification offered by the official opinion writer. Therefore, they may elect to write a separate opinion, as did Justice Souter in *Board of Regents v. Southworth*. He pens a concurring opinion for himself and two other justices, Stevens and Breyer.

Such opinions demonstrate different intellectual routes to the same result and reflect divisions on the court that may be useful in predicting the results of future litigation. Souter argues that it is unnecessary to apply a "cast-iron viewpoint neutrality requirement" to this case. He argues instead that Southworth fails to demonstrate that the University's program is not viewpoint neutral.

(H). Also include any *dissenting opinions,* if offered. This expresses disagreement with both the result and the reasoning of the court's opinion, although *Board of Regents v. Southworth* contains no such statements of dissent. If there had been a dissenting opinion, it is likely that the writer would have based the opinion on the reasoning of the courts below—to wit: the program was not germane to the University's mission, did not further a vital University policy, and imposed too great a burden on Southworth's free speech rights.

(I). Lastly, write a *Summary of the Legal Principle* that the particular opinion represents. It is a useful exercise to contemplate what a case stands for, especially when preparing for student examinations. Try to accomplish this task in a few lines. For example: University funding of controversial speech is constitutionally permissible under the First Amendment if it is viewpoint neutral in its application. However, the use of student referendum procedures to decide what groups may receive financial assistance raises constitutional questions.

Box 1.9 Sample Brief: Board of Regents v. Southworth
529 U.S. 217, 120 S.Ct. 1346, 146 L.Ed. 2d 193 (2000)

F*acts:* Southworth and other students at the University of Wisconsin at Madison brought suit challenging the University's policy of funding student organizations engaged in political or ideological speech based upon student activity fees that are separate from ordinary tuition fees. The selection of

groups that receive funding is administered through various student body committees and subject to oversight by the administration and the board of regents. Additionally, any group may bypass the committee system and seek funding (or defunding) by requesting a vote of the student body on a referendum requiring a majority vote. A federal district court found for Southworth and a U.S. court of appeals affirmed the district court's opinion in part and reversed and vacated the judgment in part.

Issues:

(1) Does the First Amendment permit a public university to impose activities fees upon its students to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral?

(2) Is the referendum aspect of the University program, which permits a majority of the student body to vote to fund or defund a particular group's speech, potentially a violation of the viewpoint neutrality requirement of the First Amendment?

Decision and Action:

(1) Yes.

(2) Yes; Reversed and Remanded.

Reasoning (per Kennedy in which CJ Rehnquist, O'Connor, Scalia, Thomas, and Ginsburg joined):

(1) Both sides to the dispute agree that the program is viewpoint neutral. The Court's rule in *Rosenberger v. Rector and Visitors of the University of Virginia* is controlling. The program of funding diverse political and ideological groups is designed to expose Wisconsin students to a variety of viewpoints, and as long as this is its operating principle there is no violation of the First Amendment. This case is distinguishable from cases involving compulsory dues payments for political purposes of labor union and bar association members; in those cases, it is possible to distinguish speech germane to the organization from speech that is political and therefore not germane. In university life, however, all speech is in some sense germane to student education. Thus, speech in the university cannot know any bounds. Yet, First Amendment rights must be protected in the University setting, and the way to do that is by imposing the obligation of viewpoint neutrality.

(2) Subjecting participation by ideological or political groups in the University's (fee-specific) program to a majority vote in a referendum raises First Amendment questions. Because the referendum is able to substitute majority determinations for viewpoint neutrality, it may possibly undermine First Amendment protections. A remand is necessary to resolve this point, and the case must be examined in this light.

Concurring Opinion (per Justice Souter, with whom Justices Stevens and Breyer join):

There is no need to impose a "cast iron" viewpoint neutrality requirement to uphold the program that funds various political and ideological groups on campus. That is, Southworth has no claim to relief from the specific viewpoint neutral scheme of the University. First, the program does not threaten his academic freedom. Second, the government, in this case the University of Wisconsin, indirectly transmits a fraction of a student activity fee to organiza-

tions that Southworth may find offensive, but this is not the same as a govern - ment body compelling or controlling speech. The student is funding a student organization that only distributes the money to various political and ideological groups and is not itself responsible for the message conveyed by any such objectionable groups. Further, the program aims at broader public discourse and not at limiting public discussion.

Dissent: None.

Summary of Legal Principle: A public university program charging its students an activity fee used to fund a program to facilitate extracurricular student speech that is viewpoint neutral is not a violation of the First Amendment. The use of a student referendum to decide what groups get funding or are defunded may raise First Amendment issues.

Key Terms, Names, and Concepts

Administrative law
Analytical (positivism) jurisprudence
Aristotle
Branches of law
Case method
Civil law
Common law
Concurring opinion
Constitutions
Criminal law
Critical legal studies
Dicta
Dissenting opinion
Elements of a brief
Friedrich Karl von Savigny
Functions of law
Historical jurisprudence
Jurisprudence
Law
Law and economics jurisprudence
Legal positivism
Legal realism
Liberty of contract
Loose view of precedent
Mechanical jurisprudence
Natural law jurisprudence
Obiter dictum
Positive law
Precedent
Private law
Progressive societies
Public law
Rule of law
St. Thomas Aquinas
Sir Henry Maine
Sociological jurisprudence
Stare decisis
Static societies
Strict view of precedent
Transpersonalized law
Utilitarianism
Volksgeist

Discussion Questions

1. What are the various views of the origins of law? Should natural law trump positive law in the making of public policy, for example, in the case of abortion?
2. Should the U.S. Congress possess the authority to prescribe to courts how provisions of the Constitution should be interpreted? In your judgment, is the Supreme Court's decision in *Boerne v. Flores* a good one?
3. What are the main differences between the common law and civil law traditions? Do you prefer the role of judges in one system over the other and why?
4. Comparing the major schools of jurisprudence discussed in this chapter, which one in your opinion is the best guide to judicial decision-making? Why?
5. Do you agree with the general criticism of the legal system offered by proponents of critical legal theory? Does it offer a viable approach to understanding the legal system?
6. If persons make and interpret the law, does the phrase "A nation of laws and not of men" make sense to you?
7. In your opinion, does the enforcement of contemporary drug laws prohibiting the distribution and consumption of drugs including marijuana effectively deter usage? Should we decriminalize the use of marijuana?
8. What are the consequences when judges apply previous precedents strictly and when they apply precedents loosely? Should judges be consistent in how they interpret precedent?
9. Why is it useful to brief court opinions? Why not simply read and mark up one's text and be done with it?

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26. For a research guide to court reports, sources of court opinions, and other tools of legal research see Albert P. Melone, *Researching Constitutional Law*, 2nd ed. (Prospect Heights, IL: Waveland, 2000), Chapter 1. ✦