

## The Nature of the Law

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## Objectives:

- ◆ Identify and distinguish the sources of law in the United States.
- ◆ Describe the *basic rights* granted under each Amendment of the US Bill of Rights covered in class.
- ◆ Understand the hierarchy of laws, and how federal and state law relate to each other.

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## Objectives (cont'd):

- ◆ Understand the basic principles of appellate review.
- ◆ Understand the difference between criminal, civil, and administrative law.
- ◆ Understand the basic structure of the federal and Washington State courts.

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## Sources of US Law

- ◆ US Constitution/State constitutions
- ◆ International Treaties: President signs, 2/3 Senate ratifies, then incorporated into our body of law (e.g. Geneva Conventions I-IV)
- ◆ Statutory Law (laws made by legislatures)
- ◆ Common Law (laws made when courts interpret the above or "previous" case law)
- ◆ Administrative Law (laws made by executive agencies)

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## US Constitution

- ◆ Ratified 1787
- ◆ “Supreme Law of the Land” (see below)
- ◆ Article I: Powers of Congress
- ◆ Article II: Powers of the Executive Branch
- ◆ Article III: Powers of the Judiciary
- ◆ Intent of the Framers was to *separate the powers* of the branches so that no one branch would have more power than another.

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## US Constitution

- ◆ Article IV: Governs relationships between states, relationships of states to the federal government.
- ◆ Article V: Describes how the Constitution may be amended. Requires a 2/3 vote by both houses of Congress to *propose* amendment, and 3/4 of legislatures of each state to *ratify* amendment (by a certain date).

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## US Constitution-The Supremacy Clause

- ◆ Article VI, cl. 2: *This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.* (Important for preemption purposes...)

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## Bill of Rights (1791)

- ◆ Important addition to the Constitution, as the legislators of many of the original 13 states were concerned that there were not sufficient protections for individual rights in the original US Constitution.
- ◆ First 10 Amendments to the Constitution

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## Amendment I: Bill of Rights

- ◆ *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

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## First Amendment: Internal Tension on Religion

- ◆ The federal and state governments must walk the fine line between protecting the *free exercise of religion*; while avoiding passing laws that *establish religion*. Litigated issues are usually *de facto* government funding of religious activities vs. prohibition of religious displays.
- ◆ Supreme Ct docket?: *Newdow vs. US Congress?*
- ◆ Recommended reading: “A Church/State Solution”, Noah Feldman, NY Times Magazine, 7/3/05.

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## First Amendment: Long Line of Cases Establishing What Speech is Protected, and What is Not

- ◆ “Fighting words” as defined by a narrow, precise statute (hate speech laws)
- ◆ Obscene speech (“You know it when you see it.”, Justice Stewart)
- ◆ Defamation, which may be subject to civil penalties. With a public figure, must demonstrate “actual malice”, NY Times v. Sullivan, (1964). *See also* Hustler v Falwell, (1987).

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## Expressive Conduct=Speech. Flag Burning is protected.

- ◆ Long history of flag desecration as protest to actions by the government. Considered protected speech (expression) by the US Supreme Court. Numerous attempts to pass a Flag Burning Amendment.
- ◆ More reading; the Flag Burning Page: [www.esquilax.com/flag](http://www.esquilax.com/flag)

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## Amendment II: Bill of Rights

- ◆ *A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.*
- ◆ Society still debating what this means, *see* NRA, debates about gun control.

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## Amendment IV: Bill of Rights

- ◆ *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

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## Issuance of a Search Warrant

- ◆ Requires a ruling by a judge
- ◆ The area being searched and the things being searched for must be clearly described
- ◆ Law officers must demonstrate “probable cause” that a crime may have or will be committed
- ◆ However, many situations where searches may be conducted without a formal warrant, both statutory (PATRIOT Act “sneak and peek” searches) and case law

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## Amendment V: Bill of Rights

- ◆ *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.*

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## Double Jeopardy; Right Not to Testify

- ◆ Double jeopardy means that you can't be tried for the *same crime* twice; that means same victim, same place, same circumstances, etc.
- ◆ "Plead the Fifth": only if liberty issue at stake

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## Amendment VI-Bill of Rights

- ◆ *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*

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## Due Process of Law

- ◆ Due process of law: basic legal concept summarized in 5<sup>th</sup>/6<sup>th</sup> Amendments-- the opportunity to be heard by a tribunal, to be aware of the charges against you, and to make an informed decision whether to acquiesce or contest. Particularly important if individual is being held in custody.
- ◆ Unlawful combatants cases: now disputing who has a right to due process and who doesn't (US citizen considered unlawful combatant: *Padilla v. Hanft*)

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## The Right to Speedy Trial, Impartial Jury, and to Face One's Accuser

- ◆ In federal court, "speedy trial" is not clearly defined. Washington Rules of Criminal Procedure require trial within 60-90 days (CrR 3.3).
- ◆ Issues with jury tampering can be the basis for a mistrial or a new trial upon appeal; whereas issues with what takes place in the jury room is often given great deference by appeals courts
- ◆ Presence of accuser: does videoconferencing, taping count?

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## Landmark case: Miranda v Arizona (1966)

- ◆ US Supreme Court case, focusing primarily on the Fifth Amendment right against self-incrimination, which established the series of warnings that must be given to an individual upon being taken “in custody”:
  - Right to remain silent
  - Anything said can be used against individual in court
  - Right to the presence of attorney
  - Court appointed if accused cannot afford one

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## Constitutional Debate: Right to Privacy

- ◆ Not specifically stated in the Constitution.
- ◆ Griswold v. Connecticut 381 U.S. 479, (1965): Justice Douglas’ opinion finds a “penumbra” of rights emanate from the amendments of the Bill of Rights; the right of privacy can be found to emanate from Fourth and Fifth amendments of the Constitution.
- ◆ Roe v Wade (1973): based on privacy right (see below)

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## Amendment VIII-Bill of Rights

- ◆ *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*
- ◆ This is the amendment that is cited by opponents to the death penalty. Also an Equal Protection argument (14<sup>th</sup> Amendment), as surveys of death row inmates over the years have demonstrated that the death penalty is disproportionately imposed on the poor and on minorities. (Now DNA testing—a whole other line of argument for DP opponents).

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## Equal Protection Clause (14<sup>th</sup> Amendment)

- ◆ *Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

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## Equal Protection Clause

- ◆ Ratified 1868, post Civil War amendment establishing full citizenship, legal protections, and voting rights for former slaves.
- ◆ Basis for virtually all civil rights litigation and legislation since then. Also, interestingly enough, the basis for President Bush's argument before the Supreme Court in Bush v. Gore (2000).

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## Hierarchy of Statutory Law

- ◆ [US Constitution]
  - ◆ Federal Statutes (CFR)
  - ◆ State Constitutions
  - ◆ State Statutes (RCW)
  - ◆ County/City Ordinances
- All result from action of legislature=**legislative process**

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## Full Faith and Credit Clause

- ◆ *Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.* (Article IV, Section 1)
- ◆ The legislative acts, public records, and judicial decisions of one state must be recognized by another.
- ◆ Another "hot topic" in this area: gay civil unions

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## Jurisdiction:

- ◆ Authority of a court to exercise judicial power. Note importance of **personal jurisdiction** in executing a judgment against an individual defendant. Issues of personal jurisdiction, if any, must be resolved pre-trial because if trial court did not have personal jurisdiction over defendant at outset of proceeding, ruling could be dismissed on appeal.
- ◆ Therefore, even Supreme Court can dismiss/ remand cases because of jurisdictional issues. See *Rumsfeld v. Padilla*.

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## Amendments IX and X-Bill of Rights

- ◆ [IX] *The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.*
- ◆ [X] *The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people*

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## Where do states get the power to make laws?

- ◆ See Article X, above. Gives states the right to legislate in all areas except those specifically prohibited or given to Congress by the US Constitution.
- ◆ Prohibited: states can't make treaties, raise armies, coin money. They also can't regulate interstate commerce.

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## What types of laws do states make?

- ◆ State legislatures have broad powers to pass laws to protect public health, safety, welfare ("police powers").
- ◆ Essentially gives the states the right to regulate certain areas of law without federal intervention. Areas of law traditionally handled by the states: marriage/family law, regulation of professions, property law (including wills and trusts), licensing.

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## Counties and municipalities (cities, towns)

- ◆ Individual states can delegate law-making power to these individual political subdivisions (created by the states).
- ◆ Laws made by counties, cities, and towns are called ordinances, and have the force of law.

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## Administrative Law

- ◆ Body of law (usually regulations) created by administrative agencies. (WAC)/(CFR)
- ◆ Administrative agencies are created by legislatures, who delegate law making power to these agencies, which become agents for the executive branch of the federal government or individual states.
- ◆ See 5 USC Chapter 5 (FAPA), and RCW

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## Administrative Agencies

- ◆ Federal and state administrative agencies also have judicial power to hold hearings and render decisions in order to enforce regulations they promulgate.
  - Federal: Food and Drug Administration (in Dept of HHS) administers the Federal Food, Drug, and Cosmetic Act; Drug Enforcement Administration (in Dept of Justice) administers the federal Controlled Substances Act
  - State: Board(s) of Pharmacy/Department of Health

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## Common Law: Law Made by the Courts

- ◆ Tradition derived from English Law
- ◆ Trial court (civil law): examines a dispute between parties, applies the proper law to the facts before it, renders a decision to resolve the matter.
- ◆ If one party feels that the trial court *erred* in making the decision, can file an appeal with a higher court. Higher court must examine the decision and determine whether the ruling by the lower court was appropriate based on its *interpretation of the facts* and the *resulting conclusions of law*.

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## Appeals courts apply one standard of review to the facts...

- ◆ When looking at the *facts*, the standard is *clearly erroneous*. Thus, appellate court would reverse a finding of fact when:
  - the reviewing court looks at all the evidence (facts) and is left with the “definite and firm conviction” that a mistake has been made (per US Supreme Court).

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## ..And a different standard of review to the law

- ◆ When looking at the *law*, there are different standards of review depending on where the case was tried (jurisdiction) and the type of tribunal the case is being appealed from (criminal, civil, administrative).
- ◆ In Washington, appellate review of law from the trial court level is *de novo*—the appellate court reviews the law “anew”, engaging in the same level of inquiry as the trial court.

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## *Stare Decisis*, a.k.a. Precedent

- ◆ Definition: To abide by, or adhere to, decided cases (opinions).
- ◆ Basic Principle: Judicial opinions at the appellate level are recorded; therefore, other courts may rely on these opinions.
- ◆ In practice, an appellate court’s establishment of a certain rule of law must be followed by all the lower courts in that jurisdiction. This is called *precedent*.

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## *Stare decisis* in practice is relatively flexible.

- ◆ Case cited as precedent supporting a legal assertion on appeal must be “on point”, meaning that the facts of the case being argued before the appellate court must match the facts of the case being cited as legal precedent.
- ◆ Appellate courts may reverse their own decisions as circumstances and times change.
- ◆ Although cases from other jurisdictions possess no precedential value, they can be considered by the appellate court for their *persuasive* value.

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## “Super Duper” Precedent?: *Roe v. Wade* (1973)

- ◆ *Planned Parenthood of SE PA v. Casey* (1992) (Justice O’Connor): [Roe’s] “limitation on state power could not be repudiated without serious inequity to people who, for two decades of economic and social developments, have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.” (cont’d)

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## *Planned Parenthood v. Casey* (cont'd):

- ◆ “The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain costs of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.”

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## Statutory Law and the Courts

- ◆ What do appellate courts look at when interpreting statutory laws?
  - The “plain language” of the law.
  - Legislative intent: why was the law passed? What did the legislature intend for the law to accomplish? Did the legislature intend for the law to apply to the specific set of facts before the court?
  - Whether the law is too broad or vague (and thus practically impossible to enforce in an equitable manner).

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## Statutory Law and the Courts

- ◆ What do appellate courts look at (cont'd)
  - Public policy: is the law before the court consistent with public policy?
  - Constitutional rights of the individual: does the law before the court conflict with individual constitutional rights? (Equal protection argument: judiciary empowered with protecting the rights of minorities against the sometimes tyrannical political majority).

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## Criminal, Civil, or Administrative Proceeding?

- ◆ Criminal: ultimately, a “liberty issue” is at stake. One of the penalties can be incarceration. Look for “Victim”/Defendant.
- ◆ Civil: disagreement between two parties being settled before a court=lawsuit. Look for Plaintiff/Defendant

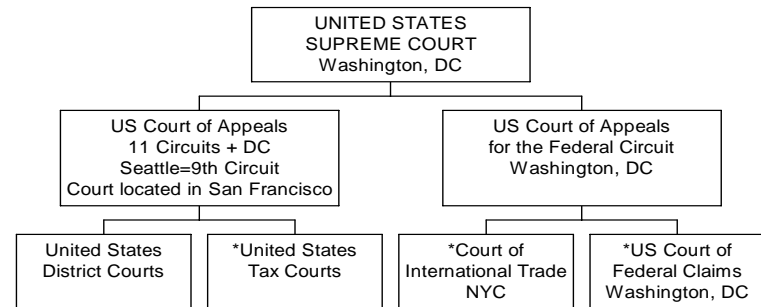
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## Criminal, Civil, or Administrative Proceeding?

- ♦ Administrative action is initiated by an agency; e.g. Board of Pharmacy begins investigation against a pharmacist for alleged violation of a statute or regulation.
- ♦ Typical administrative sanctions:
  - Warnings
  - Fines
  - License suspension or revocation
  - Probationary period

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## Federal Court System



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## Federal Court Jurisdiction

- ♦ Original jurisdiction in cases involving a “Federal Question”: cases “arising under Constitution, laws, or treaties of the United States”.
- ♦ Original jurisdiction: United States is a party.
- ♦ “Diversity” jurisdiction over civil litigation if:
  - A citizen of one state is a party against a citizen of another, AND,
  - Amount in controversy must be at least \$75,000.

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## Supreme Court Jurisdiction

- ♦ Original jurisdiction: all cases in which a state is a party.
- ♦ Appellate jurisdiction from lower courts. Some cases on appeal must be heard by the Court; others are voluntarily heard by the court if it grants *certiorari*.

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## Amicus Brief

- ◆ Amicus briefs (“friend of the court”) can be filed by interested parties not directly involved in the case (true of any appellate court), e.g. ACLU would likely file a brief in any major case involving 1st Amendment issues.
- ◆ Amicus briefs may be weighed by the justices when contemplating the ruling by the Court.

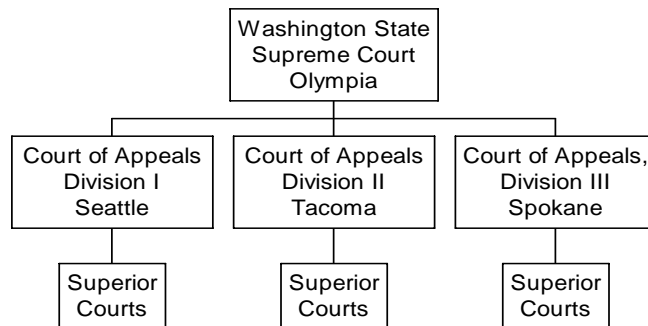
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## US Court of Appeals

- ◆ Seattle is in the Ninth Circuit, which includes OR, CA, NV, AZ, ID, MT, HI, AK, and Guam. Two districts in Washington State:
  - Eastern in Spokane
  - Western in Seattle AND Tacoma (2 divisions)
- ◆ Ninth Circuit Court of Appeals in San Francisco
- ◆ “Splitting the Circuits”, e.g., possible for circuits to rule differently on a federal question; circuit rulings are “split” until US Supreme Court resolves.

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## Washington State Court System



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## Washington State Court System

- ◆ Superior Courts are the courts of *general jurisdiction*; therefore, can hear virtually any claim arising under Washington state law. Also hear appeals from courts of limited jurisdiction (district, administrative agencies, municipal).

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## Washington State Court System

- ◆ District Courts are courts of *limited jurisdiction*. Concurrent jurisdiction with Superior Court over civil cases where amount of controversy < \$25,000 and misdemeanor and gross misdemeanor cases. Exclusive jurisdiction over small claims and infractions.
- ◆ Municipal courts are established by city ordinance.
  - Concurrent w/ Superior: misdemeanor, gross misdemeanor.
  - Exclusive: small claims and infractions.

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## State vs. Federal Law

- ◆ Supremacy Clause makes federal constitutional law the supreme law, enables Congress to displace state statutory and constitutional laws, and makes explicit that federal law binds state judges.
- ◆ **What does this mean in practice?**

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## Federal Preemption, Express or Field:

- ◆ Congress can displace, or preempt, state law when it intends to and is acting within the scope of its constitutional powers:
  - **Express preemption:** intent to supercede state law is declared within the body of the (federal) legislation.
  - **Field preemption:** not expressed in statute, but courts subsequently look at the federal law and determine that Congress by implication intended to “occupy the field”.

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## Conflict preemption :

- ◆ Conflict preemption: courts determine that an actual conflict exists between the two bodies of law, because either--
  - It is **impossible to comply with both federal and state law**. Example: Federal Food and Drug Act of 1906 imposed labeling requirements that conflicted with state labeling requirements at the time, McDermott v. Wisconsin (1913).

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## Conflict Preemption (cont'd):

- State law **stands as an obstacle** to the accomplishment and execution of the full purposes and objectives of Congress.
- Example: Supreme Court held that the Employee Retirement Income Security Act of 1974 (ERISA), which allows patients to sue for reimbursement of denied benefits, but not for damages stemming from the denial, preempts state statutory schemes that allowed patients to sue HMO's for damages/injuries resulting from the refusal of the HMO to cover treatment that a doctor has deemed "medically necessary." Aetna v Davila (2003)

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## Possible to resolve preemption issue..

- ◆ Federal statute/regulations can expressly describe how statutory schemes can co-exist:
  - Example, HIPAA: preempts state law to the extent that it is more protective of health information than state law.
  - If state law provides *greater* protection of "protected health information" than HIPAA, then HIPAA Privacy Rule allows state law to prevail.

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