Widener University
Commonwealth Law School

Memorandum

TO: First-Year Students, Fall 2017

FROM: Professor Anna Hemingway
Coordinator, Introduction to Legal Process

DATE: July 24, 2017

RE: First Assignment: Introduction to Legal Process

Welcome to law school. Our first class meeting is on Monday, August 14, 2017, at 7:00 pm in Room A180. **There is an assignment for the first class meeting**. Because you are expected to be prepared for that meeting, you must do the assignment in advance. This packet contains general information about the course, the schedule, the syllabus indicating the first class assignment, and some readings for the course.

There are two textbooks for the course that are being assigned in their entirety for the Wednesday, August 16, and Thursday, August 17, class meetings. The textbooks are *American Courts,* 3rd edition, (ISBN 978-0-314-91093-6), and *The Anatomy of a Lawsuit,* revised edition, (ISBN 978-1422479902). They are small books having approximately 100 and 120 pages of text, respectively; you may, therefore, want to purchase the books at least two weeks before the start of the course. *American Courts* can be ordered at http://store.westacademic.com/Meador_and_Mitchells_American_Courts_3d_9780314910936.html and *The Anatomy of a Lawsuit* can be ordered at http://www.cap-press.com/books/isbn/9781422479902/The-Anatomy-of-a-Lawsuit-Revised-Edition.

There are also five videos that you will need to watch for the course. The videos are referenced on your syllabus as Videos 1, 2, 3, 4a and 4b. They will be available on August 1, and can be accessed by clicking on each link listed under the Intro to Legal Process Panopto Videos 2017 heading on the law school orientation webpage.

I look forward to seeing you at the start of the course and wish you the best for the remainder of the summer.

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Introduction to Legal Process

Fall 2017

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INTRODUCTION TO LEGAL PROCESS

GENERAL INFORMATION

Course Description

The Introduction to Legal Process course is a one-week course that is intended to help bridge the gap between undergraduate school and law school, and prepare you to become a first-year law student. Because some students do not have a liberal arts background, and others could use a refresher on certain fundamentals regarding our governmental and legal systems, a portion of the course will provide an overview of the structure of our government, the federalist system in which we live, and the legal system in which you will work. These lectures comprise the first hour of each of the four sessions during the week.

Law school is different from undergraduate school. Law school can be intimidating because of the new subject matter, the heavy work load, and the new vocabulary you must master in what seems like a short time. In addition, law professors expect different things from you than did your undergraduate professors. These things include: thorough preparation of the assigned material before you come to class, useful participation in the discussion during the class period, and synthesis of the material into a coherent body of law that you can then apply on an examination. In order to better meet these expectations you need to learn how to prepare both for your class and for what the professor will be seeking from you when you are called on to participate. Therefore, the second part of each of the four class sessions will introduce you to case briefing, outlining, and analysis - skills that are vital to your success as a law student, and that you will continue to develop and hone throughout your first year. Finally, because law school exams are starkly different from those you took in undergraduate school and are puzzles to many first-year law students, the course will finish by considering exams and exam writing.

Course Materials

The required texts for the course are *American Courts* (3rd ed.), by Daniel J. Meador, and *The Anatomy of a Lawsuit* (revised ed.) by Peter N. Simon. We strongly recommend that you purchase a law dictionary before the start of the course, as it will assist you in understanding some of the vocabulary which we will be introducing during the first week. In addition, a law dictionary is an invaluable aid to have throughout your law school career (*Black's Law Dictionary* is a popular one).

Attendance

Attendance is mandatory. The school observes the American Bar Association rule requiring student attendance at no less than 80% of the class sessions in any given course. Any student who misses 20% or more of the classes may not take the final examination and effectively fails the course. Applied to the Introduction of Legal Process course, the rule requires attendance at all of the sessions. Therefore, any student who is absent from one session will be precluded from taking the final examination.

We will take attendance at each class session by passing out a roster sheet for you to sign or initial, thereby certifying that you attended the class. Please note that you are subject to the Student Code of Conduct when you sign and represent that you were in attendance.

Repeated lateness, while disruptive and distracting at the least, will also be treated as an absence.

If an emergency arises and you cannot attend class, please contact the Director of Student Affairs as soon as possible. Otherwise, such an absence will be treated as any other absence.

In addition to complying with the 20% rule for attendance, you also will be required to take three multiple choice/true-false quizzes and one essay exam to successfully complete this course. The quizzes and essay exam will be graded pass/fail. The successful completion of this course is a graduation requirement.

INTRODUCTION TO LEGAL PROCESS
SCHEDULE AND SYLLABUS

REGULAR AND EXTENDED DIVISIONS – SESSIONS 1 - 4 BEGIN AT 7:00 PM IN ROOM A180; SESSION 5 BEGINS AT 10:00 AM IN ROOM A180.

Session One - Monday, August 14
Assignment to be completed for first class: watch Panopto Video 1 (Hemingway); read Case Briefing Materials (in Packet) (pp. 5 – 14); read Dog Bite Problem Materials (in Packet) (pp. 15 – 21).

7:00 - 8:00 Introduction (Prof. Hemingway)

8:00 - 8:10 Break

8:10 - 10:00 Case Briefing (small groups - room assignments will be distributed during the first class)

Session Two - Tuesday, August 15
Assignment to be completed for second class: read *Governmental Structure* (in Packet) (pp. 31 – 91); watch Panopto Video 2 (Prof. Fruth); read *Dobrin v. Stebbins* and *Siewerth v. Charleston* (in Packet) (pp. 22 – 26).

7:00 - 8:00 Governmental Structure (Separation of Powers, Federalism, the Regulatory State) (Prof. Fruth)

> Please come to the large group session at 7:00 in A180 prepared for a multiple-choice quiz on Panopto Video 2 and the *Governmental Structure* reading assignment.

8:00 - 8:10 Break

8:10 - 10:00 Case Synthesis and Outlining (small groups - room assignments will be distributed during the first class)

> Please come to the small group session at 8:10 prepared to discuss *Dobrin v. Stebbins* and *Siewerth v. Charleston.*

Session Three - Wednesday, August 16
Assignment to be completed for third class: read *American Courts*; watch Panopto Video 3 (Prof. Lee); read *Nelson v. Lewis* (in Packet) (pp. 26 – 30).

7:00 - 8:00 Court Structure and Authority (Prof. Lee)

> Please come to the large group session at 7:00 in A180 prepared for a multiple-choice quiz on Panopto Video 3 and the *American Courts* reading assignment.

8:00 - 8:10 Break

8:10 - 10:00 Legal Analysis (small groups - room assignments will be distributed during the first class)

> Please come to the small group session at 8:10 prepared to discuss *Nelson v. Lewis.*

<u>Session Four - Thursday, August 17</u>

Assignment to be completed for fourth class: watch Panopto Video 4a before reading *The Anatomy of a Lawsuit* (Prof. Anthon); read *The Anatomy of a Lawsuit*; watch Panopto video 4b after reading *The Anatomy of a Lawsuit* (Prof. Anthon).

7:00 - 8:00 Case Structure (Civil and Criminal Cases) (Prof. Anthon)

Please come to the large group session at 7:00 in A180 prepared for a multiple-choice quiz on Panopto Videos 4a and 4b and *The Anatomy of a Lawsuit* reading assignment.

8:00 - 8:10 Break

8:10 - 10:00 Exam Writing (small groups - room assignments will be distributed during the first class)

<u>Session Five - Saturday, August 19</u>

10:00 - 11:15 Essay Exam in A180

Please come to the large group session at 10:00 AM in A180 prepared for an essay exam based on the Dog Bite statute, *Messa v. Sullivan, Dobrin v. Stebbins, Siewerth v. Charleston,* and *Nelson v. Lewis.*

Case Briefing

PREPARING FOR CLASS

Your law school classes will be different than any other class you have taken. Rather than reading textbooks and listening to lectures, you primarily will study judges' decisions in actual cases and will engage in Socratic dialogues about them with your professors and colleagues. This chapter will help unravel some of the mysteries of class preparation and will tell you the best way to prepare for class. In the next chapter, you will learn about the Socratic dialogue and the ways to make the most of your class time.

A. CASE METHOD

During the first year of law school and in many upper-level courses, your professors will use the case method. The assigned readings in your classes will consist largely of cases from the casebook for the course. Rather than reading a textbook description of the law, you will read the opinions that judges have written in actual lawsuits. Although technically the word "case" refers to the lawsuit itself, "case" also is used to refer to the judge's written opinion.

The case method is a reflection of the importance of judicial decisions in the common-law system. A great deal of the law comes from judicial decisions, and decisions in new cases are based on already decided cases. Therefore, learning to read and to analyze cases is essential. But cases teach more than just legal principles. By learning law in the context of actual lawsuits, you learn how disputes arise, the judicial procedures for resolving them, and available remedies. The case method also makes law come alive. Rather than reading pages of abstract statements of law, the principles are presented more vividly by real problems involving real people.

A case is included in the casebook either because it has been important in the law's development or because it is particularly useful in presenting a particular legal issue. The casebook author will include only the portion of the opinion that is relevant to the issue being studied. Sometimes, the opinion will be from a trial court. More often, however, the opinion will be from an appellate court because appellate courts primarily decide issues of law, which are the main focus of your classes. Trial courts, on the other hand, decide issues of fact and of law. Moreover, when deciding issues of law, trial courts are bound by the precedent of appellate court decisions, so trial court opinions less often include an in-depth examination of a legal issue. Finally, state trial court opinions usually are not published and, therefore, are less readily available to casebook authors.

An important lesson you will learn from reading cases is that more than one answer to a disagreement may exist, as demonstrated by concurring and dissenting opinions. In a concurring opinion, a judge agrees with the majority's decision but disagrees with its reasoning; in a dissenting opinion, a judge disagrees with the decision, too. The judges do not disagree because they cannot understand the law. They simply have different perspectives on how the law should apply. Therefore, do not be surprised or concerned if you disagree with the cases you read. To the contrary, independent and creative analyses of cases and of the governing law are important skills.

Beware! Your professors normally will post reading assignments for the first class session. Find out where assignments are posted, and be sure to buy your casebooks in time to get prepared. Although some professors will lecture on the first day of class, most professors will expect you to be prepared to describe the cases included in the reading assignment and to discuss the legal issues they raise. You will learn much more from class if you have done the reading beforehand.

B. READING CASES

Give yourself more time to read the assigned cases than you think you will need. Judicial opinions are not written with law students in mind. They are written for judges and for lawyers. Opinions are filled with terminology and concepts that

will be new to you and may require several readings to understand them. A law dictionary will be an invaluable companion as you puzzle your way through the cases. You also will have to work to determine how each case fits with the other assigned readings. The reason your professor assigned the case may not be readily apparent.

The necessary class preparation time varies from person to person. At the beginning of the first year, everyone will be struggling to make sense of the cases and to keep up with the assigned readings. As you learn to read cases, you will become more efficient and will prepare for class more quickly. Like every other skill, some people will learn more quickly than others. Do not be discouraged if it seems to be coming more slowly for you. If you keep working at learning, you will learn. If you do not keep working, you may not become a lawyer and certainly will not become a good lawyer. If you fall behind in your assigned reading, catch up on the materials you missed only after preparing for each day's classes. Otherwise, you may stay behind for the rest of the term.

When you read a case, the first line will be a caption that identifies the parties to the lawsuit, such as *Shelley v. Kraemer*. In a trial court opinion, the plaintiff's name normally is first, and the defendant's is second. In an appellate court opinion, some jurisdictions put the appellant's name first and the appellee's second; others use the trial court caption. If the case has more than one plaintiff or defendant, the case name still will list only

one party for each side. The "v." between the names is an abbreviation for "versus." Just beneath the case name will be a citation to the court that issued the opinion, the year in which the case was decided, and where it was published.

Usually, the next line will identify the judge or justice who wrote the opinion. For example, it might say: "Mr. Justice Stewart delivered the opinion of the Court." More frequently, just the author's name is given, such as "Zorotovich, J." This does not mean that the author's name is Janet Zorotovich. The "J." is an abbreviation for "Justice" if the opinion was issued by a court of final appeal or for "Judge" if issued by a trial court or intermediate appellate court. Similarly, "Madsen, C.J." refers to Chief Justice or Chief Judge Madsen.

Normally, the opinion then describes the parties to the case, the plaintiff's cause of action, and the relevant facts. Appellate court opinions also describe the lower court(s) decision, the procedural method by which the appellant brought the case to the appellate court, and the grounds for appeal. The court then begins its substantive discussion of the case by stating each legal and factual issue. For each issue, the court describes the governing law, how the law applies to the facts of the case, and its decision ("holding") concerning that issue. After discussing each issue, the court states its final disposition of the case. A trial court opinion describes the remedy, if any, the court is granting; an appellate court decision states whether the lower court decision is affirmed or reversed or whether

the case is being sent back ("remanded") to the lower court for further proceedings.

The best way to read a case is a matter of personal style. Many people read the entire case quickly to get a sense of it and then re-read it more carefully as many times as necessary to fully understand it. You may understand the case after one reading, but that will be unusual during the first few weeks of law school. The opinion often will include unfamiliar words and terms, which you should look up in a law dictionary. Learning the language of the law is like learning any other language. When you do not know a word, look it up! You also should underline or otherwise highlight important passages, such as the court's statement of the applicable law.

Understanding the court's opinion is just the first step. The next step is analyzing its reasoning. Did the court apply the appropriate legal principles to decide the case? Did it properly apply the principles? Is this opinion consistent with relevant precedents? What are the legal, social, and political ramifications of the court's decision? Will it cause inappropriate results in future cases? Where does this case fit with the other cases you have read? Thinking about these questions will enhance your understanding of the case and of the legal process and will prepare you for the class discussion.

After analyzing the case, read the notes following it in the casebook. The notes often include questions about the case and brief descriptions of other

cases that address the same or similar issues. The note cases may reach a different conclusion or may present a twist on the facts of the main case. Because there are so many note cases, you should not take time to find and to read the full opinions for them unless it would help your understanding of the subject or unless your professor tells you to do so. However, you should think about the note cases and attempt to synthesize them with the main case. If they reach a different result, are they inconsistent or are they distinguishable in some legally relevant way? Thinking about the note cases will illuminate new dimensions of the legal principles you are studying and will provide excellent practice at synthesizing cases.

C. BRIEFING CASES

You are now ready to begin a particularly important part of your class preparation. You now should "brief" the main case. A brief is a written summary of the case. To prepare one, you must distill the case's most important parts and restate them in your own words. The effort will provide a variety of important benefits.

First, to describe a case accurately, you must read it carefully and thoroughly. Describing the case in your own words forces you to determine exactly what the court said, which concepts and facts were essential to its decision, and the proper legal terminology and procedures. You do not understand a case simply because you can copy parts of it from

your casebook. On the other hand, if you can describe the concept in your own words, you can feel reasonably confident that you do understand it.

Second, after reading so many cases in each course, your case briefs will help you remember the details of each case for class discussions and exam preparation. Case briefs are a particularly helpful study aid because they cover all the cases you studied in class, whereas most other study aids are not so carefully tailored to your coursework. To be most effective, case briefs must be brief. Otherwise, you will have difficulty discovering the salient points in your brief during class discussions, and you will have far too many pages to read for convenient exam review, because you may brief hundreds of cases each term.

Third, briefing cases exercises skills you will use throughout your legal career. As a lawyer, you will have to read and analyze cases with a careful eye to detail. You also will have to summarize cases when writing legal memoranda, briefs, and other documents and when making oral arguments to courts. Because case briefing is such a valuable skill, the time and effort you spend perfecting it in law school will be repaid many times over.

Because case briefing can be time consuming and difficult, especially when you are beginning, you may be tempted to use commercially prepared case briefs. By all means, resist the temptation. The primary benefit of a case brief comes from prepar-

ing it. The process of writing a brief forces you to exercise your analytic skills and to dig into all the procedural and substantive aspects of a case. Simply reading a canned brief will not provide this valuable exercise. Moreover, you cannot be sure that the canned brief is accurate or focuses on the same aspects of the case as your professor. Besides, canned briefs are not available for most of the cases you will have to read when you are a lawyer!

As you become more experienced at briefing, you will get faster. When you have become adept at briefing, you can consider dispensing with a separate written brief and briefing in the casebook instead. You can make the necessary notations in the margins of the casebook and can highlight key passages. You should keep this possibility in mind when you are deciding whether to buy new or used casebooks, because you will want room for your notations. You also can save time by developing a list of abbreviations. Some common law school abbreviations are "P" or "π" for "plaintiff," "D" or "Δ" for "defendant," and "K" for "contract."

D. CASE BRIEF FORMAT

There are many different ways to brief a case. You should use the format that is most useful for your class and exam preparations. Regardless of form, every brief should include the following information.

1. CAPTION

A brief should begin with the case name, the court that decided it, the year it was decided, and the page on which it appears in the casebook. The court is included to indicate the precedential value of the opinion. The precedential value depends on the court level—trial, intermediate appellate, or court of last resort—and on whether it is a state or federal court. Including the court also will be helpful when you are synthesizing the cases in that section of materials. The year of decision also is included to help assess the opinion's precedential value. Older cases may have been modified or reversed by more recent ones.

2. FACTS

Next, state the facts of the case. This section is necessary because legal principles are defined by the situations in which they arise. For example, assume you are briefing a case in which the defendant was convicted of murder. If your brief only states that killing is a crime without stating the facts of the case, you could mistakenly apply that principle to a case in which the defendant killed in self-defense. Only by stating the circumstances concerning the killing will you have an accurate picture of the law.

Include in your brief only those facts that are legally relevant. A fact is legally relevant if it had an impact on the case's outcome. For example, in a

personal injury action arising from a car accident, the color of the parties' cars seldom would be relevant to the case's outcome. The defendant's liability will not turn on whether the injured party's car was green, rather than blue. Therefore, do not include that fact in your brief even if the court mentions it in the opinion. Similarly, if the plaintiff and defendant presented different versions of the facts, you should describe those differences only if they are relevant to the court's consideration of the case. Otherwise, just state the facts upon which the court relied. Because you will not know which facts are legally relevant until you have read and deciphered the entire case, do not try to brief a case while reading it for the first time.

3. PROCEDURAL HISTORY

With the statement of facts, you have taken the case to the point at which the plaintiff filed suit. The next section of the brief, the procedural history, begins at that point and ends with the case's appearance in the court that wrote the opinion you are reading. For a trial court opinion, identify the type of legal action the plaintiff brought. For an appellate court opinion, also describe how the trial court and, if applicable, the lower appellate court decided the case and why. In addition to setting the stage for the opinion you are briefing, describing the case's procedural history helps you learn judicial procedures.

4. ISSUES

You are now ready to describe the opinion you are briefing. In this section of the brief, state the factual and legal questions that the court had to decide. For example, assume the plaintiff claims that the defendant made a gift of a watch to her but now denies that he made the gift. For a gift to be legally enforceable, the person who claims it (the alleged "donee") must prove that (1) the person who allegedly made the gift ("the donor") intended to make a gift, (2) the alleged donor delivered the gift to the donee in accordance with the legal requirements for a delivery, and (3) the alleged donee accepted the gift. In this case, do not state the issue as: "Does the plaintiff win?" or "Was there a gift?" Instead, include in the issue statement each question that the court had to decide to answer the ultimate question of whether the defendant made a legally enforceable gift. If the court addressed all three requirements for a valid gift, you should include three issues in your case brief:

1. Did defendant intend to make a gift to plaintiff?;

2. Did defendant deliver the watch to plaintiff?; and

3. Did plaintiff accept the gift?

These are the questions the court had to answer to decide who is legally entitled to the watch.

Sometimes students think that they should consolidate all the issues in a case into one large issue.

That is the wrong approach. To analyze a case properly, you must break it down to its component parts. Otherwise, you will have a tangled skein of facts, law, and analysis. Dissecting the case allows you to deal with one question at a time, rather than trying to deal with all the questions at once.

5. HOLDINGS

In this section, separately answer each question in the issues section. For quick reference, first state the answer in a word or two, such as "yes" or "no." Then, in a sentence or two, state the legal principle on which the court relied to reach that answer (the "holding"). To do so, you must distinguish the holding from "dictum" (pl. "dicta"). The holding is the legal principle that was essential to the court's resolution of the issue. Dictum, on the other hand, is any nonessential principle that the court may have included in the opinion.

Dictum is not included in a case brief because it does not have precedential value. Although dictum can provide an insight into the court's thoughts about a related issue, the court is free to ignore it in future cases. Dictum is nonbinding because it was not directly related to the issue that the court had to decide and, therefore, may not have been considered by the court as carefully as a holding. Additionally, neither the plaintiff nor the defendant may have addressed the dictum's relevance and accuracy.

You must state the holdings as accurately as possible, because this section of the case briefs will be particularly important for exam preparation. Check whether your description of a holding is too broad by thinking of any exceptions or qualifications. For example, if you stated the holding as "killing is a crime," that holding would include a person who killed in self-defense. Therefore, narrow this statement of the holding. Similarly, check whether your description is too narrow by questioning the relevance of each part. For example, if the victim in the case was a man, the statement "killing a man without legal justification is a crime" is technically correct. However, no legally relevant reason exists for distinguishing between male and female victims, so broaden this statement. A hornbook or other study aid can help you determine the exact scope of the holding.

6. RATIONALE

You now should describe the court's rationale for each holding. This section of the case brief may be the most important, because you must understand the court's reasoning to analyze it and to apply it to other fact situations, such as those on the exam. Starting with the first issue, describe each link in the court's chain of reasoning. Begin by stating the rule of law that the court applied to decide the issue. Next, describe the facts of the case that were relevant to the court's analysis of that issue. Then, describe the court's holding when it applied the rule

of law to the facts of the case. Repeat the same three-step process for each issue in the issue section.

After stating the court's rationale, give your analysis of it. Does it follow logically from point to point? Does the court assume facts that were not proved in the case? Has the court stated precedent too narrowly or too broadly? Does the court rely on improper analogies? You must be a critical and creative opinion reader. Note your criticisms and questions so that they are readily available during class and during other discussions with your colleagues and professors.

At this point, you also should synthesize the case you have briefed with other cases you have read for the course. As a lawyer, simply describing the holdings in individual cases is not enough. You must be able to give an overview of an area of law. If two or more cases seem inconsistent, perhaps you have stated their holdings too broadly. Check the cases for limiting language that you previously may have missed. Check to see whether the cases are from the same jurisdiction. If not, the earlier case was not binding precedent for the later case because jurisdictions generally are free to develop their own common law. Also check the years the cases were decided. If a substantial time gap exists, the later case may reflect changed societal, political, or legal conditions. Synthesizing the cases will give you an overview of the subject matter and will develop your analytic skills.

COMPONENTS OF A CASE BRIEF

<u>OPENING COMPONENTS</u>:

CAPTION	Case name, court deciding, date of decision.
FACTS	Identify parties and the situation leading to the dispute. "The Story." What facts are relevant? Ask: If a fact had not happened, or had happened differently, would the outcome of the case be the same?
PROCEDURE	Where have we been in the court process? Where are we now? Who sued whom, on what claim, and what does he/she want? Often incorporated in Facts section. Be careful: Not all procedural background is needed or helpful in a case brief.

<u>CORE COMPONENTS:</u>

RULE(S)	Legal rule(s) that the court relied on or applied to resolve the legal dispute or issue in <u>this case.</u>
ISSUE(S)	Legal question(s) court must decide in order to resolve the dispute. Combines legal rule(s) and dispositive (key) facts.
HOLDING(S)	Courts answer to the questions (issues). The actual decision in the case. Mirrors the issue, with the law/rule and facts in statement form. Sets precedent; predicts how similar questions may be resolved in the future.
REASONS/POLICIES	Explains/justifies the Holding; why the court reached the decision it did. May include rules from earlier cases, statutes, etc.

NOTE: There are many ways to brief a case. Most case briefs will include the components listed above, although the terms used and the order of the components may differ.

Dog Bite Problem

Materials

You are the only clerk in the Evanston office of the venerable firm of Austin, Martin, and Riddley. The following matter has been referred to you by Mark Porteus, a senior partner:

On February 1, our firm's client, Ralph Woodley, was visiting the privately owned "Randolph Zoo" in Elgin, Illinois, with his 5 year old son, Harvey. The zoo consists of several brick buildings containing exhibits of reptiles, fish, and other small animals.

After a few hours of wandering from one exhibit to another, Ralph decided that he and Harvey would visit one more and then leave for home. He spotted a brick building, somewhat set apart from the other buildings, and he set off for it on a pathway across the ice and snow with his son in tow.

Ralph and Harvey found a walk leading to the front door of the building. When they were about 10 yards away from the front door, a large German Shepherd suddenly appeared from behind a snow-covered hedge located five yards to the left. The dog was running loose. He ran up to Ralph and Harvey and nuzzled them playfully.

After a minute or two, Ralph and Harvey resumed their progress to the front door of the brick building. Harvey ran on ahead, picked up some snow, fashioned a snowball, and lobbed it at his father. Ralph ducked and turned and saw the snowball hit the German Shepherd on the back. Although the snowball did not have much velocity, and could not have caused any pain whatsoever, it sprayed the dog with snow and appeared to startle him.

The German Shepherd immediately set upon Harvey and bit him four times, with great force, on his right elbow.

Harvey's elbow was severely lacerated and required 117 stitches. I have had several phone calls from Ralph concerning this matter and he is, to put it mildly, distraught.

Mr. Woodley's friend, Seymour Spyer, went to the Randolph Zoo a week after these events and learned that the structure in front of which Harvey was mauled is not, in fact, an exhibition building. It is the private residence of the zoo's groundskeeper, Arthur Androcles. Mr. Androcles is provided the residence, and the yard in which these events took place, as part of his compensation.

Ralph says that there were no signs informing him that Androcles' building was a residence rather than another exhibition structure. He insists that there were no fences, borders or barriers setting Androcles' residence off from the rest of the zoo, and also insists that the residence looks like the exhibition buildings. He admits, however, as noted above, that Androcles' home is somewhat set apart from the other brick buildings in the zoo.

Ralph has told me there were no signs warning of dogs on the premises.

I have discussed this matter with Androcles' attorney over the telephone. He admitted that Androcles owns the dog. He stated, rather vehemently, that the dog had never bitten or harassed anyone before this episode. He said Androcles was away from the zoo that day and did not witness the events. He suggested that the dog would not have attacked if he had not been struck by the snowball, and he has refused all our demands for compensation. He admitted there were no signs warning of dogs.

Mr. Porteus filed a complaint incorporating the above information in the Kane County Courthouse in Elgin. The complaint named Harvey and his father as plaintiffs and Androcles as defendant. Androcles' attorney has filed a motion to dismiss on the grounds that the complaint fails to state a claim upon which relief can be granted. When the motion is heard next week, Judge Brouwer will assume, for purposes of the motion only, that all the facts alleged in the complaint are true.

§ 366 Liability of owner of dog attacking or injuring person

If a dog or other animal, without provocation, attacks or injures any person who is peaceably conducting himself in any place where he may lawfully be, the owner of such dog or other animal is liable in damages to such person for the full amount of the injury sustained.

P.A. 78–795, § 16, eff. Oct. 1, 1973.

MESSA v. SULLIVAN

Court of Appeals, 1965.
61 Ill. App. 2d 386, 209 N.E.2d 872.

BURMAN, PRESIDING JUSTICE.

Betty Messa brought this action against James Sullivan, Helen Sullivan and the Keyman's Club, an Illinois not for profit corporation, to recover damages for the bodily injuries which she sustained as the result of being bitten by the defendants' dog. The complaint was based on two theories: first, a common law action for the keeping of a vicious animal and, second, an action based on what is commonly known as the "Dog Bite Statute" (Ill. Rev. Stat. 1963, ch. 8, § 12d). The parties waived a jury and the case was tried by the court. On the common law count, the trial court held for the defendants because he found that the plaintiff was contributorily negligent. No appeal has been taken from the judgment entered on that issue. On the statutory count, however, the court concluded that the plaintiff should recover and therefore he entered judgment awarding the plaintiff damages only against James Sullivan and the Keyman's Club in the amount of $3,000. From this judgment these two defendants appeal. They contend that the plaintiff failed to prove, as she was required to prove in order to recover under the statute,

that she was lawfully on the defendants' premises and that she did not provoke the dog to attack. Alternatively the defendants contend that the amount of the damage award is not supported by the evidence.

The plaintiff suffered her injuries in the Keyman's Club building, 4721 West Madison Street in the City of Chicago. Located on the lower level and on the first and second stories of this building were the following: a bowling alley, a barber shop, a cocktail lounge, banquet and meeting rooms, a ballroom and various other businesses and offices. A labor union office occupied the third floor and the fourth floor was vacant. James Sullivan, the president of the Club and the manager of its building for over twenty years, and his wife, Helen, occupied the fifth floor as their residence. No other use was made of the fifth floor. The Sullivans' apartment contained a safe in which the receipts from the operation of the building were kept. In addition, the apartment contained the defendants' furniture, personal property and their three year old German Shepherd dog, named "K.C.", which was kept there to protect the Club's property in the apartment. The various businesses located in the building were advertised by signs on the exterior of the structure and on a building directory which was located in the building lobby. There were, however, no notices anywhere that the fifth floor was used as a residence and not for commercial or business purposes.

All the floors of the building were served by an automatic elevator which could be reached on the ground floor by entering the building from Madison Street and by walking through the building lobby past the building office, which was located on the left of the lobby as one entered the building.

The plaintiff and the defendant, James Sullivan, testified concerning the events which occurred on the day in question. The plaintiff, who was a deaf mute, testified that at about two o'clock on the afternoon of June 12, 1961, she entered the defendants' building for the purpose of selling printed cards depicting the deaf and dumb alphabet. She said that this was the first time she had been in the building; that as she walked through the lobby she saw a woman at a telephone switchboard in the building office, that she entered the elevator and rode it to the fifth floor. When she got to that floor, the door on the elevator itself opened automatically. The plaintiff said that before she could step out of the elevator she had to manually open a second door which swung outward. She opened this door, which she said was heavy. She stepped out into the fifth floor hall and turned to the left where there was a door. At this point the defendants' dog ran out of the door and jumped on the plaintiff. She testified: " * * * the dog bit me on the leg, and he bit me on the body, and he bit me on the arm, and I tried to cover my face. And the dog was big, and the dog was bigger than I was, and he was on top of me, and three times he bit me." The plaintiff stated that she finally managed to get back to the elevator and to ride down to the lobby where she told the woman at the switchboard what had happened.

During her testimony, the plaintiff was shown plaintiff's exhibit number one, a picture of a sign reading in large letters:

WARNING

KEEP OUT

VICIOUS

POLICE DOGS

INSIDE

She identified the exhibit as a picture of a sign which was posted on the manually operated elevator door which swung outward into the fifth floor hall. However, she denied having seen the sign because, in her words, "* * * the door was so heavy. I was pushing the door, it was a sliding door, and I did not see the sign."

Concerning her injuries, the plaintiff identified two exhibits as accurate pictures of the large marks and wounds inflicted by the dog on her leg, on her right side and on her right arm. The plaintiff testified that the bites left "holes" in her arm, that she felt pain for about two months after the occurrence and that she could not sleep for two weeks after the events in question.

The defendant, James Sullivan, testified that on the day in question he and an office girl were in the building office; that he observed the plaintiff walk into the lobby and proceed directly to the elevator without looking at the directory; that he saw the plaintiff board the elevator; and that he noticed the elevator go to the fifth floor. He said that the door on the elevator itself opened automatically; that when this door opened on the fifth floor, there was a second door which must be opened outward by hand to gain entrance to the hall; and that a thirty inch high sign warning of the presence of vicious dogs was posted on this manually operated door so that the bottom of the sign was about three and one-half to four feet from the floor. He also stated that the door to his apartment on the fifth floor was to the right of the elevator door about fifteen feet down the hall. The defendant testified further that he saw the plaintiff after she came down from the fifth floor; that he tried to administer first-aid for the scratches on the plaintiff's arm; and that he observed a tear in her dress. In his discovery deposition, the defendant testified that there was no sign in the elevator itself regarding vicious dogs and that the manually operated elevator door on the fifth floor could be locked by a key, but that it was unlocked on the day of the occurrence.

The "Dog Bite Statute" with which this appeal is principally concerned provides:

> If a dog, without provocation, attacks or injures any person who is peaceably conducting himself in any place where he may lawfully be, the owner of the dog is liable in damages to the person so attacked or injured to the full amount of the injury sustained. The term

> "owner" includes any person harboring or keeping a dog. The term "dog" includes both male and female of the canine species. (Ill. Rev. Stat. 1963, ch. 8, § 12d)

This court, in *Beckert v. Risberg*, 50 Ill. App. 2d 100, 199 N.E.2d 811, set forth the four elements of an action under this statute as follows:

> (1) injury caused by a dog owned or harbored by the defendant;
>
> (2) lack of provocation;
>
> (3) peaceable conduct of the person injured, and
>
> (4) the presence of the person injured in a place where he has a legal right to be.

There is no dispute that the plaintiff was bitten by a dog owned by the defendants and hence there is no question concerning the first element above. The defendants contend that the other elements are not satisfied, however, because the plaintiff's entry onto the fifth floor past a large sign warning her of the presence of the dog which bit her constituted an unlawful entry by the plaintiff and constituted provocative behavior on her part.

We do not agree that the plaintiff was not lawfully on the defendants' premises. From all indications on the exterior of the defendants' building, in its lobby and on the inside of the elevator cab itself, people like the plaintiff could only surmise that the entire building was devoted to business purposes and that it was intended that they should come there on business. No notices anywhere indicated that any part of the premises was used as a private residence. It is clear, therefore, that when she entered the building, crossed its lobby, entered the elevator and rode it to the fifth floor, the plaintiff was lawfully on the premises. In addition, we believe that she was also lawfully on the premises when she entered the fifth floor hall where she was attacked. Persons entering the building and riding its elevator would have no reason to believe that the fifth floor was used for residential purposes or that vicious dogs were kept there. The sole warning to this effect was posted in a place where it could be seen only split seconds before one would enter the danger area and only at a time when the elevator passenger would be concerned with pushing open the heavy door in order to step into the hall and continue on with his business there. We agree with the trial court that under these circumstances the warning sign was in the wrong location, that it did not give adequate warning of the danger and that hence the sign gives no grounds for holding that persons who enter the hall have no legal right to be there.

The cases primarily relied on by the defendants are distinguishable on their facts and are not applicable here. In *Fullerton v. Conan*, 87 Cal. App. 2d 354, 197 P.2d 59, the California District Court of Appeal affirmed a judgment for the defendant in a case brought by a five year old child to recover for injuries she received when bitten by the defendant's dog. She had sued under the California "Dog Bite Statute" which, like our own statute, required that the plaintiff lawfully be on the dog

owner's premises. In that case, however, unlike the present case, it appears that the child had been given a direct, oral instruction not to go into the yard where the dog was. In another California dog bite case, *Gomes v. Byrne*, 51 Cal. 2d 418, 333 P.2d 754, the court affirmed a judgment for the defendant. That case is not like the case at bar because there the plaintiff saw and heard the dog before he entered the yard where the dog was kept. We do not believe that the other cases cited by the defendants are controlling and it would serve no useful purpose to extend this opinion by discussing them at length.

Next the defendants argue that the plaintiff was guilty of provocative behavior at the time she was attacked. They reason that the plaintiff approached the apartment and the dog without giving a warning as to the nature of her visit; that this act represented a threat to the security of the apartment; that the dog resented this threat and that the plaintiff should have known such conduct would be likely to provoke a dog to attack. We do not agree. Here the plaintiff had a legal right to be in the hallway. Her only actions at that point consisted of stepping off the elevator and walking a short distance toward the defendants' apartment door. We do not believe that the term "provocation" in the statute was intended to apply to a situation like this and thereby relieve from responsibility the owner of a vicious dog, which is specifically kept for protection, merely because the dog interprets the visitor's movements as hostile actions calling for attack.

Finally the defendants contend that the award of $3,000 is not supported by the evidence and that it is excessive. Our courts have consistently held that a damage award to a plaintiff in a personal injury case will not be set aside unless it is so palpably excessive as to indicate passion or prejudice on the part of the trier of fact (*Holsman v. Darling State Street Corp.*, 6 Ill. App. 2d 517, 128 N.E.2d 581, and cases there cited; *Eizerman v. Behn*, 9 Ill. App. 2d 263, 132 N.E.2d 788; *Lau v. West Towns Bus Co.*, 16 Ill. 2d 442, 158 N.E.2d 63) or unless it is so large as to shock the judicial conscience (*Barango v. E.L. Hedstrom Coal Co.*, 12 Ill. App. 2d 118, 138 N.E.2d 829; *Smelcer v. Sanders*, 39 Ill. App. 2d 164, 188 N.E.2d 391; *Myers v. Nelson*, 42 Ill. App. 2d 475, 192 N.E.2d 403). The record shows that the plaintiff sustained multiple wounds on her body, arms and legs and that she suffered great pain. We find nothing here to indicate passion or prejudice on the part of the trial judge and we do not believe that under the circumstances the award can be considered shocking to the judicial conscience. Hence we cannot substitute our judgment for that of the trial judge and set aside the award.

The judgment should be affirmed.

Affirmed.

MURPHY, J., and KLUCZYNSKI, J., concur.

DOBRIN v. STEBBINS

Court of Appeals, 1970.
122 Ill. App. 2d 387, 259 N.E.2d 405.

LEIGHTON, JUSTICE.

In a non-jury trial, plaintiff recovered a judgment against defendant for personal injuries he suffered when he was bitten by defendant's dog. Although plaintiff, who is the appellee in these proceedings has not filed a brief, we will review this appeal on the merits. *Daley v. Jack's Tivoli Liquor Lounge*, Inc., 118 Ill. App. 2d 264, 254 N.E.2d 814.

The facts are not in dispute. On July 16, 1964 defendant was the owner of a toy German Shepherd. He chained it to a pipe so that the dog was confined within defendant's property at 6225 West 79th Street in the City of Chicago. Plaintiff, then 17 years of age, was selling magazines. There was no sign or posted notice on defendant's property warning salesmen or others to keep off. Plaintiff went to defendant's home. He walked up a dirt path that led from the sidewalk. When plaintiff was within five or ten feet of the door, defendant's dog jumped on plaintiff, bit him in the abdomen and on the thigh. After getting away, plaintiff was taken to a nearby clinic where he received treatment for his injuries. Later in the day he visited his family doctor who replaced the bandages and gave him a tetanus shot. Pain from the dog bites lasted three or four days. Plaintiff's doctor submitted a bill which was paid.

Plaintiff filed suit against defendant and invoked what is colloquially the "Dog Bite Statute," Ill. Rev. Stat. 1963, ch. 8, sec. 12d which provides:

> Dogs attacking or injuring person—Liability of owner. If a dog, without provocation, attacks or injures any person who is peaceably conducting himself in any place where he may lawfully be, the owner of the dog is liable in damages to the person so attacked or injured to the full amount of the injury sustained. The term "owner" includes any person harboring or keeping a dog. The term "dog" includes both male and female of the canine species.

After hearing evidence, the trial judge awarded plaintiff damages in the sum of $750.00. Defendant appeals. He contends that plaintiff was a trespasser when he entered defendant's property; therefore no judgment could be recovered under the statute. In the alternative defendant contends that the damage award was excessive.

A trespasser is one who does an unlawful act or a lawful act in an unlawful manner to the injury of the person or property of another. 87 C.J.S. Trespass § 1; see *People v. Goduto*, 21 Ill. 2d 605, 174 N.E.2d 385. By this definition, plaintiff was not a trespasser on defendant's land when he went there during the ordinary hours of the day to solicit magazine subscriptions.

An owner of property who provides a path or walk from the public way to his door, without some indication (sign, posting of notice or words) warning away those who seek lawful business with him extends a license to use the path or walk during the ordinary hours of the day. Persons who thus make use of the path or walk are licensees. Restatement, Second, Torts, sec. 332, Comment b; *Stacy v. Shapiro*, 212 App. Div. 723, 209 N.Y.S. 305 (1925); *Reuter v. Kenmore Building Co.*, 153 Misc. 646, 276 N.Y.S. 545 (1934). Our decision in *Messa v. Sullivan*, 61 Ill. App. 2d 386, 209 N.E.2d 872 supports this view. Therefore, plaintiff was a licensee on defendant's land when he was bitten by defendant's dog. He was in a "[p]lace where he may lawfully be. * * *" within the meaning of Ill. Rev. Stat. 1963, ch. 8, sec. 12d.

This being so, proof that plaintiff while peaceably conducting himself and without provocation, was injured by defendant's dog justified entry of judgment in favor of plaintiff and against defendant. *Beckert v. Risberg*, 50 Ill. App. 2d 100, 199 N.E.2d 811; *Bailey v. Bly*, 87 Ill. App. 2d 259, 231 N.E.2d 8.

The damages the trial judge awarded plaintiff were within the limits of fair and reasonable compensation. *Johnson v. Eckberg*, 94 Ill. App. 634; *Sesterhenn v. Saxe*, 88 Ill. App. 2d 2, 232 N.E.2d 277. Judgment is affirmed.

Judgment affirmed.

STAMOS, P.J., and DRUCKER, J., concur.

SUPPLEMENTAL OPINION

LEIGHTON, JUSTICE.

Defendant petitions for rehearing on the ground that when plaintiff came upon defendant's property, he saw the dog that bit him. Defendant argues that the best warning a property owner can give to those who may come upon his land is his dog chained, in plain view and standing guard. Defendant contends that presence of his dog in this way was constructive notice to the plaintiff that he could enter defendant's property only at his peril.

We agree that a dog chained to guard its owner's property where it can be seen, is notice that entry on the land is forbidden. However, the record in this case does not support defendant's contention. Both plaintiff and the defendant testified that there were bushes on either side of the front door to defendant's home. Plaintiff testified that he never saw defendant's dog before it bit him because it "must have come out of the bushes * *." In other words, defendant's dog was not where plaintiff could see it. The petition for rehearing is denied.

Petition for rehearing denied.

STAMOS, P.J., and DRUCKER, J., concur.

SIEWERTH v. CHARLESTON

Court of Appeals, 1967.
89 Ill. App. 2d 64, 231 N.E.2d 644.

SULLIVAN, PRESIDING JUSTICE.

Plaintiff appeals from a judgment in his favor in the amount of $500.30, and asks that the judgment be reversed and remanded for a new trial on the question of damages only. Plaintiff contends that the damages allowed are totally inadequate and not supported by the record.

Defendant filed a cross-appeal and asks that the judgment in favor of the plaintiff be reversed.

Roy Siewerth, a minor, by Ralph Siewerth, his father and next friend, filed this action against Ruben Charleston for injuries sustained when the defendant's dog bit the plaintiff on or about the face.

Section 1 of "AN ACT to establish the liability of a person owning or harboring a dog which attacks or injures a person", (Ill. Rev. Stat. 1963, chap. 8, par. 12d) provides in part as follows:

> "If a dog, without provocation, attacks or injures any person who is peaceably conducting himself in any place where he may lawfully be, the owner of the dog is liable in damages to the person so attacked or injured to the full amount of the injury sustained. * * *"

The facts are these: on June 8, 1963, the plaintiff, Roy Siewerth, who was at that time seven years old, was playing with a playmate, Kevin Charleston, on the front porch or front stoop of the defendant's home. The boys were playing a game known as tic-tac-toe and were lying on the porch or stoop which was approximately 5 feet by 3 feet in area. A Rhodesian Ridgeback dog was also lying on the porch or stoop. The dog weighed approximately 100 pounds and when standing was about 27 inches high at the shoulders. Early in 1963, this female dog had given birth to a litter of nine puppies. About two or three weeks before June 8, 1963, the dog had been struck by an automobile and it was confined to a local animal hospital, where six stitches were placed upon its hind quarter. June 8, 1963, the day the occurrence took place, was extremely hot, nearing 100 degrees.

The evidence also showed that the plaintiff pushed or kicked the dog in the stomach twice prior to the occurrence. His playmate, Kevin Charleston, pushed or kicked the dog about two minutes after the plaintiff had pushed or kicked the dog the second time. The dog growled at plaintiff after each time he kicked or pushed the dog in the stomach, although the dog had never growled at him before, and the boys had played with the dog on many occasions. Plaintiff testified that when he pushed the dog with his feet the dog growled each time and he knew that he made the dog angry each time.

Kevin Charleston's mother, Barbara Charleston, was in the living room at the time of the occurrence and prior thereto. She had called to

the boys to get off the porch when the dog first growled. Roy Siewerth, the plaintiff, testified that he heard Mrs. Charleston yell at him and Kevin to get off the porch only once. The boys remained on the porch. The evidence, however, showed that Mrs. Charleston told the boys to get off the porch twice just before the incident. After the dog growled the second time Mrs. Charleston told Roy Siewerth, the plaintiff, to go home. Roy Siewerth heard her but made no attempt to leave the porch. Prior to the date of the occurrence Mrs. Charleston told Roy Siewerth's mother that she did not want children on the porch. Mrs. Siewerth, the plaintiff's mother, also told her own children many times to stay off the Charleston porch. Shortly thereafter, Mrs. Charleston was prompted to go to the front door and noticed the plaintiff bleeding from the face and walking to his home. The evidence showed that the plaintiff, while lying on the porch, bent his head toward the dog and the dog's mouth came in contact with plaintiff's face. The dog's teeth had cut the plaintiff on the forehead partly back of the hairline, and also at the corner between the nose and right eye.

In addition to the foregoing, plaintiff testified that Kevin made the statement to one of two men who had taken statements from Kevin and the plaintiff, that "Lucy was right there and I was kicking him." When the man asked, "Who was kicking him?" Kevin said, "We both were." When the man asked the plaintiff whether he was kicking Lucy too, he said, "Me and him did." When the man asked Kevin how many times he kicked her, Kevin said, "About two or three times." When the man asked the plaintiff whether he kicked her more than once, the plaintiff nodded his head. He also stated that he remembered kicking the dog twice.

We will first discuss the cross-appeal of the defendant. The defendant raises only one point, namely, that the plaintiff failed to prove all of the necessary elements of the cause of action set forth in the complaint.

In *Beckert v. Risberg*, 50 Ill. App. 2d 100, 106, 199 N.E.2d 811, 814, the court said:

> "The elements of a cause of action under the statute are (1) injury caused by a dog owned or harbored by the defendant; (2) lack of provocation; (3) peaceable conduct of the person injured, and (4) the presence of the person injured in a place where he has a legal right to be."

The defendant argues that the plaintiff was guilty of provocation and that the attack by the dog was with provocation. The kicking or pushing of the dog by the plaintiff on two occasions, plus the kicking and pushing of the dog by Kevin Charleston, his playmate, sufficiently provoked the dog to constitute a complete bar to this statutory cause of action.

The plaintiff contends that he was bitten by a dog owned by the owner of the home without any provocation on the part of the plaintiff. He further argues that there was no provocation on the part of the plaintiff, as provocation needs intent and there was nothing in the

record to show that the minor plaintiff intended to provoke the dog into the action of biting the plaintiff. This contention is without merit. The plaintiff testified that the dog growled after he was pushed or kicked by the plaintiff on each occasion, and that when the dog growled he knew that that made the dog angry. He further stated that the dog had never growled at him before. Even if, as the plaintiff argues, the provocation in the statute needs intent, the record shows intent on the part of the plaintiff. The plaintiff further argues that since he kicked or pushed the dog only twice, after each of which occasion the dog growled, and that subsequently the dog, before biting the plaintiff, was kicked by his playmate, Kevin Charleston, that the bite by the dog was not caused by the provocation of the plaintiff. With this contention we cannot agree. The kicking or pushing of the dog on two occasions by the plaintiff, and subsequently by Kevin Charleston, his playmate, constituted continuous provocation.

The conduct of the plaintiff, coupled with the conduct of Kevin Charleston, was completely sufficient to constitute provocation as contemplated by the statute.

Defendant also argues that the plaintiff failed to prove other necessary elements of the statutory cause of action. The other necessary elements argued by the defendant are that the person injured must be peaceably conducting himself and the person injured must be in a place where he may lawfully be. It is argued that the plaintiff was not peaceably conducting himself by his own admission, and that he was not in a place where he may lawfully be, because he was told to go home by Mrs. Charleston, the defendant's wife, before the dog bite occurred. We think it unnecessary to discuss these points further, in view of the fact that we are constrained to hold that the attack by the dog was not without provocation.

In view of our holding on the question of liability, it will be unnecessary for us to discuss the plaintiff's appeal on the grounds that the damages awarded were inadequate. The judgment in favor of the plaintiff is reversed.

Judgment reversed.

SCHWARTZ and DEMPSEY, JJ., concur.

NELSON v. LEWIS

Court of Appeals, 1976.
36 Ill. App. 3d 130, 344 N.E.2d 268.

KARNS, PRESIDING JUSTICE.

Plaintiff, by her father and next friend, brought an action under the Illinois "dog-bite" statute (Ill. Rev. Stat. 1973, ch. 8, par. 366) for injuries inflicted upon her by defendant's dog. From judgment entered on a jury verdict for the defendant, she appeals.

On the date of her injury, plaintiff Jo Ann Nelson, a two and a half year old, was playing "crack-the-whip" in defendant's backyard with his

daughter and other children. Jo Ann was on the end of the "whip." The testimony shows that after she had been thrown off the whip, Jo Ann fell or stepped on the dog's tail while the dog was chewing a bone. The dog, a large Dalmatian, reacted by scratching the plaintiff in her left eye. There was no evidence that plaintiff or anyone else had teased or aggravated the dog before the incident, nor was there evidence that the dog had ever scratched, bitten, or attacked anyone else. According to its owner, the dog had not appeared agitated either before or after the incident. As a result of her injuries, Jo Ann incurred permanent damage to a tear duct in her left eye. It was established that Jo Ann's left eye will overflow with tears more frequently and as a result of less irritation than normal, but that her vision in the eye was not affected.

Our statute pertaining to liability of an owner of a dog attacking or injuring persons provides:

> If a dog or other animal without provocation, attacks or injures any person who is peacefully conducting himself in any place where he may lawfully be, the owner of such dog or other animal is liable in damages to such person for the full amount of the injury sustained. Ill. Rev. Stat. 1973, ch. 8, par. 366.

Under this statute there are four elements that must be proved: injury caused by a dog owned or harbored by the defendant; lack of provocation; peaceable conduct of the person injured; and the presence of the person injured in a place where he has a legal right to be. *Siewerth v. Charleston,* 89 Ill. App. 2d 64, 231 N.E.2d 644 (1967); *Messa v. Sullivan,* 61 Ill. App. 2d 386, 209 N.E.2d 872 (1965); *Beckert v. Risberg,* 50 Ill. App. 2d 100, 199 N.E.2d 811 (1964) *rev'd on other grounds* 33 Ill. 2d 44, 210 N.E.2d 207 (1965). There is no dispute but that the dog caused the plaintiff's injury; the defendant owned the dog; the plaintiff's conduct was peaceable; and she was injured in a place where she had a legal right to be. The issue presented is whether plaintiff's unintentional act constitutes "provocation" within the meaning of the statute.

It appears that this issue has not been passed upon by an Illinois court. The statute does not distinguish between intentional and unintentional acts of provocation and thus, defendant argues, an unintentional act, so long as it provokes an animal or dog, may constitute provocation. Defendant's position, that the mental state of the actor who provokes a dog is irrelevant is consistent with the commonly understood meaning of provocation. Provocation is defined as an act or process of provoking, stimulation or incitement. Webster's Third New International Dictionary. Thus it would appear that an unintentional act can constitute provocation within the plain meaning of the statute.

Only three reported decisions have considered the question of provocation within the meaning of this statute. In *Siewerth v. Charleston, supra,* the court held there was provocation where the injured boy and his companion kicked a dog three times. The argument was there raised that provocation meant only an intentional act, but the court did not pass upon this contention as it found the injured boy's acts in kicking

the dog clearly intentional and provoking. In *Messa v. Sullivan, supra*, the court found no provocation on the part of the plaintiff where she walked into a hallway patrolled by a watch dog that attacked her on sight. The court held the acts of the plaintiff did not constitute provocation within the intent of the statute and that plaintiff had a right to be on the defendant's premises. While plaintiff argues that in *Messa* the plaintiff did not intend to provoke the dog and there was no provocation found, it appears that the court's holding was based on a determination that plaintiff's actions and conduct were not of a provoking nature, not on any determination of the intent with which plaintiff's acts were done. The court stated that it did not believe "provocation" within the meaning of the statute was intended to apply to a situation where a vicious dog interpreted a visitor's non-threatening movements as hostile actions calling for attack. Similarly in *Steichman v. Hurst*, 2 Ill. App. 3d 415, 275 N.E.2d 679 (1971), it was held that the acts of a postal carrier in spraying the defendant's dog with a repellent was not provocation. Although language in the decision might be read to mean that absence of intent by the plaintiff to provoke is material, we do not believe that this is an accurate reading of the opinion. In *Steichman* the letter carrier had previous difficulties with defendant's dog and had made several efforts to avoid the dog on the day she was attacked. The court characterized her conduct as "reasonable measures for self protection evoked by the dog's actions and deterring him only momentarily." Thus, the plaintiff's acts, although intentional, did not amount to an incitement or provocation of the dog, triggering the attack.

In the present case, it was admitted that the plaintiff jumped or fell on the dog's tail; that the dog was of a peaceful and quiet temperament; and that the dog was gnawing on a bone when the incident occurred. Under these circumstances, we believe that the dalmatian was provoked, although the provocation was not intentional.

Plaintiff argues that since her act was unintentional, or that because she was of an age at which she could not be charged with scienter, she did not provoke the dog within the meaning of the act. Although her counsel presents a strong argument for interpreting the instant statute to impose essentially strict liability upon a dog owner for injuries caused to a child of tender years, we cannot agree that the public policy of this State compels the adoption of such a standard.

At common law in Illinois, one injured by a dog could recover from the owner only if he could prove that the dog had manifested a disposition "to bite mankind" and that the dog's keeper or owner had notice of this disposition. *Chicago and Alton Railroad Co. v. Kuckkuck*, 197 Ill. 304, 64 N.E. 358 (1902); *Domm v. Hollenbeck*, 259 Ill. 382, 102 N.E. 782 (1913); *Klatz v. Pfeffer*, 333 Ill. 90, 164 N.E. 224 (1928). He could not recover for an injury resulting from his own contributory negligence either by knowingly exposing himself to the dangerous dog (*Chicago and Alton Railroad Co. v. Kuckkuck, supra*) or by provoking the dog. *Keightlinger v. Egan*, 65 Ill. 235 (1872). A dog owner's liability rested upon

negligence, and he could be liable only if he harbored a "vicious" dog. Thus, one injured by a dog bore a substantial burden of proof.

The instant statute, and its immediate predecessor, substantially eased this burden imposed by the common law. It eliminates the requisite proof that the dog was vicious towards humans and that the owner knew of this disposition, and made irrelevant questions of the injured person's contributory negligence (other than provocation). *Beckert v. Risberg,* 33 Ill. 2d 44, 210 N.E.2d 207 (1965). We do not believe, however, that it was meant to impose strict liability on dog owners for all injuries caused by dogs, except those intentionally provoked. Instead this act was apparently drawn to eliminate as much as possible any inquiry into subjective considerations. Whether the injured person was attacked or injured while conducting himself in a peaceful manner in a place where he could lawfully be are all matters which require no inquiry into a person's intent. We believe that the determination of "provocation" should also be made independently of such considerations. A determination of provocation does not require consideration of the degree of wilfulness, which motivates the provoking cause. Had the legislature intended only intentional provocation to be a bar to recovery we think it would have so specified. Its conclusion apparently was that an owner or keeper of a dog who would attack or injure someone without provocation should be liable. This implies that the intent of the plaintiff is immaterial. Nor do we think that the plaintiff's status as a child of tender years should relieve her of all responsibility for a provoking act. Our Supreme Court in *Beckert v. Risberg,* 33 Ill. 2d 44, 210 N.E.2d 207 (1965), sanctioned a jury instruction in the language of the statute where the plaintiff was a three year old boy. Although the court did not specifically address the issue, it appears by implication that a young child is not exempted from responsibility for his or her acts which provoke a dog under this statute.

We have been referred to decisions from other jurisdictions which permit an injured person to recover for unintentional acts which "provoke" a dog. Two of these cases, however, were decided on common law negligence theories, the courts concluding that these unintentional acts did not constitute contributory negligence. *Smith v. Pelah,* 2 Strange 1264, 93 Eng. Rep. 1171 (1795); *Fake v. Addicks,* 45 Minn. 37, 47 N.W. 450 (1890). Another case applied a statute which provided for strict liability for injuries inflicted by a dog unless the injury was voluntarily brought on by plaintiff with full knowledge of the probable consequences. *Wojewoda v. Rybarczyk,* 246 Mich. 641, 225 N.W. 555 (1929). These decisions are inapposite in that while they arise from similar factual situations they were decided upon legal theories which placed emphasis upon the injured person's scienter.

Although we believe that the instant statute does not impose liability upon a dog owner whose animal merely reacts to an unintentionally provocative act, the present appeal does not involve a vicious attack which was out of all proportion to the unintentional acts involved. *E.g. Messa v. Sullivan, supra.* The dalmatian here apparently only struck and

scratched plaintiff with a forepaw in response to the plaintiff's stepping or falling on its tail while it was gnawing on a bone, an act which scarcely can be described as vicious. Therefore we hold that "provocation" within the meaning of the instant statute means either intentional or unintentional provocation; that the defendant's dog was provoked by the plaintiff's unintentional acts and did not viciously react to these acts; and that no reversible error was committed in the trial court.

For the foregoing reasons, the judgment of the Circuit Court of St. Clair County is affirmed.

AFFIRMED.

JONES and GEORGE J. MORAN, JJ., concur.

Governmental Structure Readings

CHAPTER I

HISTORY AND GOVERNMENTAL STRUCTURE

It is impossible to understand the legal system of the United States without understanding its structure of government. Consequently, it is appropriate to begin this book with that topic.

The governmental structure was established by the Constitution of 1789. The two characteristics of that structure that most directly affect the legal system are "separation of powers" and "federalism." Separation of powers principles assure that none of the three branches of federal government — legislative, executive or judicial — oversteps the bounds of its proper constitutional role and usurps power belonging to the others. We will see later in this chapter that the primary effect on the *legal system* that separation of powers has is on the role of the federal courts.

Federalism means that there are two levels of government in the country, federal and state. In the version of federalism found in the United States, the 50 states of the United States have a great deal of independence and power. In a real sense, the United States is a country of 51 different governments — 50 states and the federal government. Each of these governments has its own legal system. Indeed, the title of this book is misleading to the extent that it suggests that there is a *single* "legal system of the United States." It would be more accurate to call it an introduction to "the legal *systems* of the United States."

We will first discuss briefly the historical circumstances that led to the adoption of the Constitution and the reasons why the Framers of that document chose the governmental structure they did.[1] Then we will trace the development of the constitutional structure by amendment, governmental practices and court cases since 1789. In reviewing trends and developments since 1789, we will focus first on separation powers and then on the states and federalism. Finally, there will be an overview of the impact of the governmental structure on the legal system.

A. Some Constitutional History

1. Independence From Colonial Rule and Efforts to Achieve Union

The country started out as 13 colonies of Great Britain. During the period 1760-1775, there was much strife and then actual violent clashes between British colonial authorities and the dissatisfied American colonists over a variety of taxation measures and other grievances against colonial rulers.

The dissident colonists identified strongly with their own colony and concentrated on resistance to British authority at the local level. However, they made an effort in 1774 to take collective action in Philadelphia at the "First Continental Congress." In response to measures adopted at this Congress, King George III sent troops and the American War of Independence, also called the American Revolution, began in 1775.

By July of 1776, the Second Continental Congress was ready to adopt unanimously a "Declaration of Independence," which it did on July 4, 1776.[2] Also adopted was a

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1 It is traditional to refer to the Constitution's authors as "the Framers."

2 This Declaration occupies an important place in political history of the United States and expresses the enlightened political theory of the time: a belief in "natural rights" of human beings, the right of people to throw off an oppressive government, the right of citizens to be free to develop their talents and resources — the right to the "pursuit of happiness" in the document's own words — and other important

resolution that a "plan of confederation be prepared and transmitted to the respective colonies for their consideration." In June 1776, a committee was appointed to draft what would later become the Articles of Confederation. After considerable debate, the states agreed to the Articles of Confederation, which were finally ratified by all the states in 1781.

2. The Articles of Confederation

Governmental Structure Under the Articles The Articles of Confederation were doomed from the start as a viable blueprint for governing the country. Indeed, no real national government was provided for — only a Congress of representatives from the states. When the Congress was not in session, executive power was to be exercised by committees set up by the Congress. Moreover, though the Articles granted several powers to Congress, that body could act in most important matters only on the agreement of 9 of the 13 states. Unanimous approval was needed to amend the Articles themselves. States agreed in the Articles to abide by decisions of the Congress, but Congress was given no power to enforce its decisions. It could only request that states comply. The Articles did not give Congress the power to regulate commerce or to tax, undoubtedly as a result of the experience of the colonists with the British Parliament's abuse of those powers.

Overall, the Articles established a confederation of separate states — a "firm league of friendship" in which "[e]ach State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States . . . ."[3] As George Washington once remarked, the Articles of Confederation bound the states together with a "rope of sand."

Sources of Disharmony Among the States Underlying the difficulties with the Articles were differences among the inhabitants of the states over philosophy and social and economic structure, as well as territorial disputes. These differences and disputes predated the Revolution, but had been temporarily forgotten for the duration of the war. They quickly resurfaced once the common enemy of the British crown was defeated. The south was largely rural and agricultural; both economic and social life revolved around large plantations run with slave labor. The northernmost states, called New England, were more oriented toward manufacturing and milling, fishing, shipbuilding, and overseas trade. These kinds of activities led to the creation of urban centers, which were the focus of social and economic life. The middle states engaged in many of the same activities as did New England, but had agricultural activity as well. However, farming was carried out generally on smaller farms without slave labor.

As a direct result of the inadequacies of the Articles, things deteriorated quickly after the end of the War of Independence. Congress negotiated and approved a treaty with Britain in 1784 ending the war, but many states ignored its provisions and Congress could do nothing to force them to honor the treaty. State interference provided Britain with a justification for refusing to carry out many of its obligations under the treaty. More important, it caused friendly foreign countries, which could have provided needed trade and other assistance, to decline to enter into treaties with the largely ineffective national government. Domestically, there was no effective central regulator of disputes about interstate commerce, so trade wars erupted between states. The resulting prohibitively high tariff barriers erected by states caused a sharp drop in trade at a particularly difficult time. States also refused to provide promised funding for the

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ideas.

3 Articles of Confederation, Art. II.

national government. With the army near mutiny because it had not been paid, Congress sought to amend the Articles to allow it to impose a 5% tariff on foreign imports, but the opposition of one state (Rhode Island, the smallest of the 13 states) was sufficient to defeat that proposal.

During the time of the Articles, some states sought to mediate disputes by meeting in conferences, and it was out of one such conference that the idea for a new charter of government emerged. James Madison, a Virginia delegate to a conference on navigation on interstate rivers suggested that the delegates at that conference call for a convention in Philadelphia in 1787 to discuss the question. All states but Rhode Island sent delegations.[4]

3. The Constitutional Convention

The delegates to the convention were convinced that a stronger national government was necessary, but they sharply disagreed on just how strong it should be. They had learned the vices of *insufficient* governmental power from their experience with the Articles of Confederation. But they also had clear memories of the vices of too much governmental power from their struggles against the Crown. One group of delegates favored a strong national government capable of rising above regional differences. Others mistrusted strong central control and argued against any greater encroachment on the powers of the states than was minimally necessary to avoid the problems that had arisen under the Articles of Confederation. The "nationalists" ironically and, in a stroke of political genius, chose to be called "Federalists." The "states' rights" delegates, who ultimately opposed the ratification of the constitution as written by the Convention, inherited the label "Anti-Federalists."

For the most part, the Federalists' views prevailed at the 1787 convention. However, as will be seen, significant compromises had to be made to accommodate states' rights advocates. The debates among the delegates were repeated during the ratification process at ratification conventions in the states. Despite substantial initial opposition, the Constitution was ratified and the new government commenced on March 4, 1789.[5]

4. Ratification of the Bill of Rights

A large part of the reason the Anti-Federalists and others opposed the Constitution was because it did not contain a list of individual rights that citizens would have against the new stronger central government. Bills of Rights were a feature of many state constitutions. The Federalists resisted discussing the issue, believing that the most

4 James Madison (1751-1836) is considered the "father" of the Constitution (a title he himself rejected), because he played a pivotal role in drafting the 1789 Constitution. His notes, taken at the convention, are the primary source of information about the proceedings at the convention. In addition, Madison, Alexander Hamilton and John Jay authored a series of essays, called collectively *The Federalist Papers*, arguing in favor of ratification of the Constitution. *See* THE FEDERALIST (Jacob E. Cooke, ed., Wesleyan U. Press, Middletown, Conn. 1961). *The Federalist Papers* are a classic in the political literature of the United States and are regularly used even today by the Supreme Court as a guide to interpreting the Constitution. After ratification of the Constitution, Madison became a member of Congress and in 1808 was elected the fourth President of the United States.

5 For an in-depth discussion of the circumstances surrounding the framing and ratification of the Constitution with excerpts from the original sources and special attention paid to the Constitution's intellectual origins, *see* DANIEL FARBER AND SUSANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION (West 1990). *See also* MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES (Yale U. Press 1913). For a collection of documents related to the convention, *see* THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand, ed., Yale U. Press 1913). The debates in the states are collected in JONATHAN ELLIOT, THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (J.B. Lippincott Co. 1836).

important goal was to establish a basic structure for governing the country as quickly as possible. They urged proponents of a Bill of Rights to wait until the Constitution was ratified and to add such a Bill by way of amendment — a measure the Federalists agreed to support. The depth of feeling in favor of a Bill of Rights was demonstrated by the fact that 5 of the 13 states submitted demands for a Bill of Rights along with their ratifications. James Madison, one of the Federalists who argued for delaying the question until ratification, drafted a Bill of Rights, which became the first 10 amendments to the Constitution when it was ratified by the people in 1791, shortly after being proposed.

Except for the 10th Amendment, the guarantees of the Bill of Rights relate only indirectly to the structure of government. Consequently, discussion of them is delayed until the later chapters on constitutional rights.[6]

B. The Governmental Structure Provided for in the 1789 Constitution

The Constitution has six substantive articles.[7] The most important in terms of governmental structure are Articles I, II and III, which constitute the legislative, executive and judicial branches of government. Article IV contains miscellaneous provisions that relate mainly to the states and their relationship to each other. Article V sets out the complicated and difficult process needed to amend the Constitution. Article VI sets out miscellaneous provisions, the most important of which declares the supremacy of federal over state law.

1. Legislative Power

"Enumerated" Powers of Congress Article I vests "[a]ll legislative Powers herein" in the Congress and later (in §8) lists those powers. This list of powers was a compromise resulting from one of the major differences of opinion at the convention. The Virginia delegation proposed — in direct response to the problems that had been experienced under the Articles of Confederation — that Congress be given the power "to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."[8] However, other delegates objected that this gave too much power to Congress. The final compromise language listed particular subject-matter areas in which it was *anticipated* that individual state legislation would be disruptive of the "harmony of the United States." Because the powers are set out individually in a list, they are often referred to as Congress's "enumerated powers."

The major powers listed in §8 are those one would expect a national government to have: the powers to issue money, to establish a postal system, to create federal courts, to raise an army and navy, to declare war, to collect taxes and spend money for the general welfare, and the like. As it has developed, the most important of the powers granted is the one empowering Congress to regulate interstate commerce.[9]

Compromise on Representation Another major disagreement among the Framers arose over the composition and the method of selection of the national legislature provided for under Article I. The Federalists wanted representation in the legislature

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6 *See* Chapter VIII, pp. 276-313 (4th, 5th, 6th and 8th Amendments as constitutional requirements in criminal procedure) and Chapter IX, pp. 355-381 (1st Amendment freedoms).

7 A copy of the Constitution is set out in the Appendix, pp. A15-A31.

8 *Quoted in* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, 5TH ED. 119 (West 1995).

9 In §9 and §10, the Framers listed miscellaneous prohibitions. Most are of little consequence today except prohibitions on retroactive or *ex post facto* criminal laws and laws retroactively "impairing the Obligation of Contracts."

based on population, rather than on equal state representation. This would prevent states representing a minority of the population from blocking national legislation, as had happened under the Articles of Confederation. However, strong opposition from the smaller states forced the Framers to compromise. A dual system of representation in a bicameral or two-chamber Congress was agreed to. One "house," the House of Representatives, would have proportional representation based on population, while the other house, the Senate, would have equal representation from each state. To assure that the House of Representatives would better reflect the prevailing sentiment of the voters, its members, called "representatives" or simply "members of Congress," were made subject to reelection every 2 years. Senators would serve 6-year terms so as to provide some stability. Both houses would have to agree to legislation before it could become law.[10]

In accordance with this system, today there are 100 Senators (two from each of 50 states) and 435 members of the House of Representatives representing the residents of as many districts throughout the country. The 435 House seats are divided among the states based on total population (281,421,906 in 2000), but allowing every state a minimum of one representative. The average size of districts is approximately 640,000 residents. Based on the 2000 census, California, the most populous state (33,930,798 residents) will have 53 representatives in the next Congress, Michigan (9,955,829 residents) will have 15 and Wyoming (only 493,782 residents) will have only one.[11]

Compromise on Slavery In the southern states, an agricultural economy based on slavery had developed and the question of slavery came up several times at the convention. Slavery was not abolished by the Constitution nor was Congress given the power to abolish it. Despite viewing slaves as property rather than human beings, southern delegates insisted that they be counted the same as citizens in determining the number of representatives in Congress. A compromise was reached to count slaves as three-fifths of a free person.[12] Southerners also insisted on a provision requiring the return of escaped slaves from other states.[13] However, many of the Framers hoped that slavery would eventually be abolished and, in another compromise, Congress was authorized to outlaw further *importation* of slaves after the year 1808.[14]

Assuring the Supremacy of Federal Law Another area of disagreement that arose during discussions of the legislative power was how to deal with conflicts between federal legislation and state law. Under the Articles of Confederation serious problems had arisen when states simply ignored federal laws and treaties which they did not like. Originally, Madison's plan called for a veto procedure whereby Congress could pass resolutions that would annul the effect of particular state laws. Others argued that this means of assuring federal supremacy would be too direct an affront to the states and unwieldy. The Framers settled upon a clause, set out in Article VI, which is referred to as the "supremacy clause":

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10 Until 1913, Senators were elected by the legislatures of the states. However, this was changed by the 17th Amendment to the current system of election by the entire population of the state. *See* Art. I §3 cl. 1 and footnote thereto in Appendix, p. A14.

11 Redistricting of Congress is required after each dicenniel census. The 2000 census results reported here represent a loss of one representative by Michigan and a gain of one by California. New York and Pennsylvania stand to lose two representatives each, while Texas, Florida and Georgia will each gain two.

12 Art. I §2 cl. 3.

13 Art. IV §2 cl. 3.

14 Art. I §9. Congress duly passed such a prohibition. The embarrassment of some of the Framers about slavery is reflected in the fact that the Constitution never uses the words "slavery" or "slaves," euphemistically referring to slaves as "other Persons" and "Person held to Service or Labor in one State."

> 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 Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[15]

Congress's "Power of the Purse" A power of Congress about which the Framers did not disagree was the "power of the purse." They resolved that the sole power to decide whether and to what extent to tax and fund governmental programs must be lodged in Congress.[16] Further, Article I gives the sole power to originate revenue bills to the House of Representatives, the house most directly representative of the people.[17] This clause assured that there would be "no taxation without representation" — a major complaint about British colonial taxes. In addition, the "power of the purse" would serve as a democratic curb on presidential excesses and adventures, since both would likely need funding. The Framers also gave Congress the ultimate check on executive and judicial power — the power of impeachment and removal from office of any "civil Officers of the United States," including the President and any federal judge.[18]

2. Executive Power

There was little in the Articles of Confederation to use as a departure point for discussion of the executive branch, since the Articles did not provide for an executive at all. The language of Article II of the Constitution is not much more help in determining the structure and powers of the executive. Most of Article II is taken up by qualifications for the office of President and the complicated method of election.[19]

The President as Chief Executive Article II §1 does declare generally that "[t]he executive Power shall be vested in a President of the United States of America," and §3 imposes on the President the duty "to take Care that the Laws be faithfully executed." Article II §3 also gives the President the power, with the "Advice and Consent" of the Senate, to appoint ambassadors, judges, "public Ministers and Consuls" and "all other Officers of the United States" who staff the executive branch of government. Originally the Framers intended to specify in the Constitution various departments of the executive branch, but they changed their minds and decided to leave that to Congress to accomplish by statute. Currently, Congress has created fourteen departments: Agriculture, Commerce, Education, Energy, Housing and Urban Development, Interior, Labor, State,

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15 Art. VI cl. 2.

16 Art. I §8 cl. 1.

17 Art. II §7 cl. 2.

18 Art. II §4.

19 Under this method, instead of direct election by popular vote, "electors" equal in number to the total number of senators and representatives from the state are selected by the state legislature based on which candidate wins the vote of the people of that state. It is these electors who meet as the "electoral college" and elect the President. The original idea of this indirect method of election was that the electors could exercise some independent judgment when they voted as a check on extremlsm or bad judgment of the populace. However, tradition and in some states the law require that the electors vote for the presidential candidate who has won the majority of votes in that state. Because the winner of a majority of votes in a state gets all the electors from that state, it is possible that a President could win sufficient electoral votes to be elected President, but not receive a majority of the vote of all voters in the country (called the popular vote). This happened in the 2000 election, when President George W. Bush won the presidency even though his opponent, Vice President Albert Gore, Jr., won the popular vote. Florida was the final contested state that would determine the election and considerable legal controversy arose over who should win the Florida electors. The dispute was finally settled by the U.S. Supreme Court in *Bush v. Gore*, 531 U.S. 98 (2000). For more on this debacle, *see* E.J. DIONNE, JR. & WILLIAM KRISTOL, *BUSH V. GORE*:THE COURT CASES AND THE COMMENTARY (2001); KARLEN ISSACHAROFF AND RICHARD H PILDES AND PAMELA KARLEN WHEN ELECTIONS GO BAD, THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000 (West 2000).

Defense, Transportation, Treasury, Justice, Veterans Affairs and Health and Human Services. The heads of these departments are called "secretaries" and they are appointed by the President with the advice and consent of the Senate. Collectively, they are referred to as the President's "cabinet."[20]

Veto Power of the President One of the most important and most specific powers of the President, the power to veto legislation, is set out in Article I §7, not Article II. In the discussions over the shape of the powers to be accorded the executive branch, the Framers divided themselves into two camps. Some feared tyranny from a too-powerful executive. Others feared that, without a powerful executive to counterbalance Congress, there would be *legislative* tyranny, which had happened already with some state legislatures. It was the latter group whose ideas prevailed. The delegates determined that there should be a single President, elected independently of the Congress for 4-year terms, who would have limited veto power over legislation. Similar to the veto power enjoyed by governors in many states, the President could veto legislation, but that veto could be overridden by a two-thirds majority vote of the entire Congress.[21]

The presence of a President with his own direct electoral mandate and veto power makes the U.S. system different from some parliamentary systems. A stalemate between the chief executive officer and the chief legislative body cannot be resolved by a vote of "no confidence" by the legislature, the resignation of the government and a new election. Under the system provided for in the Constitution, an adamant President exercising his veto power liberally against an equally stubborn Congress unable to muster a two-thirds majority could in many instances result in stalemate, called "gridlock." Because of this potential, there is a great need for cooperation between Congress and the President.[22]

Presidential Power in Foreign Affairs The powers granted the President by Article II are the most specific in the area of foreign affairs. The President has the power to "receive Ambassadors and other public Ministers" (and thus the power to choose whether to recognize foreign governments) and to make treaties with Senate concurrence.[23] The President is also made "Commander in Chief" of the armed forces.[24] The relative specificity of duties in the area of foreign affairs and the fact that the President is head of state show that, at least in foreign affairs, the President has broad authority. A statement made in 1816 by the Senate Committee on Foreign Relations observed that

20 A chart showing the organization of federal government and its principal agencies and departments is set out on pp. A30-A31 of the Appendix.

21 Art. I §7 cl. 2-3.

22 The need for cooperation and accommodation has been great in recent years because of the voters' tendency to elect presidents and congressional majorities from opposite political parties. Until the 1992 election, in only 4½ of the previous 27 years did elections produce a President and a majority of Congress from the same political party. The tendency was to elect a Republican President and a Democratic Congress. In 1992, the voters elected a Democratic President and a Democratic Congress, but that lasted for only two years, after which they elected a Republican Congress in both houses that worked in active opposition to the Democratic President. This continued until the 2000 eletion. The 2000 election produced a Republican President and a Republican majority in the House of Representatives, but an evenly divided Senate. However, just months after the election, one liberal Republican Senator resigned from the Republican party, making the Democratic party once again the majority party in the Senate, and Senate Democrats immediately began to make plans to oppose Republican George W. Bush's legislative agenda and to press their own. However, in the final analysis, research shows that having a Congress and a President from opposing political parties has not prevented needed legislation from being passed. *See* DAVID MAYHEW, DIVIDED WE GOVERN (Yale U. Press, New Haven 1991).

23 Art. II §2.

24 Art. II §2.

"[t]he President is the Constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations." The statement emphasizes that the executive power is particularly appropriate for international relations since "[t]he nature of transactions with foreign nations . . . requires caution and unity of design, and their success frequently depends on secrecy and dispatch."[25] However, the Framers provided for a shared responsibility with Congress for foreign policy. They gave Congress the power to regulate foreign commerce and to decide whether and to what extent to maintain and regulate the armed forces, to ratify treaties, or to fund foreign involvements. In addition, Congress has the sole power to declare war.[26]

3. Judicial Power

The Supreme Court and Lower Federal Courts Article III provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish."[27] The quoted language was the source of a major dispute among the Framers. Some delegates, particularly Madison, felt that the Constitution should *establish* lower federal courts as well as a Supreme Court to assure an effective check on the excesses of the states and the legislative and executive branches of the federal government. Other delegates objected and argued that state courts were sufficient to enforce federal law. They feared that a full complement of federal courts would lead to greater interference in state prerogatives. As a compromise, the Framers agreed that lower federal courts would not be created by the Constitution itself, but that the Constitution would give *Congress* the power to create them if it thought they were needed.

Limited Subject-Matter Jurisdiction of Federal Courts This mistrust of federal courts also led the Framers to limit the types of cases the federal judiciary could handle. Federal courts were limited to cases of two principal types: controversies between citizens of different states or aliens, and cases "arising under" the federal Constitution and laws. The first type of jurisdiction, called "diversity" jurisdiction, was relatively uncontroversial, undoubtedly because it was thought appropriate to avoid possible bias by state courts against persons from other states. The second category, commonly referred to as "federal question" jurisdiction, was conceded to be appropriate to assure sympathetic and consistent treatment of issues of federal law — but only if Congress thought that necessary. It is some indication of the mistrust of the lower federal courts in federal question cases that Congress gave federal courts diversity jurisdiction almost immediately in 1789, but did not vest them with general federal question jurisdiction until 1875.[28]

The Framers did agree that it was important that the Supreme Court be established in the Constitution itself. However, consistent with separation of powers principles, the

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25 Quoted in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

26 Art. I §8 cl. 3, 11-16. The President's and Congress's powers in foreign affairs are discussed in Chapter XVII, pp. 653-658, 656-658, 665-666.

27 For a more complete discussion of the jurisdiction of the United States Supreme Court and the lower federal courts, *see* Chapter V, pp. 174-177.

28 Details of federal question and diversity jurisdiction are discussed in Chapter V, pp. 187-189.

Court's[29] appellate jurisdiction was established "with such Exceptions, and under such Regulations as the Congress shall make."[30]

Judicial Selection Perhaps the most important difference of opinion among the delegates regarding the judicial power was the issue of judicial independence. Judicial independence was thought necessary to assure immunity from pressure from the political branches to decide cases a particular way. Much of the discussion focused on the method of selection and the tenure of federal judges. Many delegates wanted Congress to elect federal judges. Others feared that this would make judges too dependent on Congress's will. Ultimately the question was decided by a compromise that spread the responsibility between the President and the Congress: the President would appoint federal judges for life terms with the advice and consent of the Senate, though they could be removed by the entire Congress through the impeachment process.[31]

C. Separation and Balance of Powers Among the Branches of the Federal Government

Separation of powers and "checks and balances" among the three branches of government were a matter of conscious design. The concept derives from the writings of Baron de Montesquieu and John Locke, with whose works the delegates to the convention were familiar.[32] However, the idea as understood in the United States is less one of strictly *separating* powers than it is of *spreading* power among the branches. As Madison observed, the "necessary partition of power among the several departments" in the Constitution will assure that "its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[33] A contemporary commentator has described the Constitution as establishing "separate institutions sharing power."[34] Consequently, it is more appropriate to understand the scheme of the Constitution as a *balancing* of powers — as it is referred to commonly, a system of "checks and balances."

Since 1789, governmental structure and relationships between components of government have evolved. Supreme Court decisions have caused some changes. Others have resulted from the natural growth of the size of the country and changes in technology and in the types of challenges facing government. We will discuss four major developments affecting the balance and separation of powers: judicial review, greater presidential power, the growth of administrative agencies, and Congress's modern investigatory oversight role.

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29 When referring to the United States Supreme Court in short form, it is common to call it "the Court," with a capital "C," which distinguishes if from references to all other courts.

30 Art. III §2 cl. 2. The meaning of this clause and its possible use as a means of controlling the Supreme Court's power of judicial review are discussed in the chapter on constitutional law, Chapter IX, pp. 325-326. The power of judicial review, which is not explicitly referred to in the Constitution, is also discussed in Chapter IX, pp. 314-319, and later in this chapter where developments since 1789 are considered. *See infra* pp. 10-11.

31 Art. III §1 and Art. II §4. The modern impact of the lifetime tenure requirement is discussed in Chapter VI, pp. 217-219. Impeachment of federal judges is discussed in Chapter V, pp. 183-184.

32 *See* MONTESQUIEU, THE SPIRIT OF THE LAWS 151-152 (Nugent trans. 1949)(originally published 1748) ("there can be no liberty where the legislative and executive powers are united in the same person or body of magistrates"); John Locke, SECOND TREATISE ON GOVERNMENT: AN ESSAY CONCERNING THE TRUE ORIGIN, EXTENT AND END OF CIVIL GOVERNMENT (1690). *See generally* M.C.J. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 64-67 (Oxford U. Press 1967) (discussing Locke's role in developing this theory).

33 *Federalist No. 51*, *supra* note 4, at 347-348.

34 RICHARD NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP 3 (Wiley & Sons 1960).

1. Establishment and Vigorous Exercise of the Power of Judicial Review

As the discussion of the basic provisions of the 1789 Constitution indicates, the Constitution's "checks and balances" provide means for the executive and legislative branches to check the power of the judicial branch, primarily through selection of judges and control of federal court jurisdiction. The constitutional text does not clearly set out what checks the *judicial* branch was to have on *legislative* and *executive* power. Today, we know it is the power of judicial review — the power of the Supreme Court to pass on the constitutionality of laws and actions of the other two branches. But such power is not explicitly set out in the Constitution. Instead, it was held to be implicit in the Constitution in the 1803 case of *Marbury v. Madison*.[35]

The Basis for Judicial Review The Court in *Marbury*, speaking through Chief Justice John Marshall, found judicial review implicit in the nature of a written constitution, in the supremacy clause and in Article III's grant of judicial power. He reasoned as follows. First, the Constitution is *law* and must be followed; indeed, the supremacy clause makes the Constitution the *supreme* law of the land. Second, the judges of the judicial branch, being vested by Article III with the "judicial Power of the United States," have the power to say *what the law is* in cases that come before them. It follows then that judges, in deciding an issue to which both a statute and the Constitution apply, must follow the hierarchy of law set out in the supremacy clause: they must apply the constitutional provision and disregard the statute. *Marbury* involved a federal statute, but the reasoning of *Marbury* was applied to invalidate a state enactment in 1810 in *Fletcher v. Peck*.[36]

Vigorous Exercise of Judicial Review in Modern Times Judicial review was used sparingly in the first century of the country's history. Today, it is a major force in law and government that profoundly affects the balance of federalism, separation of powers and the relationship between individuals and all levels of government. The greatest surge in judicial review has been since 1953, when Earl Warren became Chief Justice of the United States.

In the 75 years from 1789 until 1864, the Court held only two Acts of Congress unconstitutional. From 1789 to 1953, a period of 164 years, the total climbs to only 76 invalidations. But during the period 1953 to 1998, it took the Court only 46 years to reach that total of 76 Acts of Congress held unconstitutional. Interestingly enough, though the surge in cases began with the "liberal" Warren Court (1953-1969), the more "conservative" Burger Court (1969-1986) was no less "activist."[37] While the tenures of the two Chief Justices were approximately the same length (16 years), Chief Justice Burger presided over 34 invalidations of federal law, while Chief Justice Warren presided over

35 5 U.S. 137 (1803).

36 10 U.S. 87 (1810) (Georgia state law unconstitutional for violation of prohibition against passing any "Law impairing the Obligation of Contract"). Judicial review is discussed in more detail in Chapter IX, pp. 314-316.

37 Historians generally divide the various eras of Supreme Court history into periods of time defined by the tenures of the fourteen Chief Justices. For a brief, readable excerpt dividing the Court's history into four principal periods, *see* DANIEL A. FARBER, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY, 2D ED. 7-28 (West 1998). Although the cited book is a casebook, it has more than the average amount of narrative explanation and analysis.

only 25. The Rehnquist Court (since 1986) has proceeded at an only slightly lower rate of 17 federal laws in 12 years.[38]

A similar trend can be seen with state laws, though the Court has invalidated more state laws than federal laws. In the first 100 years of the existence of the Constitution, the Supreme Court invalidated 79 state laws, while in the second 100 years, it invalidated ten times as many — 794. Of these 794 decisions, 373 or close to half were rendered after 1953. Again, the "conservative" Burger Court accounted for more decisions striking down state laws (192) than did the "liberal-activist" Warren Court (150).

Numbers do not tell the entire story. But it is as true qualitatively as quantitatively that in the modern era, the federal courts — and the Supreme Court in particular — have become a greater influence on the life of the average citizen in the United States than ever before. Constitutional considerations play a major role in many areas of the law. The era since 1953 has been one marked by unprecedented attention to constitutional issues in general and to individual rights and liberties in particular. Some recent decisions of the Court have shown a less accommodating approach to certain individual rights. However, it would take a radical retreat to return to the situation before 1953.[39]

Dangers in Activist Judicial Review While judicial review has generally won praise, it has not always served progressive interests. Some "low points" in legal history demonstrate the dangers of activist judicial review. One low point that will be discussed shortly was the Court's infamous 1857 decision in *Dred Scott v. Sandford*,[40] which held that Congress had no power to end slavery. Thus, the Court did not get off to a very good start in its exercise of judicial review: *Dred Scott* was only the Court's second invalidation of a federal law, the first being *Marbury v. Madison*.[41]

The most recent difficult period for the Court was the period from around 1900 to 1937. During this time, the Court repeatedly used three bases — the due process clause of the 5th and 14th Amendments, a limited view of Congress's power to regulate interstate commerce, and the doctrine against delegation of legislative power — to deny to Congress and the states the power to enact progressive laws regulating business. The Court struck down a New York state law limiting the hours bakers could work per week,[42] federal laws prohibiting child labor,[43] federal laws regulating industry through

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38 These statistics are taken from DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS, 5TH ED. 30 (W.W. Norton 2000). The figures do not include federal laws effectively invalidated by Court decisions because they are identical in all relevant respects to the law involved in a decided case. For example, *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), is counted only once despite the fact that the decision effectively meant that 212 other federal statutes with the offending legislative veto provision were unconstitutional. Nor do the statistics include the decisions of the lower federal courts, which also have the power to hold Acts of Congress and state laws unconstitutional and often do so in cases that never reach the Supreme Court level.

39 Supreme Court decisions on individual rights are discussed in Chapter IX, pp. 338-381, and decisions affecting rights of criminal suspects and defendants are discussed in Chapter VIII, pp. 276-313.

40 60 U.S. 393 (1857).

41 *See* discussion *infra* p. 23.

42 *Lochner v. New York*, 198 U.S. 45 (1905).

43 *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

taxation,[44] federal laws to regulate the economy in the wake of the Great Depression of the 1930s,[45] and a New York law setting minimum wages for women.[46]

Viewing these decisions as a continuing obstacle to further legislation treating the serious social and economic needs of the country, President Franklin Roosevelt and Congress in 1937 considered the possibility of legislation to "pack" the Court, that is, to authorize the President to appoint additional justices to the Court in order to change the balance of power. In the alternative, the President considered the possibility of simply disregarding the Supreme Court's decisions. Neither the "Court-packing" plan nor disobedience to the Court was necessary, however. In the Spring of 1937, one Justice switched his vote to favor upholding economic and social welfare programs. Over the next four years, death or retirement of Justices allowed President Roosevelt to appoint seven new justices, all of whom were committed to a more expansive view of Congress's power.[47]

The due process decisions of the Court during this disastrous 1900-1937 period starkly illustrate the nature of the crisis in judicial review then and what many consider to be a continuing problem with judicial review today. Due process doctrine developed toward the end of the 19th century, when the Court began to define the concept of "liberty" in the 14th Amendment due process clause as including the "freedom of contract." In *Lochner v. New York*[48] the Court held that a New York law that limited the hours that bakers could work to sixty per week violated the due process clause. Such a law, the Court concluded, was an undue burden on "the freedom of the master and employee to contract with each other in relation to their employment."[49] In his dissent in the case, Justice Oliver Wendell Holmes, Jr., protested that the majority's concept of "liberty" imposed its own concept of what was proper economic policy on states. Referring to a popular book by a 19th-century English philosopher of *laissez faire* economic policy, he observed wryly: "[t]he fourteenth amendment does not enact Mr. Herbert Spencer's Social Statics."[50]

The Court has regularly referred to the period before 1937 as providing important lessons for its role today. The most recent occasion for discussion of this history and its meaning for the Court's role was in the Court's 1992 decision to stick by its 1973 abortion decision despite considerable opposition on the part of the public.[51] The *Lochner* Era teaches that, while the Court is a counter-majoritarian check on political forces, it cannot allow itself and its decisions to stray too far from the mainstream of thought in the country. Its power and influence ultimately depend not on coercion, but on the degree to which its decisions are voluntarily respected by society. Despite the bad experience of the *Lochner* Era, it is fair to say that the Court has recovered the

44 *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (child labor tax); *Hill v. Wallace*, 259 U.S. 44 (1922) (tax on grain future contracts).

45 *See, e.g., A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (improper delegation of power to develop trade code for industry); *Railroad Retirement Board v. Alton R. Co.*, 295 U.S. 330 (1935) (act setting up retirement program for railroad employees exceeded Congress's commerce clause powers); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (maximum hour labor standards for coal industry beyond commerce clause power).

46 *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

47 This history is related in NOWAK & ROTUNDA, *supra* note 8, at 147-154.

48 198 U.S. 45 (1905).

49 *Id.* at 75. There were several other decisions invalidating state laws on due process grounds.

50 198 U.S. at 64. Holmes, known during his tenure on the Court as the "great dissenter," is discussed in another connection in Chapter II, p. 44.

51 *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

prestige and moral power it lost in the pre-1937 period and the vigorous exercise of judicial review is a feature of the governmental structure that is fully accepted today.

2. Growth of Presidential Power

Many Framers were concerned with the *legislative* branch becoming too powerful. If anything, the modern era has demonstrated their concerns in reverse. The President's function in the 19th century — described as "carrying out the will of Congress"[52] — has been supplanted in the 20th century by a model of presidential primacy. A good part of the responsibility for the emergence of what some have called the "Imperial Presidency" falls on Congress, which has largely cooperated in establishing and maintaining it.[53] There have been "power grabs" by strong Presidents, but there have been many more willing delegations of power by Congress.[54]

Factors in the Growth of Presidential Power Perhaps the primary factor leading to greater presidential power has been the succession of strong personalities who have occupied the White House in the 20th century, starting with President Theodore Roosevelt in 1901 and continuing with Franklin Roosevelt in the 1930s and 1940s, followed by several strong post-World War II Presidents. Although responsibility for foreign policy is shared between the President and Congress, the different nature and organization of the two branches make the executive branch more capable of reacting to modern crises than Congress. United States participation in two world wars and its emergence as a world power, and numerous other international incidents have generated the need for quick decisions and responses — something a branch headed by one person and a staff of advisors can do better than a 535-member pluralistic legislature. All this, plus the President's control of information about unfolding crises, has allowed the President to seize the initiative in formulating foreign policy, often leaving Congress with no other choice but to follow along.

On the domestic front, much of the impetus behind presidential primacy came from the Great Depression of the 1930s. That crisis called for the decisive action of a strong national leader. President Franklin Roosevelt, in response, presented a comprehensive legislative program for Congress to enact. There have also been "spillover" effects from the primacy of the President in wars and foreign affairs. For all these reasons, voters today look to the President for a domestic legislative agenda as much as for foreign policy. A large part of Congress's legislative role when an active President is in the White House has been reacting to the President's proposed legislative programs.[55]

Power Over Implementation of Legislative Programs Even if the President cannot implement his own legislative program, he can affect the implementation of Congress's

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52 HARRY A. BAILEY, JR. AND JAY M. SHAFRITZ, EDS., THE AMERICAN PRESIDENCY: HISTORICAL AND CONTEMPORARY PERSPECTIVES vii (Dorsey Press, Chicago 1988).

53 *See* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (Houghton, Mifflin 1973). The impact of this growth in presidential power on separation of powers is discussed in Philip D. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 607-613 (1986). In the 20th century, Congress has also *gained* much power as the result of the Supreme Court's willingness to read its powers broadly. But, as will be discussed, that gain in power has been at the expense of the states rather than the President.

54 Recently and in reaction to some perceived excesses of the Presidents, Congress has made some efforts to reclaim some of its power from the executive branch. This has raised some interesting separation of powers questions. *See* Chapter VI, p. 215 (legislative veto) and Chapter XVII, pp. 665-666 (war powers).

55 Only members of Congress may introduce legislation, but the President has no trouble convincing members of his party in Congress to lend their names to legislation he would like to propose.

or earlier Presidents' programs. The Constitution directs the President to "take Care that the Laws be faithfully executed,"[56] and the President is required to implement congressional programs.[57] But there is no requirement that he implement them enthusiastically. There are many opportunities for undermining legislative commands. There is usually much room for interpretation of statutory directives. This room for interpretation is most directly felt when the statutory scheme is the typical delegation of authority to a secretary in the President's cabinet or the head of an administrative agency answerable to the President or cabinet secretary.[58]

Limits on Presidential Power Despite the growth in presidential power, the President's power must give way when it conflicts with the constitutional powers of the other branches. Two cases illustrate this. One involved a conflict with Congress's legislative power and the other was a conflict with the judicial power.

The first case was the *Steel Seizure Case* or *Youngstown Sheet & Tube v. Sawyer,*[59] decided in 1952. In that case, labor strikes at steel mills during the Korean War caused concern because they might interfere with steel production needed for U.S. troops in Korea. Consequently, President Truman issued an executive order instructing the Secretary of Commerce to seize the privately-owned steel mills and begin to operate them under government control. The Supreme Court held the order unconstitutional. Congress had passed, at an earlier time, general labor-management legislation and in the process had rejected the possibility of government seizures of plants in cases of emergencies caused by labor strife. Thus, the executive order was invalid because it conflicted with a policy that Congress had already declared.

The second case on presidential prerogatives was *United States v. Nixon,*[60] which involved the Watergate Scandal. During the campaign for the 1972 presidential election, several men identified with the Republican Party national organization were caught breaking into the national headquarters of the Democratic Party located in a building called "The Watergate." President Nixon, who was reelected after that campaign, sought to withhold various tape recordings and documents that had been subpoenaed by a Special Prosecutor investigating the matter. Nixon claimed "executive privilege" as the basis for withholding the tapes and documents — the power of the President to protect from disclosure information and material regarding the discharge of executive functions that the President believes should not be disclosed. While acknowledging that executive privilege existed, the Supreme Court unanimously affirmed a district court order to produce the tapes. Thus, the Court confirmed that Presidents, no less than the average citizen, must comply with court orders to turn over evidence.

In the President's favor, the Court in the *Nixon* case recognized that executive privilege exists as an implied power of the President. Despite absence of explicit text in Article II, "[c]ertain powers and privileges flow from the nature of enumerated powers; the protection of confidentiality of presidential communications has similar constitutional underpinnings." To the extent that such confidentiality "relates to the effective discharge of a President's powers, it is constitutionally based." However,

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56 Art. II §3.

57 *See Train v. City of New York*, 420 U.S. 35 (1975) (President may not impound money Congress has directed to be spent).

58 In fact many influences come to bear on administrative agencies. *See* Chapter VI, pp. 211-215, where congressional and presidential means of controlling agency action are discussed.

59 343 U.S. 579 (1952).

60 418 U.S. 683 (1974).

outside the context of military and diplomatic discussions, the privilege must give way to the needs of the parties and courts in criminal cases to obtain all relevant evidence. Most important, the Court made it clear that the decision whether material was protected by executive privilege was one that only the *courts* could make. The Court noted that "[a]ny other conclusion would be contrary to the basic concept of separation of powers and checks and balances that flow from the scheme of tripartite government."[61]

3. The Advent and Growth of Administrative Agencies

Development of Agencies Administrative agencies are nowhere mentioned in the Constitution. Yet, today they occupy an important place in governmental structure.[62] The first powerful federal administrative agency, the Interstate Commerce Commission, was established as early as 1887. But the greatest growth in the power of administrative agencies came in the 1930s. At the request of President Roosevelt, Congress readily delegated a great deal of power to administrative agencies to provide the expertise and swift action necessary to regulate the economy and provide relief to victims of the Great Depression. This was only the beginning of a transformation of the country into what some have called "the administrative state."[63] This change has been true of states as well as the federal government. Today federal and state administrative agencies operate in a wide variety of areas, from banking to social security to occupational health and safety to labor organizing.[64]

The principal impact agencies have is through their enactment of substantive law in the form of rules through delegated legislative power.[65] One can get a rough idea of the impact of agency rules by looking in the law library: the shelf space in the library taken up by federal regulations is some ten times that of federal statutes. A person or company engaged in an activity controlled by federal law will often find little useful guidance from the statute and will instead have to consult masses of administrative rules and interpretive guidelines. But agencies not only enact rules. They have enforcement divisions that investigate and prosecute violations of those rules and their own administrative hearing officers who adjudicate the disputes resulting from enforcement (subject to judicial review). In many areas of the law, the only hearing of consequence the litigants will get will be an administrative hearing, not a court hearing. Even though there will be judicial review, in most instances that review is limited in scope.[66]

"Independent" Federal Administrative Agencies There are two types of federal agencies: "executive" agencies and "independent" agencies. Executive agencies are under the general supervision and control of a cabinet officer responsible to the President. Consequently, the growth of the power of executive administrative agencies

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61 418 U.S. at 705. Since the *Nixon* case, Presidents Nixon, Ford, Carter, Reagan and Clinton have all testified in cases under litigation, usually by way of videotaped depositions. *See* NOWAK & ROTUNDA, *supra* note 8, at 231, n. 28.

62 *See* Chapter VI, where the law of administrative agencies is outlined.

63 A diagram of the structure of the modern federal government showing many of the major agencies is set out in the Appendix to this book on pp. A30-A31.

64 The phenomenon is international. *See* MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 16-24 (Oxford U. Press 1989).

65 In general, delegation is proper so long as Congress provides sufficient standards to guide the agency in its rule-making. Many standards that have been approved are very general. *See* Chapter VI, p. 216.

66 Separation of powers objections to this mixing of legislative, executive and judicial power in administrative agencies have been largely rejected or ignored by the Court. *See* Chapter VI, pp. 215-220.

can be considered part of the growth of presidential power discussed earlier, though there are limits to how much control Presidents can effectively exercise over them. Independent agencies, on the other hand, are not even formally subject to supervision by a cabinet member or the President. They are typically headed by collegial bodies. Members of these bodies are appointed by the President, with Senate advice and consent, but the appointments are for set terms of office that overlap presidential and congressional elections. Such members cannot be removed except for good cause. Among the independent agencies are the Securities and Exchange Commission, which regulates matters related to sales of financial securities of corporations, the Federal Communications Commission, which regulates and decides on licensing of television and radio stations, the Federal Reserve Board, which controls monetary policy, and the Federal Trade Commission, which regulates certain business practices.[67]

Independent agencies regulate in important areas that are thought to need more continuity of policy and insulation from political control than would be the case if they were subject to the effects of different presidential administrations, shifting majorities in Congress, and the influences of congressional committees. However, Congress has not shown a great deal of consistency in its judgment about what subject matter areas should be under the control of independent agencies. In fact, it has left many areas of regulation partially in the hands of an independent agency and partially in the hands of a more conventional cabinet-controlled agency.

The size and practical independence of administrative agencies have led some commentators to refer to them as a "fourth branch of government."[68] In view of the fact that unelected administrative agencies exercise a great deal of independent power over citizens, their growth may well signal a net loss for democratic values in government.[69] However, at least some democratic control is reasserted through congressional and presidential influences on agency action.[70]

4. Congress's Investigatory Oversight Role

As legislating in the modern world has become more complex, there has been greater need for professional assistance and for legislative work to be done by committees. Proposals for legislation, budgets, approval of Presidential appointments, and all manner of other legislative business must generally survive intensive committee scrutiny before it can be brought forward for a vote on the floor. And on the floor, the relevant committee's recommendations have weight among busy members of Congress who may be only vaguely aware of the details of much legislation outside their areas of concern and expertise.[71] There are now 298 standing, special and select committees and subcommittees. The subject matters of some of the more important standing committees that both houses of Congress have are agriculture, appropriations, armed

67 Others include the National Labor Relations Board, the Federal Maritime Commission, the Consumer Product Safety Council, the Commodity Futures Trading Commission, and the Nuclear Regulatory Commission.

68 *See* Peter Strauss, *The Place of Administrative Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

69 *See* CAPPELLETTI, *supra* note 64.

70 *See* Chapter VI, pp. 211-215.

71 A side effect of the committee system and the requirement that all proposed legislation go through committees has been to give power to those members of Congress who chair important committees to control the legislative calendar and agenda — what bills get discussed and reported out for a vote on the floor. The power of legislative committees is another reason why the question of which party is in the majority in each house of Congress has so much importance, since the majority party names the chairpersons of all the committees and is given majority representation on them.

services, banking, education, energy, foreign affairs, governmental operations, judiciary, labor, small business, and science and technology. Within each committee are standing subcommittees devoted to particular areas.

The original purpose of committees and Congressional agencies was to deal with the increased complexity and specialized nature of legislation in the modern world. But with the changing nature of legislation and the growth of administrative agencies, committees have taken on the more general task of overseeing the operations of government.

President Woodrow Wilson, before he became President, remarked on the importance of Congress's role in overseeing government and exposing inadequacies, noting that the "informing function of Congress should be preferred even to its legislative function."[72] Committee investigative hearings are nowhere mentioned in the Constitution, but the connection to Congress's legislative power that investigations have is that they are undertaken to determine whether there is a need for legislation. On this basis the Court has upheld Congress's right to investigate, including the power to issue subpoenas and to punish disregard of those subpoenas as a "contempt of Congress."[73] However, for some committee hearings in recent years, the legislative agenda potentially involved has not always been obvious. The fact that the investigators are politicians and there is often intense press and television coverage of the hearings has caused many such investigations to take on a life of their own. The primary product of many such committee investigations is publicity, but that is all to the good if the investigations create greater public awareness of the shortcomings of the government and its officials.

To undertake such oversight functions, the legislative branch cannot be dependent on the executive to provide it with information, so the growth of the congressional investigative function has led to a growth in congressional staff and other professional assistance.[74] Providing information and assistance essential to Congress's oversight role is the General Accounting Office (GAO). The GAO, which has more than 4,000 professional employees, conducts regular audits of agency expenditures and more broadly seeks out fraud, waste and mismanagement in agencies. It also performs particular studies at the request of congressional committees. Its suggested "corrective measures" instantly get the attention of both Congress and the agency involved and its finding that a particular expenditure would be improper will make even the most intrepid, independent-minded agency administrator hesitant to spend those funds.[75]

Investigations can take on political overtones and the more political congressional investigations are, the more controversial they are. Some such investigations have had

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72 Woodrow Wilson, Congressional Government 303-04 (Houghton-Mifflin, Boston 1885).

73 *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927). *See* Nowak & Rotunda, *supra* note 8, §§7.4-7.5.

74 In 1989, there were 2,999 Congressional staff members assigned to Congressional committees. Personal staff for all members of Congress totaled 11,406, averaging 38 for each Senator and 18 for each house member. This represents a 400% growth in personal staff and a 650% growth in committee staff since 1946. In addition to these permanent staff, committees also hire investigative aides each year who, while nominally temporary, often remain with a given committee year after year. Congressional Quarterly Guide to Congress 483-484 (1991). *See also* Harrison W. Fox, Jr. & Susan W. Hammond, Congressional Staffs: The Invisible Force in American Lawmaking (Free Press, N.Y. 1977).

75 For a general discussion of the GAO, *see* Erasmus Kloman, ed., Cases in Accountability: The Work of the GAO (Westview, Boulder Colo. 1979). Another important congressional agency, the Congressional Budget Office, has since 1974 enabled Congress to prepare its own budget proposals and to assist budget committees in analyzing the effect of budget proposals coming from the White House. For a lucid description of the machinery of government with a specific focus on agencies, *see* Peter Strauss, An Introduction to Administrative Justice in the United States (Carolina Academic Press 1989).

laudatory results, but others have not. The Senate committee investigation of the Watergate scandal, which ultimately led to President Nixon's resignation, is placed by most in the positive category.[76] In that scandal, the Senate committee in 1974 began investigating to see if officials at the highest levels of the Republican White House were involved in and later tried to cover up a burglary of the Democratic National Headquarters. Ultimately, the incriminating evidence was laid out on national television and the President, who had denied any involvement, resigned in disgrace. Perhaps the most widely known abuse of the committee investigatory process involved the activities of Senator Joseph McCarthy, who chaired a committee in a 1954 investigation of "Communists" allegedly working in the Army and the State Department. No substantial evidence was ever produced, but the accusations of McCarthy, assisted by a brewing anti-Communist hysteria in the country at the time, cost hundreds of people their reputations and careers. For better or for worse, the Congressional investigatory power is well established and has become a real force in government.

D. The States and Federalism

As discussed earlier, the system of separation of powers and "checks and balances" between the branches of the federal government was carefully planned. Federalism had a different basis. As the brief discussion of history of the Constitution's formation suggests, the federal structure of government resulted from political necessity. Few in the newly independent states would have voted for ratification of any constitution that did not provide a vigorous and meaningful role for the states.

Federalism has two dimensions. "Vertical" federalism describes the relationship between the states and the federal government. "Horizontal" or interstate federalism describes the relationship of the states to each other. Both relationships have changed considerably since 1789. The history of vertical federalism has largely been a story of the growth of federal power over state power. Horizontal federalism has been marked by a steady decrease in the legal significance of state boundaries.

It is an interesting question whether the delegates to the constitutional convention would have approved of these developments. Before reviewing those changes and considering that question, however, we should discuss more generally the nature of state power and the governments of the states and their political subdivisions.

1. State Government Structure and Powers

The Nature of State Governmental Power States were not created by the Constitution, though it often refers to them. There was no need to create them because they already existed in 1787. In fact, states wrote and ratified their own constitutions quickly — all had them by the end of 1776. This fact of states' "aboriginal" existence makes the nature of the power of states significantly different from that of the federal government. The thirteen colonies emerged from the War of Independence as separate sovereign nation-states. Their status as such was modified only to the extent that they gave up certain rights in the Constitution of 1789 and later amendments to it. Thus, states need not search the federal Constitution for some positive grant of power to act or to make law: they have the power and inherent competence of separate, independent and sovereign nations and may pass legislation on any subject they choose, except as limited by the federal Constitution or their own constitutions.[77] The text of the Tenth Amendment delineates this principle: "The powers not delegated to the United States

76 *See supra* p. 14.

77 The principle that all states are equal and admitted to the union on the same basis preserves this same status for later-admitted states.

by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[78]

State Governmental Structure The governmental structure of many states is a state-sized version of federal governmental structure and powers, at least in broad outline. Many concepts were "borrowed" from state constitutions and placed in the 1789 federal Constitution. In turn, as states framed new constitutions periodically after the ratification of the federal Constitution, they borrowed from it to some extent.

Like federal governmental structure, state constitutions provide for three branches of government, with the chief executive officer having veto power over the legislative branch and the supreme court of the state having the power of judicial review. State legislatures are bicameral (i.e., there are two "houses," usually a "house of representatives" and a "senate"), except for one state, Nebraska, which is unicameral. However, many of the names of state governmental offices and institutions differ from those of their corresponding federal office. The chief executive officer of the state is called the Governor and the person next in line to succeed the Governor is called the Lieutenant Governor. There is usually a Secretary of State and an Attorney General, commonly an Auditor General, and there are department heads for departments that sound similar to those of the federal government. The chief legislative body is generally referred to as the "state legislature" or "general assembly." The court of last resort is usually called the state supreme court.

The constitutions of states sometimes reflect their citizens' feeling that the best government is the one that governs least. In many states, governors have been restricted to short terms of office and cannot seek consecutive terms of office.[79] Legislatures have historically been limited as well. One device is to limit legislative sessions to only one every two years and then for only a given number of days. Another is to allow only one house of the legislature to meet one year, the other the next. Many states limit the number of bills each member may introduce. However, the tremendous growth of the responsibilities of states in the last 30 years has caused most state governments to reorganize along more realistic lines.[80]

Executive power in most states is more diffused than federal executive power. On the federal level, the President appoints the members of his cabinet and other high-level executive officials with the advice and consent of the Senate. By contrast, in many states, the heads of some major divisions of state government, such as the Attorney General or the Secretary of State or the Auditor General, are directly elected by the people. As such, they neither owe their office to the Governor nor can they be dismissed by the Governor. In many states, these officials are members of a different political party from the governor. It is even the case in some states that the Lieutenant Governor of the state is from a different political party than the Governor.[81] Such

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78 In the words of Chief Justice Marshall, "it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument. *Sturges v. Crowninshield*, 17 U.S. 122, 193 (1819).

79 For example, in Virginia, governors serve a four year term and consecutive terms are not allowed. BOOK OF THE STATES: 1998-1999 EDITION 17, Table 2-1 (The Council of State Governments, Lexington, Ky.) Term limits in Alabama led the governor of that state to run his wife for Governor with the understanding that he would really be in charge. His wife was elected in 1967, but she died halfway through her term in 1968.

80 *See generally* BOOK OF THE STATES, *id.* at 124-208.

81 The 12th Amendment to the U.S. Constitution makes it impossible for the President and Vice President to be members of different political parties.

independently-elected officers will often act independently of, and sometimes in opposition to, the Governor. State judges tend to be elected rather than appointed. Election systems were present in some states around the time the Constitution was adopted, but elections became more prevalent during the first half of the 19th century. Nonetheless, many states have appointment systems and some have combined systems.[82]

Constitutional Limits on State Governmental Structure Having seen that state governments have a structure somewhat similar to the federal government, it is fair to wonder whether states are required to have any particular form of government. The answer is "yes and no." Article IV §4 of the Constitution provides that "[t]he United States shall guarantee to every State in this union a Republican Form of Government." However, even assuming one could define precisely the characteristics of a "republican" form of government, the Court has held that this clause is not enforceable by the courts in the same manner as other guarantees in the Constitution, since it presents a non-justiciable "political question."[83] Nevertheless, the Supreme Court has not hesitated to assure that boundaries of state election districts are fairly drawn so as not to dilute the voting strength of people in some parts of the state. A system that assures "one man, one vote" is said to be necessary because of the right to equal protection of the laws under the 14th Amendment to the Constitution.[84] The basis for distinguishing these redistricting cases from the republican form of government case is that redistricting does not affect basic state governmental structure; it simply assures that the *existing* election structure already chosen by the people of that state does not discriminate.

Local Governmental Structure The basic political subdivisions of states are counties and cities or villages, though in rural areas, the intermediate township level is also important. All these levels are subsumed under the term "local government" or "municipal government." The governmental entities on these levels are generally considered to be creatures of the state and subject to overall state control. However, in many states large cities enjoy a certain independence from state government. This is sometimes the result of political reality (a large percentage of the members of the state legislature may be elected from the largest city in the state) and sometimes it is the result of the state constitutions granting more independence and "home rule" rights to large cities.

On the city level, the chief executive officer is generally called the mayor and the legislative body is called the "city council." It is common on the local level to have a relatively weak executive in comparison to the legislative body. The laws passed by cities are generally referred to as "ordinances" rather than statutes. They have legal effect only within the city. There is often no judicial branch, since courts that are part of the state judicial system will have jurisdiction over offenses within the city limits, including violations of city ordinances.

Powers of Local Governments Local governments provide many of the services needed to maintain communities and urban centers. One of the most important and traditional functions of local government is law enforcement. Law enforcement was originally conducted solely by local police forces, which were raised and supported

82 Methods of judicial selection are discussed in Chapter V, pp. 180-183.

83 *See Luther v. Borden*, 48 U.S. 1 (1849). The political question doctrine is discussed in Chapter IX, pp. 323-324.

84 *See Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1967). The 14th Amendment's guarantee of equal protection of the laws is discussed in Chapter IX, pp. 340-351.

through the revenue of local governments. Then in the 20th century, state governments created state police forces to assist in the enforcement of laws.

Another important function of local governments is the control of land use through zoning. Local governments also provide various services for their populations, including sewage and garbage disposal, and water supply. A major function of local government is public education on the elementary and secondary school level — schools which the vast majority of children attend. These school systems, while they must generally meet requirements imposed by a state department of education, are usually run by local school boards. Local governments are given the authority to raise revenues by taxation in order to pursue all these programs. By far the largest portion of the local tax burden in most communities is the school tax imposed to support elementary and secondary education. Often local governments fund local community colleges or vocational training centers as well.

2. Changes in Vertical Federalism: The Growth of Federal Power

The understanding of federal and state power that many had from reading the "enumerated powers" of Congress and the 10th Amendment to the Constitution was that described by James Madison in the debates on ratification:

> The powers delegated . . . to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State.[85]

This view has changed considerably since that time.

a. Early Development of an Expansive View of Federal Power

The Implied Powers Doctrine A principal reason the just-quoted view of the nature of federal power began to be undercut was Chief Justice John Marshall, whose expansive concept of federal power affected interpretation of the Constitution for many of the early years of the country.[86] He developed the notion of "implied powers" in the 1819 case of *McCulloch v. Maryland*.[87] The issue in *McCulloch* was the constitutionality of Congress's establishment of a Bank of the United States. Chief Justice Marshall admitted that the federal government was a government of limited powers and that there was no specific mention in Article I of any power to constitute a bank. But he held that the grant of explicit enumerated powers necessarily implied the power to do what was appropriate to carry out those powers. Thus, since Congress had explicit power to lay and collect taxes, to borrow money, to regulate commerce and to raise armies, and a bank would clearly assist in carrying out these powers, it had the implied power to create a bank. In reaching this result, Marshall found support in the "necessary and

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85 Federalist No. 45 at 313, *supra* note 4. As with all statements made during ratification debates, there is no guarantee that Madison really thought this or was saying what was expedient to calm those who were opposed to ratification based on a fear of a strong central government.

86 Chief Justice John Marshall (1755-1835), the fourth and most famous of the fourteen Chief Justices who have headed the Court, was a strong Federalist in favor of a strong central government and served on the Court for 34 years. He wrote many of the opinions in landmark cases, including the case that established the power of judicial review, *Marbury v. Madison*, discussed *supra* p. 10 and in Chapter IX, p. 314.

87 17 U.S. 316 (1819).

proper" clause, the last of the enumerated powers, giving Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."[88]

Supreme Court Power to Review State Court Judgments Federal judicial power *vis-a-vis* the states was also solidified early. As noted earlier, in the 1810 case of *Fletcher v. Peck*, the Court extended its power of judicial review to acts of state governments. Then, in 1816, it made clear that it had appellate jurisdiction over state court decisions that interpret federal law. In *Martin v. Hunter's Lessee*,[89] the Virginia Supreme Court, while acknowledging that it was bound by the supremacy clause of the Constitution to *follow* federal law, denied that the United States Supreme Court could review its *interpretation* of federal law. The United States Supreme Court held that its appellate jurisdiction applied to *all* cases raising issues of federal law, whether those cases came from the lower federal courts or the state courts. Otherwise, the Court noted that great "public mischief" would result as the Constitution or a treaty could mean one thing in Virginia and another in New York. The power to review state *criminal* cases where the conviction was alleged to violate federal law was made clear in *Cohens v. Virginia*.[90]

b. State Resistance to Expanding Federal Power, the Civil War and the Civil War Amendments to the Constitution

State Reaction In the period 1800-1860, the growing power of the federal government disturbed many in the southern states who believed in states' rights and who were concerned that the federal government was largely controlled by the more populous, more urban, anti-slavery, northern states. What frustrated southern states' rights proponents most about federal action displacing state authority was that the limits of the federal government's power were being decided solely by its own departments without any meaningful participation by the states.

Starting in the 1830s, resistance to federal authority became increasingly strident. A characteristic incident was South Carolina's attempt to "nullify" a federal tariff law that hurt the interests of southern planters. John C. Calhoun, a former Vice President of the United States, became the head of the South Carolina States' Rights party and called a convention to adopt an "ordinance of nullification" declaring the offending tariffs passed by Congress "null, void, and no law, nor binding on this state, its officers or citizens." The federal government responded to South Carolina's actions with a show of force and the state had to back down.

The southern states also deeply resented the Supreme Court's assertion of appellate power, set out in *Martin v. Hunter's Lessee* and *Cohens v. Virginia*, discussed above.[91] The depth of the animosity toward the Supreme Court and Congress is illustrated by an incident in 1830. Georgia had convicted an Indian named George

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88 Art. I §8 cl. 18.

89 14 U.S. 304 (1816). At issue in *Martin* was a Virginia law prohibiting aliens from inheriting property in the state, which was challenged on the ground that it violated the 1794 treaty with Great Britain, which guaranteed the rights of British subjects in the United States.

90 19 U.S. 264 (1821). Article III does not give the United States Supreme Court the power to review state supreme court decisions on issues of *state* law, however. Consequently, after *Martin*, state supreme courts have the final say as to the meaning of *their own* law, but the Supreme Court must in all cases be the final arbiter of the meaning of federal law, whether the issue arises in state or federal court. *See* Chapter V, pp. 192-193 and the diagram of federal and state court systems in the Appendix, p. A32. *See also* Chapter II, p. 37 and note 3.

91 Seven states enacted laws denying the Supreme Court's appellate power over their courts. *See* Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States — A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM.L.REV. 1, 3-4 (1913).

Tassell of murder and had sentenced him to death. This was a violation of a federal statute prohibiting states from exercising jurisdiction over Indians in certain areas of the state. Tassell appealed his death sentence to the Supreme Court, which was sure to apply the federal statute and reverse the conviction. However, the appeal had to be dismissed as moot when Georgia, in defiance of the Supreme Court's exercise of jurisdiction, executed Tassell, an act that Chief Justice Story labeled "indecorous."[92]

The Slavery Question and Civil War The southern states' system of agricultural economy based on slave labor spread into other new southern states. The south's resentment of federal government's was magnified by the gradual westward expansion of the remainder of the United States. A major expansion added states in the Northwest Territory, now roughly the states of Indiana, Illinois, Wisconsin, Ohio and Michigan. Congress had prohibited slavery in these states and the citizens of many of these new states were "abolitionists," meaning that they favored the abolition of slavery. Moreover, these and other northern states became points on an "underground railroad" that assisted slaves to escape to free states or to Canada. Thus, slavery came up as a national issue in Congress during the first half of the 19th century primarily in relation to the admission of new states into the Union. Each new state's admission raised the question of whether it would be admitted as a "slave" or "free" state. Unable to resolve the question otherwise, Congress compromised and sought to balance the number of new "free" and "slave" states.

One such compromise was the Missouri Compromise of 1820, which admitted the states of Missouri ("slave") and Maine ("free"). The enactment went further and broadly declared that the whole northern part of Louisiana Territory would be "free" — an immense territory extending as far North and West as the present state of Montana. In an apparent attempt to placate the southern states and head off their threatened withdrawal from the Union, the Supreme Court issued its now-infamous 1857 decision in *Dred Scott v. Sandford*.[93] In that case, a slave, Dred Scott, had sued for his freedom on the ground that he had lived in "free" areas for years as a result of accompanying his "owner" there. The Court rejected Scott's claim on several grounds in several opinions, but the case is taken to stand for the proposition that Congress had no power to outlaw slavery in the territories or to make black people citizens of the United States. This ringing endorsement of slavery in *Dred Scott* was not enough for the south. Eleven states seceded (withdrew) from the Union and formed the Confederate States of America. Civil war broke out in 1861 and ended in 1865 with the surrender of the south.[94]

The Civil War Amendments to the Constitution The fact that the south lost the Civil War established that the states were in the Union for better or for worse and that the interests of the union would prevail where they conflicted with those of the states.[95]

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92 *Id.* at 167. In reaction to a case holding the state liable for breach of contract, Georgia enacted a statute in which it declared that anyone enforcing the Court's ruling was "hereby declared to be guilty of a felony, and shall suffer death, without benefit of clergy by being hanged." That decision, *Chisholm v. Georgia*, 2 U.S. 419 (1793), was eventually overruled by the ratification of the Eleventh Amendment to the Constitution. *See infra* p. 36 and Chapter VI, pp. 221-223.

93 60 U.S. 393 (1857).

94 The rebel "Confederate States of America" were Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. As might be expected from the name chosen, the confederate constitution emphasized states' rights much more than did the United States Constitution.

95 In a case decided after the Civil War was over, the Supreme Court held that the states had no constitutional right to secede and that, for the entire time of the war, they remained states of the Union. See *Texas v. White*, 74 U.S. 700 (1869).

The legal impact of the war on states' rights was spelled out in the three so-called "Civil War Amendments" to the Constitution, the provisions of which effected "a vast transformation from the concepts of federalism that had prevailed in the late 18th century" under the original Constitution.[96] The 13th Amendment (1865) ended slavery, thus overruling the principal holding of *Dred Scott v. Sandford*, and the 15th Amendment (1870) assured voting rights to the newly freed slaves. The 14th Amendment (1868) made clear that former slaves were citizens of the United States and of the state in which they reside, thus overruling the other part of *Dred Scott v. Sandford.* More broadly, the 14th Amendment provided that a state could not "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," nor "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." All three amendments gave Congress broad power to "enforce" these amendments "by appropriate legislation."[97]

c. Federal Power Since the Mid-20th Century

Impact of the 14th Amendment Perhaps surprisingly, in the years immediately following the Civil War, Congress's power under the Civil War amendments and the very scope of the individual rights set out in those amendments were viewed rather narrowly.[98] This gave way to a more expansive view in the 20th century. Congress has used some of its power under the Civil War amendments. But the greatest impact of the Civil War amendments has been felt through court decisions. As discussed earlier, since 1953 the Court has become more activist generally and particularly with regard to striking down state and local laws and practices. The due process and equal protection clauses of the 14th Amendment have formed the largest part of this "constitutionalization" of many areas of law traditionally considered to be matters solely of state concern.[99] Two of the most important have been the areas of criminal due process rights and discrimination based on race and sex.[100]

Impact of the Interstate Commerce Clause The greatest expansion of Congress's power to pass laws displacing state authority has been pursuant to the interstate commerce clause set out in Article I. After a series of decisions reading the interstate commerce power narrowly,[101] the Court began to take a much broader view in 1938.[102] The commerce clause power of Congress reached its peak in the mid-1990s. Federal legislation was sustained under the commerce clause whenever Congress had a rational basis for concluding that the regulated activity would affect interstate com-

96 *Mitchum v. Foster*, 407 U.S. 225, 241 (1972) (1871 civil rights act passed pursuant to 14th Amendment was an exception to 1793 law barring federal court injunction against state court action).

97 Many have unthinkingly heaped praise on the "genius" of the 1789 Constitution without considering the fact that its vagueness about state-federal relations and its failure to deal with the question of slavery set the scene for eventual civil war. See Thurgood Marshall, *Reflections of the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987). Justice Thurgood Marshall (1908-1993) was the first black justice to sit on the Supreme Court.

98 *See Civil Rights Cases*, 109 U.S. 3 (1883)(beyond Congress's power to pass federal law prohibiting racial segregation in private businesses); *Slaughter-House Cases*, 83 U.S. 36 (1872)(14th Amendment did not protect any right to engage in a profession); *Plessy v. Ferguson*, 163 U.S. 537 (1896)(state-imposed regime of racially segregated facilities not unconstitutional). This paralleled a similar limited view of Congress's commerce clause powers during the same period. *See infra* note 101 and accompanying text.

99 *See supra* pp. 10-11.

100 *See* Chapter VIII, pp. 276-313 (due process rights); Chapter IX. pp 341-344 (race) and 346-351 (sex).

101 *See, e.g., United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (manufacturing is not "commerce"); *Veazie Bank v. Fenno*, 75 U.S. 533 (1869) (insurance contracts are not "commerce").

102 It was not purely coincidental that this was also the time when the Court abandoned its "economic due process" limits on federal (and state) legislative power. *See supra* pp. 11-13.

merce.[103] Under this test, the Court upheld Congressional regulation of many local activities that only indirectly related to the flow of commerce across state lines. Even if the activity occurred completely within a state, it was properly within Congress's power to regulate if the effect of the activity — when combined with other intrastate activity — could be considered to be national. Thus, in one case the Court allowed Congress to regulate the amount of wheat a farmer could grow for his own consumption and local sale on a small farm in Ohio on the theory that the "cumulative effect" of *many* small farmers doing the same could have a depressing effect on wheat prices.[104] A law banning racial discrimination in public accommodations was approved in large part based on the effect such discrimination had on interstate commerce. The Court reasoned that discrimination even in small local hotels and restaurants could make it difficult for black citizens to travel on business.[105] The 10th Amendment to the Constitution, which provides that all powers "not delegated to" the federal government are "reserved to the States," has been urged as a limitation on Congress's commerce clause power. However, the Court has dismissed the 10th Amendment as adding nothing to the discussion, remarking that it "states but a truism, that all is retained that has not been surrendered."[106]

Cutting Back on Federal Power This "truism" view of the 10th Amendment still prevails, but recent cases decided by the Court signal a changed view of what states "retained" and what they "surrendered" upon ratification of the Constitution. In the 58 years since 1937, the Court had never held a federal statute unconstitutional as beyond Congress's interstate commerce clause power. But in 1995, it unexpectedly reversed course in *United States v. Lopez*.[107] In *Lopez*, the Court struck down as beyond the commerce power a federal criminal law punishing possession of a handgun in or near any school. It rejected arguments that firearms are used in violent crime, which has economic impact and discourages individuals from traveling to high crime areas of the country, and that violent crime in schools impedes the educational process, thus resulting in a "less productive citizenry." Acceptance of these arguments, the Court observed, would allow Congress to legislate against all violent crime and all the activities that might lead to it, as well as any activity that related to the economic productivity of citizens, including marriage and divorce. This would enable it to infringe on the traditional powers of the states.

The *Lopez* Court set out its revised view of Congress's interstate commerce clause power: (1) Congress may regulate "the use of the channels of interstate commerce," as was the case in the racial discrimination cases involving public accommodations for travelers, (2) Congress can "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities," such regulating the rates charged by railroads even for intrastate transportation, and (3) Congress can regulate "activities having a substantial relation to interstate commerce . . ., i.e., those activities that substantially affect interstate commerce," including "intrastate economic activity where . . . that the activity substantially affected interstate commerce." An example would be regulating labor

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103 *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (accepting Congress's conclusion that racial discrimination affects interstate commerce).

104 *Wickard v. Filburn*, 317 U.S. 111 (1942).

105 *See* cases cited *supra* note 103.

106 *United States v. Darby*, 312 U.S. 100, 124 (1941). Limitations of the 10th Amendment are more substantial when Congress seeks to regulate the states themselves. *See infra* p. 26.

107 514 U.S.549 (1995).

practices of employers with a substantial number of employees or the regulating intrastate agricultural activity that had a cumulative effect on interstate commerce.[108]

In its most recent case, the Court in 2000 struck down the Violence Against Women Act (VAWA), which authorized a federal civil claim to be brought by anyone who was the victim of violence that was carried out against that person because of her sex. In *United States v. Morrison,*[109] a rape victim sued her attackers in federal court under a recently enacted law. Since the VAWA did not regulate commercial activity itself, it could be justified only under the third *Lopez* category. However, the Court found the kind of impact on interstate commerce involved to be just the kind rejected in *Lopez* — the argument that ordinary crime has an economic impact.

Congressional Power to Affect States Directly Congress's commerce and other powers are even more limited when it passes legislation that affects states directly if the effect of such laws is to improperly "commandeer" state governments. In *New York v. United States,*[110] the Court invalidated a federal law that attempted to "encourage" states to develop disposal sites for hazardous radioactive waste produced in the state instead permitting it to be shipped it to other states for disposal. If a state did not permit disposal within its borders, the federal decreed that state would become the owner of the wastes (which were generated by private companies) and would become liable for all damages suffered as a result of its failure to take possession of "its" wastes. The Court held this provision unconstitutional as an attempt to "commandeer" the state legislature by coercing it into enacting state laws that Congress wanted. In *Printz v. United States,*[111] the Court applied its anti-commandeering doctrine to administrative agencies of states. In *Printz*, it invalidated a federal law that required local police officials to investigate the backgrounds of prospective handgun purchasers.[112]

d. Conditional Spending

Any assessment of the federal government's power *vis-a-vis* states must take into account "conditional spending." As just discussed, Congress cannot *directly* "commandeer" state legislatures and require states to enact particular laws. However, it can effectively do so through use of the device of "conditional spending" — offering financial grants to states on the condition that they set up programs that comply with federal requirements. The power source for this kind of measure is not the commerce clause, but the power to tax and spend to "provide for the General Welfare."[113] This power of Congress, referred to as the "spending power," was greatly enhanced by ratification of the 16th Amendment to the Constitution (1913), which for the first time established the right of the federal government to impose a direct tax on income. Federal income tax is generally the most significant tax that inhabitants of the United States pay. Today, it ranges from 15% to around 40% of income. Federal income tax receipts have led to an enormous imbalance in tax revenues received by the federal government on the one hand and the states on the other. It is true, as the Court remarked in a 1947 case, that a state can resist the temptation of federal money by the

108 *Id.* at 558-559. *Lopez* and the other post-1995 cases are discussed in Chapter IX, pp. 328-332.

109 529 U.S. 598 (2000).

110 505 U.S. 144 (1992).

111 521 U.S. 898 (1997).

112 These cases are discussed in more detail in Chapter IX, pp. 327-329. Congress undoubtedly had the power under the commerce clause to regulate these activities itself, Thus it could have set up a federal agency to accomplish the tasks it sought to foist on the states.

113 Art. I §8 cl. 1.

"'simple expedient' of not yielding."[114] But few states are in a position to do so. Refusing federal money means that the state will, to that extent, experience a disadvantageous "balance of payments" with the federal government: the state will receive less back in federal money than its citizens pay in federal taxes. Thus, Congress as a practical matter has the power to force states to pass many laws or conform to other federal directives through the state's "voluntary" agreement to comply with federal grant conditions.[115]

One can see examples of the effects of federal conditional spending programs in the minimum drinking age of 21 imposed by all states. This was among the conditions attached to federal highway construction money. In addition, the principal reason many states have had strong social welfare programs for the poor is that Congress has passed legislation making federal funds available to set up such programs, but only if states follow federal requirements.[116]

3. Changes in Horizontal Federalism: The Blurring of State Boundaries

There has been a psychological blurring of state boundaries resulting from greater urbanization, mobility of the population, and advances in communication and transportation. Crossing a state boundary is a barely noticed event. Accompanying this psychological blurring has been a *legal* blurring of boundaries. While the legal consequences of state borders are still significant, several constitutional provisions and doctrines make them less significant than they have been in the past.

The Right to Travel The right of interstate travel was explicitly protected by the Articles of Confederation, but inexplicably no such provision was included in the 1789 Constitution. Nonetheless, the right has been recognized by the Supreme Court based on a number of sources in the Constitution. One of the principal cases involved a Nevada law that imposed a tax on persons leaving the state by means of public transportation. In *Crandall v. Nevada*,[117] the Court held the tax unconstitutional, calling the unrestricted right of interstate travel inherent in the very nature of the federal system.[118] In more recent times, the Court has spoken of the right to travel to travel as a "fundamental right" and has invalidated more indirect burdens on exercise of that right. In *Shapiro v. Thompson*,[119] it held unconstitutional a state requirement that all applicants for welfare benefits be able to show that they had resided in the state for at least 6 months. The effect of this law, the Court said, was to prevent the migration of people who might need those benefits to survive in their new state of residence.[120]

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114 *Oklahoma v. Civil Service Commission*, 330 U.S. 127, 143-144 (1947).

115 To be constitutional, conditions for receipt of particular federal money must be clear to the states and must have some rational relationship to the use of the federal grant. *See South Dakota v. Dole*, 483 U.S. 203 (1987) (conditioning receipt of highway funding money on state having certain minimum drinking age is rational). In *Dole*, the Court acknowledged that financial inducements to states might amount to unconstitutional coercion in some circumstances, but adhered to its position in earlier cases that "to hold that motive or temptation is equivalent to coercion is to plunge the law into endless difficulties." *Id.* at 213.

116 Federal-state cooperative assistance programs are discussed in Chapter IX, p. 328.

117 73 U.S. 35 (1867).

118 A state or municipality may nonetheless charge *all* travelers a nominal amount for the use of state-provided transportation facilities (such as an airport) to help pay for the cost of those facilities. See *Evansville-Vandenburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972).

119 394 U.S. 618 (1969).

120 *Shapiro* was decided as a "fundamental rights" equal protection case. *See* Chapter IX, p 344. A more recent case decided identifying the right to travel as being part of substantive due process and the privileges and immunities clause, Art. IV §2, is *Saenz v. Roe*, 526 U.S. 489 (1999).

The "Dormant" Commerce Clause A doctrine with even greater impact on state barriers to trade and travel is the doctrine of the "dormant" commerce clause. The "active" commerce clause has been discussed. It is a source of expansive federal power to reach most any private conduct or transaction taking place within the states. But even in its unexercised "dormant state," the commerce clause has an effect. Its mere presence in the Constitution was intended to guarantee the free flow of commerce between the states. As the Court observed in one case, "this Nation is a common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand."[121] From early in the history of the country, the Court has used the dormant commerce clause to invalidate state economic protectionist legislation that discriminates against or unduly burdens the commercial activities of out-of-state businesses. "Out-of-state businesses" include international firms. In recent years, the instances of use of the dormant commerce clause have increased.[122]

Expanded Interstate Reach of State Court Power As traditionally understood, the territorial boundaries of a state defined the limits of the power of its courts over defendants. Thus, a court of one state generally had no power to handle a suit against a defendant from another state, unless that defendant was present or owned property in the first state at the time suit was commenced.[123] A state court's ability to bind a defendant to its judgments is called "personal jurisdiction" and the ability to bind an out-of-state defendant is called "long-arm" jurisdiction. The Court expanded this power in the second half of the 20th century. Starting in 1945, the "long arm of the law" got longer. The Court expanded the circumstances under which out-of-state residents, particularly out-of-state corporations, are amenable to suit. In *International Shoe v. Washington*,[124] the Court approved subjecting out-of-state defendants to personal jurisdiction so long as the defendant had sufficient "minimum contacts" with the state — in the form of having done business there — such that subjecting the defendant to personal jurisdiction would not be "unfair." Thus today, despite state boundaries that ordinarily would prevent extraterritorial operation of the process of a state court, the courts of California may properly decide a civil case against New York defendants if they have conducted business in California and the suit relates to that business.[125]

The "Full Faith and Credit" Requirement Article IV requires that states give "full faith and credit" to the judicial proceedings, records, and public acts of other states. This assures that a birth certificate issued or marriage concluded in one state will be considered valid in every other state. The main application of the full faith and credit clause in legal matters has to do with the validity and scope of judgments rendered by out-of-state courts. Here the Court has taken a strict view that a state must give the judgment of a court of another state the same effect that it gives the judgments of its own courts. Only if the courts of the first state did not have the constitutional prerequisite of personal jurisdiction can the courts of a second state refuse to enforce that judgment.[126] It does not matter if the first state's judgment is clearly in error or that it is based on a law that violates the public policy or laws of the second state. It must be

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121 *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976)

122 The dormant commerce clause is discussed at greater length in Chapter IX, pp. 334-337.

123 *Pennoyer v. Neff*, 95 U.S. 714 (1877).

124 326 U.S. 310 (1945).

125 The fairness limitations on personal jurisdiction are enforced by way of the due process clause of the 14th Amendment. Details of the circumstances under which personal jurisdiction can be constitutionally obtained are discussed in Chapter VII, pp. 249-254.

126 *Durfee v. Duke*, 375 U.S. 106 (1963).

honored by the second state.[127] The combination of long-arm jurisdiction and full faith and credit guarantees makes it impossible for people to use state boundaries to evade legal responsibility in a civil case.

Extradition of Fugitives from Justice The extradition clause of the Constitution assures the validity of a state's criminal convictions in other states.[128] Extradition is the process by which someone charged with or convicted of a crime in one state and arrested in another state may be sent back to or "extradited" to the first state upon request. The request must be complied with. Reversing an old precedent, the Supreme Court in 1987 held that if all the necessary paperwork is completed, there can be no other proper ground to refuse to extradite and that, if necessary, an action can be filed against a state governor in federal court to compel extradition.[129]

E. The Impact of Governmental Structure on the Legal System: An Overview

Separation of powers and federalism have their advantages in diffusing power among several components of the governmental structure. However, they make for a complex legal system. In later chapters of this book, we will discuss many of those complications, but a few points by way of an overview should be made here.

1. The Effects of Vertical Federalism: Concurrent Power to Make Laws and Adjudicate Disputes on the Same Territory

a. Concurrent Federal and State Lawmaking Power

Reasons for Concurrent Lawmaking Power As already discussed, Madison's suggestion that federal power is limited and that federal and state power occupy mutually exclusive spheres has not been accepted by the Supreme Court. Instead, it has allowed federal power to expand to the point that the federal government today under its commerce powers can probably regulate most any subject matter anywhere in the country that can be shown to have some economic impact. At the same time, states have retained their traditional sovereign power to make laws for persons and transactions within their borders. The result is that two different sovereigns — state and federal governments — have overlapping or concurrent power to make law governing transactions and occurrences taking place on the same geographical territory.

Where Congress has chosen to legislate, conflicting state law must give way under the supremacy clause. Some areas of federal law have little occasion to conflict with state law, as where Congress has created a whole new body of law, such as federal tax law or laws dealing with administration of the federal government. But there are many other areas of federal legislative activity that are more general and have the potential of displacing state law. Yet, despite the great increase in federal legislative activity in the last 70 years, Congress has followed a longstanding policy of legislating incompletely — asserting federal power only as far as necessary for the success of some national policy or program — and thus not disturbing the continued application of state law in most areas of the law.

State Law's Traditional Domain Because of Congress's restraint, there are many areas of law that remain overwhelmingly state law. For example, Congress probably

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127 *See Fauntleroy v. Lum*, 210 U.S. 230 (1908) (Holmes, J.) (Missouri court judgment for gambling debt that arose in Mississippi and was illegal under Mississippi law must be enforced by Mississippi because of full faith and credit). This area is dealt with in more detail in Chapter V, pp. 256-257.

128 Art. IV §2 cl. 2.

129 *Puerto Rico v. Branstad*, 483 U.S. 219 (1987), *overruling Kentucky v. Dennison*, 65 U.S. 66 (1860).

has the power to pass a national commercial code for the entire country and a national law for incorporating companies, but it has shown little interest in doing so. As a result, most of the law that governs most ordinary transactions among private citizens or companies remains state law. Contract, tort, property, family and commercial law are virtually all state law. Professions, from law and medicine to barbers and morticians, are regulated by state law. Corporations and other business entities are established and regulated primarily in accordance with state law. Public utilities supplying gas or electric power to homes and businesses are generally state-regulated private monopolies. Most ordinary crimes, such as murder, robbery, larceny, rape, and assault, are state law.

Incomplete Federal Legislative Intervention When Congress does choose to intervene in an area traditionally governed by state law, the result is most often a mix of federal and state law on the same topic. One typical pattern occurs when Congress decides that the resources of the federal government should be brought to bear on a traditionally local problem that has become a national one. An example of this is the problem of collection of child support from responsible parents. Since the 1970s, when the low rate of child support collection became a national disgrace, Congress provided funding and imposed certain minimum standards for child support collection.[130] A second pattern consists of Congress deciding that there is a need for a uniform national rule for some category of transactions that states will have already regulated for years. An example of this is consumer credit transactions. The enormous growth in the number of credit cards and other forms of credit, combined with the welter of conflicting state requirements for advertising the terms of credit, led Congress to conclude that it was difficult for consumers to compare credit terms and shop among lenders, so it passed the federal "Truth-in-Lending" Act.[131] Typically then, federal law does not completely take the place of all of state law on a subject. The result is that a layer of federal law is simply superimposed on existing state law.

The Doctrine of Preemption The coexistence of both state and federal law on the same subject matter is made all the more likely by the Supreme Court's doctrine on "preemption" of state law by federal law. Congress can and often does explicitly provide for the preemption of state law right in the federal statute. In such cases, the scope of the preemption enacted and its effects on particular state laws are issues of statutory interpretation. However, preemption is not always clear even when the federal statute deals with them explicitly.[132] More often, the scope of preemption must be implied. Thus, state law will be displaced only if (1) there is a direct conflict between state and federal law or (2) Congress has expressed an intent to "occupy" an entire "field" of law. Conflict between federal and state law is relatively clear if it is impossible to comply with both.[133] However, it is not always clear whether Congress

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130 *See* 42 U.S.C.A. §§651 *et seq.*, discussed in Chapter XIII, p. 513.

131 15 U.S.C.A. §1601 *et seq.* The same is true of other federal consumer legislation. *See generally* Chapter X, pp. 409-416, where state and federal consumer protection statutes are discussed.

132 *Compare Cipolone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (federal statute providing that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising and promotion of cigarettes" did not preempt state-law damages actions for breach of warranty or fraudulent misrepresentation regarding the dangers of smoking other than those contained in advertising) *with Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (federal act requiring airbags or other passive restraint systems in cars stated that "[c]ompliance with 'a federal safety standard' does not exempt any person from any liability under common law"; held that state damages claims for failure to install airbags preempted).

133 *McDermott v. Wisconsin*, 228 U.S. 115 (1913) (federal law required labeling of maple syrup in a manner that Wisconsin law prohibited).

intended the federal standard to be the *only* standard or only a *minimum* standard that could be supplemented by state law.[134] In such a case, the Court looks at whether the state law stands as an obstacle to the accomplishment of Congress's full objectives in light of the federal act's intended purposes and effects.[135] When the issue is not clear, there is a presumption *against* federal preemption.[136]

The Resulting Mix of State and Federal Law Two examples will illustrate typical mixes of federal and state law. Taking an example from civil law, in a simple real estate sales transaction where homeowners are selling their house, state contract and property law (usually common law and a few special statutes) will govern the transfer of the property and the rights and obligations of the parties on the contracts for sale of the property and the bank's loan of the money to purchase it. State law or local city or county ordinances will regulate the liability of the buyer and seller for property taxes, the zoning of the property for particular uses and whether the building's structure and sanitation are proper. However, federal consumer protection laws regulate the bank's disclosure of the terms of its loan and any report of the problems with the buyer's creditworthiness. If the buyers are eligible for any of the various federal housing assistance programs, the parties will have to follow applicable federal regulations. Federal banking laws control some bank operations while state laws control others.

On the criminal side, bank robbery violates state criminal laws against robbery and larceny. State law would govern the robbery and any assaults on police or local inhabitants committed in the process of the robbery and the theft of any "getaway" car. However, the federal government has, since the Great Depression of the 1930s, insured bank deposits against loss and has made robbery of any federally-insured bank a federal crime. If the getaway car the bank robbers stole has moved in interstate commerce, they could be in violation of federal law. Moreover, interstate flight to avoid prosecution, even for a state crime, is a federal offense. Any attack on federal law enforcement agents involved in apprehending the robbers would violate federal criminal laws. City ordinances may even be applicable if the robbers speed away in their getaway car or discharge their firearms within the city limits, though prosecution would not be likely in view of the other offenses committed. If the robbers are prosecuted in state court, applicable criminal procedure would be governed by state law, but a large body of quite specific federal constitutional requirements would also apply. If prosecuted in federal court, both federal statutory and constitutional law would govern the procedure.[137]

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134 *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991) (federal pesticide laws did not preempt stricter local rules). *Compare Rice v. Sant Fe Elevator Corporation*, 331 U.S. 218 (1947) (part of Congress's purpose was to prohibit dual state and federal regulation of grain elevators).

135 *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) (Massachusetts law barring state agencies from buying goods or services from companies doing business with Myanmar was preempted by federal sanctions against it passed by Congress); *United States v. Locke*, 529 U.S. 89 (2000) (Washington state law governing navigation of oil tankers in Puget Sound preempted by federal law).

136 *See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203-204 (1983) (California law prohibiting construction of nuclear power plants until safe method of disposal of nuclear fuel was found was valid even though it had the effect of preventing the building of federally-approved nuclear power plants; federal focus was safety of plant design, while state concern was in part economic feasibility). *See also Medtronics, Inc. v. Lohr*, 518 U.S. 470 (1996) (state tort suit seeking civil damages for defective heart pacemaker device not preempted by federal law regulating such devices); *Silkwood v. Kerr-Magee Corp.*, 464 U.S. 238 (1984) (state tort suit for punitive damages for escape of plutonium not preempted by federal regulation of nuclear materials even though defendant was in compliance with federal law).

137 A person whose single criminal act constitutes both a state and a federal crime may in most situations be prosecuted for both violations despite the prohibition against "double jeopardy" for the same offense, guaranteed by the Constitution's 5th Amendment. *See* Chapter VIII, p. 307.

The reasons why both state and federal government might choose to regulate the same subject matter vary with the area involved. Sometimes one government deems the measures adopted by the other to be inadequate to protect its interests. But often overlapping regulation is a result of inertia.

The mix of state and federal law can present a challenge to the lawyer seeking to find all the applicable law. Experienced lawyers will have a good sense of whether a given area is one in which Congress has decided to intervene, but this is not always obvious. Unless already familiar with the area of law, a lawyer will have to do a thorough search of both state and federal law, and then seek to determine how they intersect on the issue in question.

b. Concurrent Federal and State Adjudicatory Power

Concurrent Subject-Matter Jurisdiction Not only do both state and federal governments exercise concurrent *lawmaking* power; two coordinate *judicial systems* — state and federal — coexist on the same territory. Often federal and state courts in a state are literally across the street from each other. Federal courts naturally have jurisdiction over all federal-law claims and criminal prosecutions, just as state courts have jurisdiction over all state law claims and crimes. At the same time, however, *state* courts are required by the supremacy clause to adjudicate most *federal* law claims[138] and *federal* courts routinely handle *state* law claims between citizens of different states under their "diversity of citizenship" jurisdiction. The result is that a plaintiff who has a federal claim or who has a state-law claim against a citizen of a different state, has a choice of filing either in state or federal court. The defendant also has a choice: if the plaintiff files a federal question or diversity case in state court, the defendant can in most situations "remove" those cases to federal court if so desired.[139]

What Law is Applied by State and Federal Courts When a *federal* court handles a *state* claim, it must apply *state substantive* law, though it may use its own *federal procedural* law. The federal court must follow state law as declared by the highest court of the relevant state. For example, a federal court handling a diversity medical malpractice case (a state law claim) will follow state law as to the nature of the claim and any defenses, but will apply its own federal rules of procedure.[140] When a *state* court handles a *federal* claim, an approximate reverse mirror image results. The supremacy clause requires that the state court apply *federal substantive* law, but the state court may use its own *state procedural* rules so long as they do not conflict with federal law. Thus, a state court handling a federal civil rights claim will follow federal law as to the substance of that claim, but will apply its own state court rules on matters of procedure.[141]

2. The Effects of Horizontal Federalism: Concurrent Adjudicatory and Lawmaking Powers Among the States

In the typical case involving state-law claims, the law and the courts of only one state are involved. However, if the case involves parties, transactions or occurrences

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138 *Testa v. Katt*, 330 U.S. 386 (1947) (invalidating state court's refusal to adjudicate a federal claim because the state's conflicts of law rule provided that the states were not required to entertain penal actions of "foreign sovereign").

139 Details of the subject-matter jurisdiction of state and federal courts are set out in Chapter V, pp. 187-189. Of course, because most state law claims involve parties from the same state, the bulk of state law claims will only be allowed to be asserted in state court.

140 *See* 28 U.S.C.A. §1652.

141 For more detail on state claims in federal court and federal claims in state court, *see* Chapter V, pp. 189-192.

connected with more than one state — as a great and increasing number of cases do — "horizontal" federalism complicates matters. In such interstate disputes, the courts of more than one state may have jurisdiction to decide the dispute and more than one state may claim an interest in the dispute sufficient to have its law applied to resolve it. This proceeds from the broadened personal jurisdiction powers of state courts and the variety of state choice of law rules.

Multiple State Forums for Adjudication As discussed briefly earlier in this chapter, a state has the power of "personal jurisdiction" over all its residents and other persons present within its borders, meaning that all such persons are properly subject to suit in its courts. A state's power over non-residents was for years limited to cases where the person had property in the forum state. However, in the last 50 years that understanding has changed. Anyone who has certain "minimum contacts" with a state may be subject to suit in its courts.[142] Since a given defendant — especially a corporation — may have the appropriate "minimum contacts" with several states, it may be subject to suit in the courts of more than one state.

Choice of Law Among Multiple State Sources The law can vary from state to state. In interstate litigation, "choice of law" issues can arise — questions of which state's law will govern the dispute. Unfortunately, there is no uniform body of federal choice-of-law rules to mediate between the competing state interests involved. Instead, the choice-of-law rules of the state where the case is pending apply to determine the question. One difficulty with this is that state choice-of-law rules are in a great state of flux, so it is difficult to predict what law will be applied to a given dispute.[143]

An equally difficult problem is that many states' choice of law rules have tended in recent years to favor application of their own law. This trend, when combined with the wider personal jurisdiction powers of state courts, makes it more likely that the choice of *where* one litigates a dispute will often affect *what law* will be applied to resolve the dispute.[144] Interstate cases governed by state law can present the lawyer with a wide variety of courts and bodies of law to choose from. The decision of where to file suit is often a complicated one. So, for example, in choosing to file suit in Minnesota, one must take into account not only the questions of convenient location and other such issues relevant to the deciding where to litigate, but also the possibility that Minnesota law will be applied to the dispute simply because the dispute is filed in its courts.

3. The Effects of Separation of Powers and Federalism on the Federal Courts

Limitations on federal court power under the double banners of separation of powers and federalism are on the rise today as a more conservative Supreme Court reacts to the federal court "activism" of the 1960s and 1970s. Whether one agrees with the Supreme Court's formulation of these limitations on federal court power or not — many of them are controversial — they are consistent with concerns of some of the Framers that a system of lower federal courts parallel to state courts was unnecessary and presented the potential for interference with the states.[145]

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142 *See International Shoe v. Washington*, discussed *supra* p. 28.

143 The variety of choice of law rules is discussed in Chapter VII, pp. 258-264.

144 Details of personal jurisdiction are set out in Chapter VII, pp. 249-254.

145 *See supra* p. 8. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION, 3D ED. (Aspen 1999) for a discussion of the intricacies of federal court jurisdiction.

The "Cases" and "Controversies" Limitation of Article III This limitation relates to justiciability of a suit — whether a dispute is of a type that should be decided by the federal court. Article III states that federal "judicial power" extends to "cases" and "controversies." These terms have been read by the Supreme Court to limit federal courts to deciding only traditional lawsuits in which there are opposing parties who have a legal claim between them and a concrete "stake" in the controversy. As a result, federal courts may not render advisory opinions or otherwise declare what the law is in some abstract, non-judicial context. In addition, a federal court must check closely in all cases to determine whether the plaintiff has "standing" to raise an issue or whether the case presents a "political" as opposed to a legal question.[146]

Since justiciability limits arise from the special nature of federal courts as defined by Article III, they have no effect on state courts. Some state constitutions have similar limitations on the power of their courts, but others do not. For example, it is not uncommon for state supreme courts to have the power to issue advisory opinions, even on federal constitutional issues.[147]

Federal Common Law-Making Federal courts, like state courts, have the power to make "common law." As will be discussed in the next chapter, the term "common law," when used in this sense, means law that is made completely by judicial decision or caselaw, as opposed to statutory law or even caselaw interpreting statutes.[148] Courts exercising common law powers might be thought of as performing a "legislative" function, since they are creating substantive rules of law that will govern people's conduct in the future. The fact that courts perform such "legislative" functions is not a problem in a common law system as a general matter. However, federal courts are said to be different from state courts: federal courts' common law-making powers are affected by separation of powers and the grant of "[a]ll legislative Powers" to Congress. As the Court noted in a recent case, the common law-making process "involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives."[149]

Federal courts were long ago denied the power to punish common law crimes.[150] Their power to make common law in civil cases, while it exists, is more limited than for the courts of the states. Federal judicial lawmaking is proper only in a few areas where there are clear and strong uniquely federal interests or Congress directs its application. Thus, federal common law-making is generally limited to cases concerning property and rights and obligations of the United States government (such as government checks and bonds), international relations, and admiralty cases, plus those instances where there is clear congressional intent that federal common law be created or that gaps in federal legislation be filled.[151]

This limitation on federal court common law power also has federalism underpinnings. *Erie, Lackawanna R.R. v. Tompkins*[152] established that federal courts must follow

146 These justiciability limitations are discussed in more depth in Chapter IX, pp. 319-324.

147 *See* Chapter IX, p. 315. *See also Doremus v. Board of Education*, 342 U.S. 429 (1952) (appeal from state court to U.S. Supreme Court on issue of 1st Amendment freedom of religion dismissed for lack of standing under Art. III; irrelevant that plaintiff had standing in state court under state law).

148 *See* Chapter II, p. 39.

149 *See Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 647 (1981), quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980).

150 *United States v. Hudson & Goodwin*, 11 U.S. 32 (1812).

151 *See generally* CHEMERINSKY, *supra* note 145, §§6.1-6.3.

152 304 U.S. 64 (1938).

state common law decisions when they handle state law claims and have no right to make their own determinations of what state law is. The *Erie* decision relied in part on the reserved powers of the states over their common law and the fact that common law-making by federal courts interfered with those state powers.[153]

Implied Private Rights of Action When a statute creates a right, but provides no remedy, a common law court will generally create one in the form of an action for damages. The power to do so is inherent in the ancient maxim *ubi jus ibi remedium.*[154] Congress has created many federal rights by statute, but often has failed to provide a private right of action to enforce those rights. If so, federal courts may not create a remedy unless Congress expressly authorizes it to do so or there is some implied congressional direction to do so.[155] According to the Supreme Court, free judicial creation of remedies not only might invade the legislative function generally, but would also allow federal courts effectively to expand their own jurisdiction, a function the Constitution gives solely to Congress in Article III.[156]

If state courts show a hesitancy to make common law, the disability is one imposed by their own sense of restraint or by their own state constitutions or laws. They are unaffected by federal separation of powers or Article III considerations.

The Anti-Injunction Act and Federal Court Abstention Under the supremacy clause, federal courts enforcing federal law necessarily enjoy primacy over state institutions, including state courts. However, Congress's concern about federal court interference with state court proceedings caused it to reverse this normal effect of federal supremacy as part of the first legislation enacted under the new Constitution. In 1789, it passed the "Anti-Injunction Act," a statutory prohibition on federal courts enjoining state court litigation (ordering that state court litigation cease). Some exceptions to the ban on injunctions have developed over the years, but the general prohibition exists to this day. In addition, the Supreme Court in the 20th century has developed in recent years several complete or partial "abstention" doctrines. These doctrines, which appear to be in part constitutionally based, independently require federal courts to abstain from exercising jurisdiction to avoid interference with pending state proceedings or otherwise to avoid a direct affront to the exercise of state judicial, administrative and legislative power.[157]

State Sovereign Immunity from Suit in Federal Court Article III originally provided for federal court jurisdiction over some categories of suits against a *state*. When the

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153 *Erie* was decided at a time when the Court's view of federal power was more restricted than it is today. Consequently, it is not so clear today that the Court would hold that federal courts are *constitutionally* incapable of making common law outside of the limited federal areas listed earlier.

154 "For every right, there is a remedy." *See also* RESTATEMENT (SECOND) OF TORTS §874A (1979) (when a statute "protects a class of persons," but provides no civil remedy, a "new cause of action analogous to an existing tort action" may be accorded a person injured by violation of a statute if the court "determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision").

155 *See Touche Ross & Co v. Redington*, 442 U.S. 560 (1979). *See generally* CHEMERINSKY, *supra* note 145, §6.3.3.

156 *See* Article III §2 and discussion *supra* p. 8. The most complete statement of the rationale for this restrictive rule for federal courts is Justice Powell's dissent in *Cannon v. University of Chicago*, 441 U.S. 677, 730-749 (1979), a position effectively adopted by the majority in the *Touche Ross*, *supra*. This apparently constitutionally-based incapacity of federal courts to create rights of actions from federal statutes is a recently "discovered" incapacity. *See Middlesex Sewerage Authority v. National Sea Clammers Assoc.*, 453 U.S. 1, 23-25 (1981) (Stevens, J., dissenting) and *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("[I]t is a general and indisputable rule, that where there is a right, there is also a legal remedy by suit, or action at law, whenever that right is invaded.")

157 Some of these are discussed in when the judicial system is discussed in Chapter V, pp. 193-195. For more detail, *see* CHEMERINSKY, *supra* note 145, §§12-14.

Constitution was being debated, the question arose whether this provision of Article III served to abolish state sovereign immunity from suit at least when suit was brought in federal court. In the 1791 case of *Chisholm v. Georgia*,[158] the Supreme Court decided that Article III did abolish such immunity. It held that the state of Georgia was liable on a contract for supplies that it had entered into during the Revolutionary War. Congress and the states responded with passage and ratification of the 11th Amendment in 1793, overruling *Chisholm*. State sovereign immunity continues to exist today despite the intervening ratification of the Civil War Amendments, particularly the 14th Amendment's clear limitations on state power. Various fictions have developed to allow suits in federal court to compel states to follow federal law, but suits for money damages remain barred unless the relevant state consents to suit.[159]

158 2 U.S. 419 (1793). The decision was not well-received in Georgia. *See supra* note 92.

159 The complicated fictions allowing injunctive relief are necessary because the Supreme Court has declined to hold or even to rule on the argument of many that the 14th Amendment (ratified in 1868) of its own force repealed the 11th Amendment (ratified in 1798). For more on the 11th Amendment, *see* Chapter VI, pp. 221-223. *See also generally* Chapter VI, pp. 220-224, where judicial remedies against state and federal governments and officials are discussed.

CHAPTER II

LEGAL METHODOLOGY

The first task of this chapter is to inventory the various forms that sources of law take in the United States and place them in the appropriate hierarchy of authoritativeness. We will then examine the two most frequently encountered sources of law — common law and statutes — and will explore their interrelationship and methodology. Finally, we will examine briefly the practical questions of how lawyers find and research the law and argue legal points.

A. Sources of Law and Their Hierarchy

1. Enacted Law

Constitutions The structural provisions of the federal Constitution were discussed in Chapter I, as was the increased "constitutionalization" of the law that has taken place since 1953. As will be evident from later chapters, there is scarcely any area of the law that has not been touched by the growth of federal constitutional limitations on government action. Federal constitutional law is discussed in more detail later in this book.[1]

Challenges to state laws and practices based on *state* constitutional grounds have been increasingly successful. For years, close examination of state constitutional rights was overshadowed and rendered largely unnecessary by vigorous enforcement of federal constitutional guarantees. However, some state courts have chosen to provide their residents with greater protections.[2] Even where federal and state constitutional provisions have exactly the same wording, state supreme courts have sometimes interpreted their state's versions to provide more protection than their federal counterparts.[3] Since the United States Supreme Court has no power to decide any issue of state law, such state constitutional rulings are immune from reversal by the United States Supreme Court unless they violate some federal law, which is unlikely.

Statutes Statutes are laws enacted by federal, state and local legislative bodies. Generally proposed statutes, called "bills," must survive close scrutiny from specialized legislative committees and gain the approval of the appropriate head executive official. The collection of federal statutes is called the United States Code, while collections of state statutes are called compiled laws or statutes. Statutes and statutory interpretation are discussed in more depth later in this chapter.[4]

Treaties Treaties with foreign nations, concluded by the President and ratified by the Senate, and executive agreements — treaty-like documents that need not be ratified — are another source of law, though not a major one. All treaties are federal law, as states are prohibited by the federal Constitution from entering into treaties with foreign

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1 *See* Chapter IX.

2 William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV.L.REV. 489 (1977); Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269 (1985).

3 *Compare Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) *with Sitz v. Dept. of State Police*, 506 N.W.2d 209 (Mich. 1993), discussed in Chapter VIII, p. 289 , note 133 (unreasonable searches). *See* Utter, *State Constitutional Law, the U.S. Supreme Court and Democratic Accountability*, 64 WASH.L.REV. 19 (1989) (finding 450 such decisions).

4 *See infra* pp. 49-63.

nations.[5] Unlike the situation in some other countries, treaties in the United States are on the same hierarchical level as federal statutes, meaning that Congress can change a treaty by simply passing a contrary statute — arguably not a firm basis on which to build good international relations. In addition, some treaties are not "self-executing" and cannot be enforced unless Congress has passed implementing legislation.[6]

Court Rules Court rules govern the procedures to be followed in courts. For example, the federal courts are governed by the following bodies of court rules adopted in the following years: Federal Rules of Civil Procedure (1938), the Federal Rules of Criminal Procedure (1946), Federal Rules of Appellate Procedure (1968), and the Federal Rules of Evidence (1975).

Federal court rules are the primary responsibility of the Judicial Conference of the United States, a supervisory and administrative arm of the federal courts. The Conference appoints an Advisory Committee of legal academics, judges and practitioners who draft the rules. The rules are then reviewed and revised by the United States Supreme Court and, if Congress does not intervene, they become law. Federal court rules have the same force as federal statutes. Some of the federal rules related to civil and criminal procedure and evidence are discussed in later chapters.[7]

States also have court rules, which are adopted by various means, usually by the supreme court of the state. Often in states, the court rule (if it truly deals with matters of procedure) has higher status than a statute passed by the legislature and, if there is a conflict, the court rule will prevail.[8]

Administrative Agency Rules and Decisions Administrative agencies make law primarily through rules they promulgate. In addition, administrative hearing decisions may have some lawmaking effect in the same manner as judicial caselaw, discussed next. Some federal administrative agencies make policy almost exclusively by way of case-by-case adjudication. Agency rule-making and adjudication are discussed in the chapter on administrative law.[9]

2. Caselaw

In a common law system, caselaw court decisions of individual cases are a source of law and are referred to as a whole as "caselaw." Thus, court decisions not only resolve past controversies; a decision of a case is considered to be a "precedent" that has legal effect in the future. This effect comes from the principle of *stare decisis* — the idea that future cases should be decided the same way as past cases.[10] Caselaw is sometimes referred to as "unwritten" law, because the rule established by the court decision is often only implicit in the decision.

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5 Art. I §10. States may, however, with Congressional approval, enter into "compacts" with foreign nations, as they may with sister states. Pursuant to this authorization, some American states have entered into compacts with neighboring Canadian provinces.

6 *See Frolova v. U.S.S.R.*, 761 F.2d 370 (7th Cir. 1985) (U.N Charter and Helsinki Accord concerning the reunification of married couples were not self-executing, so American wife of a Russian citizen could not sue the Soviet Government for its refusal to allow her husband to emigrate) and Chapter 17, p. 655.

7 *See* Chapters VII, pp. 225-237 (Federal Rules of Civil Procedure) and Chapter III, pp. 108-115 (Federal Rules of Evidence).

8 See, e.g. *Winberry v. Salisbury*, 74 A.2d 406 (N.J. 1950) (court rule governing the time period within which an appeal could be taken governed over a contrary statute) and *Ammerman v. Hubbard Broadcasting, Inc.*, 551 P.2d 1354 (N.M. 1976) (since evidence law in New Mexico was considered procedural rather than substantive, statute establishing a privilege in favor of newspaper reporters was ineffective).

9 *See* Chapter VI, pp. 197-202.

10 *Stare decisis* is discussed in greater detail *infra* pp. 64-65.

There are two kinds of caselaw: common law caselaw and caselaw interpreting enacted law. The two types of caselaw occupy different places in the hierarchy of sources of law, so they are treated separately here.

a. Common Law Caselaw

"Common Law" as Used Here The term "common law" is sometimes used to refer to *all* judicial decisions in a system where those decisions have precedential effect. In this book, the term is used in a more narrow sense to mean only that body of law developed and articulated *solely* through judicial decisions which began in England in the 11th century. As such, unlike caselaw interpreting statutes, common law constitutes a separate and distinct source of law independent of enacted law. The history and nature of common law and its relationship to statutory law are discussed in more detail below.[11]

Common law is on the lowest level of the hierarchy of sources of law in a given legal system. At one point in history, there was a suggestion that the common law prevailed over contrary statutory law.[12] However, the principle of legislative supremacy has won out. Consequently, a legislature has the power to abolish or modify the common law as it sees fit. Common law may also be displaced by a constitutional provision or by an administrative agency rule properly promulgated and within the agency's statutory authority.

State and Federal Common Law As discussed in Chapter I, the legislative powers of the state and federal governments are different in nature. States have the general power to pass legislation in any area and are limited only by limitations imposed on them by the Constitution. The federal government, on the other hand, is one of limited legislative powers. Similar restraints have been said to operate on judicial law-making as a result of both separation of powers and federalism factors.[13] Thus, state common law governs many areas of the law of a given state, such as torts, contracts and property. Federal common law's domain is narrower. Federal judicial lawmaking is proper only under two circumstances: (1) where Congress directs its application pursuant to a proper exercise of its enumerated powers and (2) where there are clear and strong uniquely federal interests that need to be protected.

An examples of the first category are such things as Federal Rule of Evidence (FRE) 501, which provides that the privilege of witnesses from testifying, e.g. doctor-patient privilege, "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Examples of the second category are as varied as the federal interests involved: maritime and admiralty law, international relations, disputes between the states, and federal government property and financial paper. In addition, in areas where Congress has legislated, even the most comprehensive statutes have gaps. In some cases, those gaps are filled by state common law. However, federal common law built on promotion of the federal interests behind the statute is most often the preferable solution.[14]

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11 *See infra* pp. 43-47 and 49-53.

12 *See Dr. Bonham's Case*, 77 Eng. Rep. 646 (C.P. 1610) (Coke, J.).

13 *See* Chapter I, pp. 34-35.

14 *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION §§6.1-6.3 (3d ed. 1999) and sources cited therein.

While state and federal common law deal with different subject matters, they are identical in their methodology. Consequently, no further mention will be made of the distinctions between them in the discussions of common law that follow.

b. Caselaw Interpreting Enacted Law

Caselaw interpreting enacted law, like common law caselaw, follows the rule of *stare decisis*. Consequently, a case decision interpreting a statute is a source of law and will control later cases arising under the statute that involve similar facts.

Caselaw construing enacted law is listed here as a separate source of law apart from the enacted law it interprets. This reflects the understanding that a case decision interpreting and applying enacted law adds something to the law beyond the effect of the enactment standing alone. The amount of law that is added by judicial decision depends on how much interpretation of the enacted law is needed. But that is only a matter of degree. Some lawmaking is taking place.

As a *source of law*, however, caselaw interpreting enacted law is considered to be derivative of the law it interprets. As such, this form of caselaw takes on the hierarchical level of the enacted law that it interprets. Thus, caselaw interpreting the Constitution prevails over a conflicting statute, caselaw interpreting a statute prevails over common law, and so on. Caselaw interpreting a statute can be overruled by later action of the legislature, just as the statute itself can be amended. Caselaw interpreting the Constitution is reversible only by amending the Constitution.

Common law and caselaw interpreting statutes employ much the same reasoning process. For that reason, the two are discussed together when the nature of caselaw reasoning is discussed.[15]

3. The Hierarchy of Sources of Law

Adding the supremacy clause of the Constitution to the points about hierarchy mentioned above, a complete hierarchy of sources of law can be constructed. From highest to lowest, they are (1) the federal Constitution, (2) federal statutes, treaties and court rules, (3) federal administrative agency rules, (4) federal common law, (5) state constitutions, (6) state statutes and court rules, (7) state agency rules, and (8) state common law. It is understood that each level of enacted law includes the caselaw interpreting that enacted law. If two sources of law on the same level of the hierarchy conflict, then the later in time will govern.

This hierarchy of law should be viewed with caution. First, a law's superior position in the hierarchy is not an indication of its importance or the frequency of its use. As discussed in Chapter I, while there is more federal law now than ever before, it is still

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15 *See infra* pp. 66-73. The precise boundary between common law caselaw and statutory interpretation is sometimes difficult to discern. There are at least three "hybrid" forms. As mentioned earlier in the discussion of federal common law, *supra* p. 39, the legislature may delegate the power to make common law without limitations. Or the legislature may so delegate with the understanding that such common law will be consistent with prevailing legislative principles in the area. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (construing §301 of the Taft-Hartley Act as a congressional direction to federal courts to make a federal common law of collective bargaining contracts that is responsive to federal legislative policy on labor-management relations). Or the legislature may use general statutory language and signal its intent that courts interpret that language in accordance with pre-existing common law understandings of its meaning. *See* Sherman Antitrust Act, 15 U.S.C.A. §1, and *National Society of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978) (Congress intended that §1, prohibiting all agreements "in restraint of trade or commerce," would be "shape[d]" by "drawing on common law tradition"). *See also* Chapter XVII, p. 696 (definition of "commercial activity").

true that most everyday transactions and occurrences affecting most people and companies in the United States are governed by state law.[16]

A second caveat regarding this hierarchy is that some conflict combinations in the hierarchy are more likely than others. It is not uncommon for courts to find that a state statute or regulation conflicts with a federal statute and is consequently invalid. It would be rare that a federal administrative rule would override a right guaranteed by a state constitution. The subject matters addressed by the typical federal agency rule and the typical state constitution are so dissimilar that such a conflict is unlikely.

In the next sections, we will focus in more depth on common law and statutes. There are several reasons to do this. First, common law and statutory law together govern the overwhelming majority of legal questions that arise in the legal system. Second, the relationship between common law and statutory law is important, as the role of one affects the nature of the other. Third, the judicial processes involved in common law and statutory interpretation serve as paradigms for dealing with other sources of law: reasoning applied in common law caselaw applies generally to all caselaw, and statutory interpretation principles have applicability to interpretation of other forms of enacted law.

C. Statutory Law in a Common Law System

1. Growth of Statutory Law

Calling the United States a "common law" country is misleading to the extent that it suggests that the most prevalent form of law is common law. While this might have been true at one point, it is emphatically not true today. Since the turn of the 20th century and particularly since the 1930s, there has been an "orgy of statute-making"[illegible] ushering in what has been called the "Age of Statutes."[illegible] The "center of gravity" of state law has also shifted to statutes. Indeed, it is probably fair to say that the average state in the United States has as many statutes as the average civil law country in Europe. If one multiplies that amount of statutory law by 50 states, one can see just how prevalent statutory law is in the United States.

Some statutes have replaced common law, but many more have created entirely new areas of law. On the federal level, volumes of federal taxation, social security, environmental, financial securities and banking law fill the United States Code. On the state level, numerous statutes regulating businesses, consumer rights, commercial transactions, and family relations have been enacted. Common law has not disappeared. Many areas of private law in the states — contracts, torts and property law — are governed primarily by common law with some statutory modifications. In most areas of the law, however, statutes are the rule rather than the exception.

CHAPTER VI

ADMINISTRATIVE LAW

Administrative law is the study of the law governing administrative agencies and officials.[1] Included are the proper procedures for promulgating legislative rules and adjudicating disputes, legal issues raised by less formal actions of agencies, the problem of improper conduct of administrative officials, and the judicial remedies available in all these areas.[2]

This chapter will focus primarily on the law of federal administrative agencies and the requirements of the federal administrative Procedures Act (APA) and caselaw thereunder. One reason for focusing on federal agencies is their importance in their own right, but another is that much of state administrative law is modeled on the federal experience.[3]

PART I: Law and Procedures of Administrative Agencies

A. Types and Purposes of Administrative Agencies

Types of Agencies Broadly defined, virtually every non-military government organ other than the courts and the legislature is considered an "agency."[4] There are two general types of agencies: regulatory agencies and social welfare agencies. Regulatory agencies regulate conduct in private relations in various areas, from transportation to food and prescription drugs. An example is the federal Interstate Commerce Commission, the first administrative agency. Social welfare agencies dispense government assistance in the various programs of assistance for veterans, the aged, the disabled and others. An example is the federal Social Security Administration within the Department of Health and Human Services. Both types of agencies exist on both the state and federal level. Both have the power to make rules, to enforce them and to adjudicate disputes arising in matters under their jurisdiction.

Federal agencies are also distinguished by whether they are "executive branch" agencies or "independent" agencies. The former are responsible to a cabinet "Secretary," while independent agencies are headed by administrators, boards or commissions not formally subject to executive branch supervision.

Advantages and Disadvantages of Agencies There are essentially three reasons for having agencies. First, agencies bring expertise to bear on problems in a way that generalist executive officials, legislators and judges cannot. The highly technical fields

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1 The advent and expansion of administrative agencies is one of the major changes in the structure of government since 1789. *See* Chapter I, pp. 15-16.

2 For one-volume treatise treatment of administrative law, *see* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, HORNBOOK ON ADMINISTRATIVE LAW (West 1993); BERNARD SCHWARTZ, ADMINISTRATIVE LAW, 3D ED. (Aspen 1991); ROBERT J. PIERCE, SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS, 3D ED. (Foundation 1999). Student texts are ERNEST GELLHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL (West 1997); WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW, 4TH ED. (Matthew Bender 2000). *See also* PETER STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES (Carolina Academic Press, Chapel Hill 1989), a book written especially for the foreign lawyer. *See* Appendix, p. A30-A31, for an outline of governmental structure with major federal agencies shown. Major federal and state laws on administrative agencies are collected in SELECTED FEDERAL AND STATE ADMINISTRATIVE AND REGULATORY LAWS (West 1999).

3 Also having strong influence on state practice is the Uniform Law Commissioners' Model State Administrative Procedure Act (1981).

4 *See* 5 U.S.C.A. §551(1).

of economic and market regulation require expert knowledge and flexibility to react quickly to changes in conditions. In the social welfare area, programs are complex and the number of recipients is so great that it is only through specialized and expert administration that benefits can be properly distributed. The second reason for agencies is efficiency. Considerable efficiency results naturally from expertise in administration. But further efficiency gains come from the nature of agency structure. It combines legislative, executive and judicial functions "under one roof" rather than relying on the more traditional diffused governmental structure.[5] A third attraction of agencies is that their self-contained structure makes them more independent, insulating them from the "political winds that sweep Washington."[6] Thus, it is hoped, government policy and actions in a given area will be more consistent and more rational than those that would be produced by the political branches.

The disadvantages of agencies grow directly out of the three advantages just stated. Expertise can breed a narrow vision and arrogance. Undue concern for efficiency can trample individual rights. Insulation from political control can lead to a lack of accountability for actions and lawlessness. Much of administrative law struggles to enhance the positive side of agency expertise, efficiency and independence while controlling their more negative consequences.

The first half of the 20th century saw unrestrained growth in the size, number and variety of practices of federal agencies. A scathing report issued in 1937 complained that they had become "a headless 'fourth branch' of government, a haphazard collection of irresponsible agencies and uncoordinated powers."[7] Following a presidential commission investigation, steps were taken in 1946 to deal with such problems though passage of the Administrative Procedures Act (APA), a comprehensive statute regulating federal agency procedure for rule-making, adjudication and other activities.[8]

Agencies have two basic functions beyond their obvious executive mission: rule-making and adjudication. Statutory and constitutional aspects of these two functions will be outlined first.

B. Rule-Making Functions of Agencies

1. Legislative Rules and the Rule-Making Process

"Legislative rules" set substantive and procedural law that must be followed by both the agency and those subject to its jurisdiction. Under the APA, rule-making can be formal or informal, but by far the most common process is informal rule-making. For this, the APA requires a notice-and-comment procedure.[9] A federal agency must first publish a notice of proposed rule-making in the Federal Register, a daily government publication, and invite public comments on its proposal. "[A]n agency's notice must 'provide sufficient detail and rationale for the rule to permit interested parties to comment meaningfully.'"[10] At the end of the notice and comment period, the agency promulgates and publishes the final version of the rule. In an introduction to the rule,

5 The separation of powers problems inherent in such an arrangement are discussed *infra* pp. 215-220.

6 *Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. 833, 835 (1986).

7 President's Commission on Administrative Management, Report with Special Studies (1937), quoted in AMAN & MAYTON, *supra* note 2, at 3.

8 *See* 5 U.S.C.A. §§551-559, 701-706, 1305, 3105, 3344, 5372, 7521.

9 5 U.S.C.A. §553.

10 *Fertilizer Institute v. Environmental Protection Agency*, 935 F.2d 1303, 1311 (D.C. Cir. 1991).

the agency must take into account and discuss the public comments it has received and declare the basis for writing the final rule as it did in light of the comments it received. In the process, the agency must deal meaningfully with the public comments and cannot ignore any point of view.[11] It must respond specifically to significant negative comments either by modifying the proposed rule or explaining why it did not.[12] Overall, the agency must show that it has "genuinely engaged in reasoned decision-making."[13] Otherwise, a reviewing court will vacate the rule.

Congress may require, but rarely does, that formal rule-making procedures be followed. With formal rule-making, testimony and other evidence must be taken "on the record" before final rules can be promulgated.[14] Formal rule-making is generally reserved for such matters as rate-making, in which an agency must make a general decision on what prices or rates to allow in an industry that it regulates. The Court has made it clear that rule-making procedures more formal than the notice-and-comment procedure may only be imposed by *Congress* and that courts do not have any power to impose more stringent procedures where Congress has not.[15]

The public has the right to petition for rule-making. However, there is no requirement that the agency respond with rule-making.[16]

Final federal agency rules are compiled yearly in Code of Federal Regulations (CFR), where they are organized by subject matter. However, CFR compilations are notoriously late in being published, so it is often necessary to find the final rule in the Federal Register.

Both state and federal administrative procedure acts contain "good cause" exceptions to the normal notice and comment procedure. Under the federal APA, "good cause" is said to exist when the notice and comment procedures would be "unnecessary, impracticable or contrary to the public interest." These are generally interpreted as requiring some sort of emergency need for the rule. The rules adopted pursuant to this exception are called "interim final" rules. The agency then goes through the comment procedure before finalizing the rule, although interim rule may take effect upon its first publication.

2. Interpretive Rules and Statements of Policy

Agencies also issue "interpretive rules." As the name suggests, these rules interpret some existing legal standard. They often deal with the application of legislative rules

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11 *See Kennecott Copper Corp. v. Environmental Protection Agency*, 462 F.2d 846 (D.C. Cir. 1972) (rule sent back to agency for reconsideration of why it reached a particular standard for air quality when tests showed a different standard was sufficient). In addition, Congress has required that all major agency action consider specific items. One is the requirement of an environmental impact statement. *See* 42 U.S.C.A. §4321, discussed in Chapter 15, p. 605.

12 *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240 (2d Cir. 1977) (agency did not respond sufficiently to comments that current health standards were adequate and new rule would make commercial marketing of whitefish unfeasible).

13 *Greater Boston Television Corp. v. Fed. Communications Comm'n*, 444 F.2d 841, 851 (D.C.Cir 1970) (decision on license renewal upheld). If a court vacates a rule, the agency can re-publishes the same rule and follows the proper procedures the second time, but it cannot make the rule retroactive. *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204 (1988) (retroactive recoupment of Medicare payments already made to hospitals).

14 *See* 5 U.S.C.A. §557.

15 *Vermont Yankee Nuclear Power v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) (reversing lower court order requiring agency to implement additional procedures, including suggestion of possible cross-examination of agency personnel who produced report on which agency relied).

16 5 U.S.C.A. §553(e). *See WWHT, Inc. v. Fed. Communications Comm'n*, 656 F.2d 807 (D.C.Cir. 1981) (by providing petition procedure, Congress did not mean to compel rule-making).

to particular facts and are expected to apply to a general category of cases of that type. Interpretive rules are exempt from the procedural requirements for rule-making applicable to legislative rules.[17] Interpretive rules may be promulgated in the same rule-style form as legislative rules or they may be in a less formal style, such as a question-and-answer format.[18] It is sometimes difficult to draw the line between an interpretive rule and a new legislative rule, but the basic principle is clear. An interpretive rule is improper if it sets out what is effectively a new requirement.[19]

"Statements of policy" are also issued. They need not follow any particular form. They relate principally to the future intentions of the agency, often with regard to what enforcement action it will take in particular situations. Interpretive rules or policy statements can be disputed as incorrect interpretations of existing law. If this can be shown, the agency has the duty to refrain from applying them to the complaining party and to change them for other similar cases.[20]

Agencies also give advice to the public on how to comply with their regulations. When that advice is correct, it is a great service to the public. When it is incorrect, agencies will seek to protect reliance interests to the extent possible. However, it is clear that in general there is no obligation to do so.[21]

C. Adjudicatory Functions of Agencies

Adjudication determines the rights and obligations of a particular party based on the application of some legal standard to particular facts. Understood in a broad sense, adjudication happens every time an agency takes action that is not in the form of a rule. However, in this section we will focus on *formal* adjudication, by which affected parties are afforded a trial-type hearing before the agency. Examples of formal adjudication by federal agencies are claims before the Social Security Administration for disability insurance benefits, unfair labor practice claims against an employer or union before the National Labor Relations Board or enforcement proceedings before the Securities and Exchange Commission to revoke the license of a securities broker. The formal adjudicatory functions of administrative agencies are an important part of their work. Indeed, Congress has established several agencies whose sole responsibility is adjudication and who do not issue rules.[22]

Whether formal adjudication is called for is determined by examining the relevant statutes. Requirements can vary. For example, while all the proceedings mentioned in the last paragraph require formal adjudication, no such process applies to a decision of the Secretary of Transportation to order an automobile manufacturer to recall a

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17 *See* 5 U.S.C.A. §553(d).

18 The Equal Employment Opportunity Commission issues both. *See Newport News Shipbuilding and Dry Dock v. Equal Employment Opportunity Comm.*, 462 U.S. 669 (1983), where examples of both forms of interpretive rules (on sex discrimination in medical disability insurance) are quoted.

19 *Compare Cabias v. Egger*, 690 F.2d 234 (D.C.Cir. 1982) (agency letter simply construed the language and intent of statute) *with Chamber of Commerce v. Occupational Safety & Health Admin.*, 636 F.2d 464 (D.C.Cir. 1980) (requirement announced in agency head's speech and later published as an interpretive rule enunciated a new requirement that must be promulgated as a rule). *See also Hoctor v. United States Dep't. of Agriculture*, 82 F.3d 165 (7th Cir. 1996)(discussing what an interpretive rule is).

20 Agencies may also waive their rules in individual cases where it appears the rule is not appropriate, a part of what has been called "administrative equity." *See* Jim Rossi, Making Policy Through the Waiver of Regulations at the Federal Energy Regulatory Commission, 47 ADMIN.L.REV. 255 (1995).

21 *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990)(incorrect advice caused plaintiff to lose 6 months of his pension; yet, equitable estoppel did not operate against the government).

22 Among them are the Occupational Safety and Health Review Commission, the Federal Mine Safety and Health Review Commission and the National Transportation Safety Board.

particular car for safety defects. Although the primary focus here will be on formal adjudication, more informal agency action will be discussed later when judicial review is considered.[23]

23 *See infra* pp. 210-211.

D. Judicial Review of Agency Action

One major value of administrative agencies is their expertise. However, they must apply that expertise within the confines of the law. Judicial review is deemed necessary to assure a rational and legally appropriate decision, both when agencies adjudicate and when they make rules. In the United States, this judicial review is undertaken by the ordinary courts — not by special administrative courts, as is the case in some other systems. Review by generalist judges is thought to be a benefit since it counteracts tendencies toward a narrow agency perspective.

1. Right to Judicial Review of Agency Action

Right to Review in General The right to judicial review of agency action is provided by statute, either by the specific statute that governs that agency or by the APA.[66] Where there is no specific statute and the APA is the only possibility, a court will "begin with the strong presumption that Congress intends judicial review."[67] The question of whether there is a *constitutional* right to judicial review of all administrative action is one that has been debated, but not definitively resolved.

Interpretation of Statutes to Permit Review The issue of a constitutional right to judicial review has not been resolved in part because courts have tended to interpret statutes in such a way as to permit judicial review even when those statutes appear on their face to preclude it. For example, despite the fact that the Immigration and Nationality Act provides that all agency decisions in deportation cases "shall be final,"

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63 In actuality, the due process clause *does* result in the application of most Bill of Rights guarantees to state court criminal cases, but it is generally said instead that those right are "incorporated" against the states by the due process clause rather than being the product of a weighing due process factors. *See* Chapter VIII, p. 277.

64 *See* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of Value*, 44 U. CHI. L. REV. 28, 46-57 (1976) (offering an alternative "value-sensitive approach"). *Cf. Saleeby v. State Bar*, 702 P.2d 525 (Cal. 1985) (including in California due process "the dignitary interest in informing individuals of the nature, grounds, and consequences of the action" and "freedom from arbitrary adjudicative procedures").

65 *See* Chapter III, text at note 131, where the individuality-reinforcing values of procedural fairness are discussed. Due process hearing rights apply only to adjudicative determinations and not to legislative changes. Thus, if an agency were promulgating a rule the effect of which would be to deprive a person of liberty or property, the trial-type procedures of *Goldberg v. Kelly* are not required before such a rule can be adopted. SCHWARTZ, *supra* note 2, §§5.6-5.8. For more on procedural due process rights, *see* JOHN E. NOWAK & RONALD D. ROTUNDA, HORNBOOK ON CONSTITUTIONAL LAW, 5TH ED. §§13.1-13.10 (West 1995).

66 5 U.S.C.A. §§701-706.

67 *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986).

judicial review was held to be available.[68] Congress later provided expressly for review by statute. However, in 1996 Congress removed the right to judicial review for aliens subject to deportation for having been convicted of committing certain aggravated felonies. The Court held that the right to direct appeal of the agency's decision had been removed. But it also held that review by means of *habeas corpus* was still available. This was so despite the fact that Congress had entitled its repealing sections "Elimination of Custody Review by Habeas Corpus." The Court held that the result was necessary in view of the lack of clarity of the *text* of the statutes and the need to avoid the serious constitutional question that would arise should it interpret the amendments involved as removing all judicial review of the deportation orders involved.[69]

The statutory interpretations involved have on occasion appeared strained.[70] However, if Congress has clearly prohibited review, the Court has acquiesced, even when those decisions are alleged to be arbitrary and capricious, in violation of statutes.[71] A more difficult question is whether judicial review of *constitutional* issues could ever be denied. This issue is discussed in more depth in the chapter on constitutional law.[72] The Court has never decided the issue, but it has interpreted ambiguous statutes is such a way as to permit review "in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."[73]

2. Procedural Aspects of Judicial Review

Exhaustion of Administrative Remedies Generally, claimants aggrieved by agency action must obtain a final decision of the agency before resorting to judicial review.[74] This means that the claimant faced with a negative action by an agency must exhaust the appeal procedures the agency provides. This is said to assure economical use of judicial and administrative resources, to promote administrative autonomy and responsibility by providing the agency with the opportunity to correct its own mistakes, and to further the legislative purpose of granting authority to the agency by requiring that its procedures be respected. However, exhaustion will not be required if it would be

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68 *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955).

69 *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001); *Calcano-Martinez v. Immigration and Naturalization Service*, 533 U.S. 348 (2001). *Cf. Zadvydas v. Davis*, 533 U.S. 678 (2001) (interpreting statute as not providing for indefinite detention of aliens subject to deportation orders who cannot be deported in light of potential constitutional problems with any other interpretation).

70 *Lindahl v. Office of Personnel Management*, 470 U.S. 768 (1985) (statute providing that Navy disability determinations were "final and conclusive and are not subject to review" held not to preclude some judicial review of "misconstruction of the governing legislation" going "to the heart of the administrative determination").

71 *See, e.g., United States v. Wunderlich*, 342 U.S. 98 (1951) (decision of agency in government contract dispute), *But see* SCHWARTZ, *supra* note 2, §8.6 at 485-486 (criticizing lack of review as making agencies "virtual laws unto themselves").

72 *See* Chapter IX, pp. 325-326.

73 *Webster v. Doe*, 486 U.S. 592, 603 (1988). *See also Johnson v. Robison*, 415 U.S. 361, 366 (1974) (prohibition of review of veterans benefit cases did not prohibit review of constitutional issue). *But see* Scalia, J., dissenting in *Webster v. Doe, supra*. *Cf. Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) (Congress can properly bar review of attorney general's decision to commence deportation proceedings against illegal aliens even it that decision is alleged to constitute unconstitutional selective enforcement, since illegal aliens have no right to argue selective enforcement as a defense).

74 5 U.S.C.A. §704. *McKart v. United States*, 395 U.S. 185 (1969) (military draft classification not appealed administratively, so later judicial review is barred). However, exhaustion is not required where the administrative remedies are inadequate to award the relief the plaintiff seeks. *McCarthy v. Madigan*, 503 U.S. 140 (1992) (federal prisoner who sued prison officials for money damages was not required to exhaust prison administrative remedy).

futile, such as where the agency is bound by applicable law to decide against the claimant and the claimant wishes to challenge that law.[75]

Means of Obtaining Review Judicial review may be obtained by any available means. Usually, a petition for review is required to be filed within a certain number of days after the final decision.[76] In other cases, the agency may have to bring an enforcement action in court to gain compliance, at which time review will be provided in that proceeding. This is the case with some decisions of the NLRB, which must bring an action for enforcement in the Court of Appeals.[77] In some cases, review will be by way of defense against administrative enforcement and appeal from any negative decision in that proceeding. In addition, an action for an injunction or for declaratory relief may be used.[78] *Habeas corpus* was used in deportation cases until review under the APA was recognized.[79]

Standing A person seeking judicial review of agency action in federal court must have "standing" to contest that action. Standing generally requires that the person be one who is actually injured by the agency action.[80] However, when review is sought under the APA, an additional requirement beyond simple injury must be met. The APA provides for review only if the claimant's injury qualifies as an injury "within the meaning of a relevant statute."[81] This has been understood as requiring that the injury complained of be one that is within the "zone of interests" defined by the statute governing the agency action.

This requirement is most relevant when the injured plaintiff is not the party who was the direct subject of the administrative action. Such plaintiffs must show that the relevant statutes were intended to protect them from the type of injury they complain of. For example, when the Comptroller of Currency approved the applications of two banks to sell securities, the banks did not complain, but stock brokers and dealers who would face competition from the banks did file suit. The Court found that an arguable basis for the National Bank Act limiting securities brokerage activities of banks was to prevent competition with established securities dealers — the precise injury complained of by the plaintiffs.[82] Had the Court found that the sole purpose of the Act was to assure that banks did not fail by overextending their operations, then injury to competitors would not have been within that zone of interests. An example of a negative zone of interests case is one involving the decision of the federal Postal Service to permit certain private courier companies to engage in some international mail delivery. The postal workers' union sued to contest the decision, claiming that it was unlawful. The Court held that the zone of interest test was not satisfied: Congress's

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75 *Bethesda Hospital Ass'n. v. Bowen*, 485 U.S. 399 (1988) (agency had no power to award reimbursement hospitals sought). *See generally* SCHWARTZ, *supra* note 2, §§8.33-8.40.

76 *See e.g.* 42 U.S.C.A. §405(g) (60 days for Social Security appeals).

77 29 U.S.C.A. §160(e), (f).

78 An injunction is a court order stopping the defendant from doing something or requiring the defendant to do something. Declaratory relief is a declaration that the defendant's actions are unlawful. Both are discussed in greater detail in the chapter on Civil Procedure. *See* Chapter VII, pp. 241-243.

79 *Shaughnessy v. Pedreiro*, *supra* note 68. *Habeas corpus* is discussed in Chapter VIII, pp. 273-274.

80 Constitutional aspects of standing are discussed in Chapter IX, pp. 320-322.

81 5 U.S.C.A. §702.

82 *Clarke v. Securities Industry Ass'n.*, 479 U.S. 388 (1987). Clearly, application of the zone of interest test can lead to varying results depending on the analysis of the relevant purposes of the statute — an analysis that often comes close to deciding the merits of the case.

purpose in prohibiting private competition with the Postal Service was to assure that the Service received sufficient revenues, not to protect government postal workers' jobs.[83]

83 *Air Couriers Conference of America v. American Postal Workers Union*, 498 U.S. 517 (1991). *See also Block v. Community Nutrition Institute*, 467 U.S. 340 (1984) (denying standing to consumers of milk products to challenge minimum prices set for milk handlers and producers).

84 5 U.S.C.A. §706(2)(E) and *Universal Camera v. Nat'l Labor Relations Bd.*, 340 U.S. 474 (1951).

85 *Consolidated Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938).

86 *See* Federal Rule of Civil Procedure 52 and Chapter V, p. 170 and Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L.REV. 70 (1944).

87 *Dickenson v. Zurko*, 527 U.S. 150, 153 (1999) (requiring that Federal Circuit Court of Appeals review patent and trademark office decisions under the APA standard and not "clearly erroneous").

88 AMAN & MAYTON, *supra* note 2, at 446. The *Dickerson* case cited in the last footnote contains a detailed discussion of the evolution of the APA standard of review.

89 This is true of many civil rights claims. *See Chandler v. Roudebush*, 425 U.S. 840 (1976) (employment discrimination).

90 *Agosto v. Immigration and Naturalization Service*, 436 U.S. 748 (1978) (*de novo* trial of citizenship issue in deportation proceeding required both by statute and the Constitution).

91 *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), discussed in Chapter II, p. 59. For a good discussion of what deference is due and when, *see* STRAUSS, *supra* note 2, at 257-261.

E. Presidential and Congressional Controls on Federal Agency Action

Federal agencies are subject to statutory commands and owe their continued existence to Congress and the President. Consequently, complete control of agencies is always available through legislation abolishing them or limiting their power. However, these means of control are not often resorted to. Instead, Congress and the President use less drastic and less direct means. These efforts are not completely successful in part because many agencies have been set up as independent precisely to avoid the effects of political influence. In addition, presidential and congressional influences often pull agencies in opposite directions, so they effectively cancel each other out.

1. Power Over Tenure of Agency Officials

Presidential Power of Appointment A major way to influence agency policy and rules is through the power to appoint the agency head or cabinet secretary whose department supervises the agency. The "appointments clause" of the Constitution provides that Congress shall establish the offices of government, that higher-level or "principal officers" will be appointed by the President subject to Senate confirmation, and that "inferior officers" may be appointed by the President, by the courts of law, or by department heads without need for Senate involvement, if Congress so provides.[100] The President's choice and the process of Senate approval of a Cabinet Secretary or agency head present opportunities to pick administrators who have particular views about the way the agency should be run and to extract promises regarding the future direction of the agency.

Presidential Removal Power The Constitution is silent about how federal administrative officers may be removed other than by way of impeachment by the Congress. Any presidential removal power would presumably be part of the grant of executive power in Article II, particularly the power to "take care that the Laws be faithfully executed."[101] But as noted in Chapter I, there are many "independent"

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98 It is important to emphasize that the "substantial evidence" rule and great deference to administrative agency fact-finding would not apply to discretionary decisions such as the one in *Overton Park*, because there was no trial-type administrative hearing. Indeed, the problem with the administrator's decision in *Overton Park* was that there was *no* record of reasons for it.

99 28 U.S.C.A. §2412(d)(1)(A). However, the maximum rate for attorney fees is $125 per hour.

100 Art. II §2 cl. 2.

101 Art. II, §3. *See Myers v. United States*, 272 U.S. 52, 164 (1926) and NOWAK & ROTUNDA, *supra* note 55, at 264. The removal power has been a sore point between the President and Congress. The famous impeachment of President Andrew Johnson and his narrow acquittal in the Senate in 1867 — the only impeachment ever of a President — was based on his refusal to accede to a Tenure in Office Act passed by Congress that would have changed the tenure of all his cabinet officials (most of them inherited from President Lincoln) from service at the pleasure of the President to dismissal only with the concurrence of the Senate. Under *Myers*, *supra*, the Act violates separation of powers.

administrative agencies. This independence is assured by providing for appointment terms that extend beyond the term of office of the President who appointed them and by limiting the presidential ability to remove them.[102]

The original caselaw on removal drew a distinction between administrative officials who perform "executive" functions and those who performed "quasi-judicial" and "quasi-legislative" functions. While the President retained the right to dismiss "those who are part of the Executive establishment" and who perform purely executive functions, he could not dismiss those "whose tasks require absolute freedom from Executive interference."[103] This test has been replaced by a more flexible functional one under which the President can freely dismiss only those officials who are essential to the President's performance of core presidential functions.[104] Thus, the distinction is drawn between executive branch officials performing "administrative" functions, whose dismissal Congress can regulate, executive officials exercising "political" executive authority, whom the President can dismiss at will.[105]

Civil Service Employees Below "inferior officers" are employees whose appointment and tenure are not subject to any constitutional restraints.[106] This provides a constitutional justification for the existence of a competitive, merit-based civil service system.[107] It is these individuals, who are protected from dismissal except for cause, who perform the daily functions of government administration.

Congressional Control Over Tenure of Agency Officials Though the Senate must approve presidential agency appointments, it is clear that Congress does not have the power itself to appoint executive officials. In *Buckley v. Valeo*,[108] the Supreme Court considered the constitutionality of provisions of the Federal Election Campaign Act. It authorized a Federal Election Commission to make rules regulating campaign practices and to investigate and prosecute violations of them. In an effort to achieve a political balance on the Commission in this sensitive political area, the Act provided for appointment of some commissioners by the President (without participation of the Senate) and some by the President *pro tempore* of the Senate and the Speaker of the House of Representatives.[109] The Supreme Court held the Commission so constituted violated the appointments clause. Since the Commissioners would be enforcing the law and would therefore be *executive* officers, they could only be appointed by the President with approval of the Senate and could not be appointed by legislative officials. The decision was supported by reference to the policy that underlies all separation of

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102 *See* Chapter I, p. 15.

103 *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (prohibiting presidential dismissal where Congress had provided by statute that a member of the Federal Trade Commission could be removed mid-term only for poor job performance).

104 *Morrison v. Olson*, 487 U.S. 654 (1988) (appointment and removal procedure for special prosecutor not invalid just because limits were placed on presidential power to dismiss her, since such limits did not "impede the President's ability to perform his constitutional duty").

105 *See* STRAUSS, *supra* note 1, at 68.

106 *Buckley v. Valeo*, 424 U.S. 1, 126, n. 162 (1976).

107 Another reason why the civil service is constitutional is that civil service employees are "inferior officers" whose appointment and dismissal are vested in department heads whose discretion to hire and fire is controlled by the merit requirements of the statute establishing the civil service. *See* STRAUSS, *supra* note 2, at 64 and *United States v. Perkins*, 116 U.S. 483 (1886) (when Congress vests appointment power in department heads, it may restrict the manner of removal).

108 424 U.S. 1 (1976).

109 These officials are the presiding officers of the two houses of Congress elected by their members.

powers problems: the notion that "the same persons should not both legislate and administer the laws."[110]

Just as Congress cannot appoint executive agency personnel, it violates separation of powers for Congress to vest executive power in an official over whose tenure it already has control. In *Bowsher v. Synar*,[111] Congress passed a law intended to reduce the federal deficit. The law assigned certain duties to the Comptroller General, the official in charge of the Government Accounting Office, a legislative bureau that investigates and evaluates internal operations of government. The law instructed the Comptroller, upon being notified of certain fiscal information, to determine what spending cuts to make based on standards set out in legislation. These spending cuts were then to be transmitted to the President who was required to put them into effect. The Comptroller General's exercise of this kind of judgment, the Court held, was clearly executive action. The problem was that the Comptroller General, as head of a legislative agency, was subject to removal by Congress before expiration of his 15-year term. It violated separation of powers for Congress to vest executive decision-making power in an official under its control.[112]

2. Ongoing Presidential and Congressional Influence on Agency Action

Presidential Means of Control Beyond the power to appoint agency officials, the President has many opportunities to exercise ongoing control over agency policy and action. The degree of a President's control varies with the agency and depends in part on whether the agency is an executive agency, which is responsible to a presidential cabinet Secretary or other presidential appointee, or an independent agency. Actions of executive agencies can be supervised closely. "Major rules" generally must be cleared with the White House's Office of Management and Budget (OMB) and may result in considerable debate, negotiation and compromise.[113] The content and timing of the administrative rules may be affected. Enforcement priorities of agencies can be set that reflect the President's view as to the wisdom or importance of the law. A policy of agency *inaction* is the easiest to implement. Thus, there is a long history of executive branch officials and agencies reading statutory commands narrowly or "dragging their feet" in promulgating needed regulations or in initiating or pursuing enforcement actions in programs with which they disagree. To give a recent example, the Reagan and Bush administrations were repeatedly criticized for failing to enforce vigorously civil rights and environmental protection laws.

Presidential influence should not be overstated, however. Most federal administrative agencies are housed in the executive branch. However, of the approximately 5 million civilian and military personnel in the 14 departments of the government, the President gets to appoint only the top 3,000 or so. The remaining administrators who actually do the work carrying out policy are not so easy to control. They are part of the merit-based civil service system.[114] Generally the President cannot

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110 424 U.S. at 272. The act had also provided that all appointees would need to be approved not just by the Senate, but by both houses of Congress — a provision that the Court struck down as well.

111 478 U.S. 714 (1986).

112 *See also MWAA v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991) (unconstitutional for members of Congress to serve on a board overseeing administration of federal airports because power they would exercise would be executive power and would be in a form other than legislation).

113 *See* OMB Executive Order No. 12291, 46 Fed. Reg. 13193 Feb. 17, 1981) (requiring that all executive agency action be cleared through OMB).

114 *See supra* p. 212.

fire them and they have specialized knowledge and strong feelings about "their" agency's policies and practices. Further, the President and his staff or appointees are only one influence on agency personnel. As pointed out below, congressional committees have great influence over agencies.

President Harry S. Truman, who served from 1945 until 1953, was considered by many to have been a very strong President. But in dealing with the bureaucracy, he described his task as being "to bring people in and try to persuade them to do what they ought to do without persuasion. That's what I spend most of my time doing. That's what the power of the President amounts to."[115] Truman also commented on the eve of his successor, former Army General Dwight D. Eisenhower, becoming President: "He'll sit here and he'll say 'Do this! Do that!' and nothing will happen. Poor Ike — it won't be a bit like the Army."[116]

There are some legal limits to presidential intervention in agency matters even in those agencies whose heads the President has appointed. For example, the President may not seek to "impound" funds Congress intended that the agency spend.[117] In *Train v. City of New York*,[118] Congress had passed the Clean Water Act of 1972 over President Nixon's veto, but Nixon continued his opposition to the program and impounded funds by ordering the administrator of the Environmental Protection Agency to withhold several billion dollars that Congress had directed should go to fund construction of sewage treatment plants for New York City. The City of New York sued for release of the money. The Court held that the President had no power to order the agency to withhold the funds and that the agency must spend those funds as Congress directed.[119]

Congressional Power and Influence Over Agencies Congressional oversight of agencies has its source in the "power of the purse" given by the Constitution — the power to decide whether and to what extent to fund government operations.[120] The means by which congressional influence is most commonly exercised is through congressional committees. As noted in Chapter I, the original purpose of committees was to deal with the increased complexity and specialized nature of legislation in the modern world. But with the growth of administrative agencies, committees have developed a strong supervisory influence on their operations. Because committees are organized according to subject matter, their members develop expertise and a strong interest in an area of agency action, making it difficult for agencies to use their superior knowledge to escape scrutiny. Most important, since Congress has control over agency budgets, Congressional committee members can be very persuasive in convincing agency heads to alter the way they are carrying out a particular Congressional program.[121]

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115 Quoted in STRAUSS, *supra* note 2, at 61 n.32.

116 ALEX AYRES, ED., THE WIT AND WISDOM OF HARRY S. TRUMAN 43 (Meridian Books 1998).

117 Impoundment dates from 1803, when President Thomas Jefferson refused to spend $50,000 on defense of the Mississippi River. President Nixon was perhaps the biggest impounder of funds, at one point impounding as much as $25 billion.

118 420 U.S. 35 (1975).

119 A "settlement" of the impoundment dispute between Congress and the President enacted after *Train* is set out in 2 U.S.C.A. §681 *et seq.* (allowing the President to delay spending and propose recission of budgetary amounts, but prohibiting outright impoundment).

120 *See* Chapter I, p. 6.

121 Even the influence of individual members of Congress on agency decisions have been tolerated at least before the adjudication stage. *DCP Farms v. Yeutter*, 957 F.2d 1183 (5th Cir. 1992). *Compare supra* note

To assist it in carrying out this oversight role, Congress has established powerful agencies of its own to do research and investigative work and to make recommendations in particular areas. Among them are the Government Accounting Office (GAO), the Congressional Budget Office and the Library of Congress. The GAO regularly issues reports on the performance of federal agencies.[122]

One device widely used in the past by Congress to control agency action was the "legislative veto." Congress would reserve to itself the right to "veto" certain agency action or proposed rules through the use of a joint resolution or vote of one house or in some cases even a committee vote. This device was declared unconstitutional by the Supreme Court in *Immigration & Naturalization Service v. Chadha*[123] as an encroachment on the power of the executive branch. The Court held that the legislative veto by a single house of Congress provided for in *Chadha* violated the "presentment" clause, which requires that legislation be presented to the President for approval or veto, the "bicameral" clause, which requires that legislation be passed by both houses of Congress, and the implied separation of powers structure of the Constitution.[124] According to the dissent in *Chadha*, the majority decision in that case invalidated some 200 federal statutes.[125]

PART II: Separation of Powers and Federalism Issues Involving Agencies

A. Administrative Agencies and Separation of Powers

From all that has been discussed, it is clear that administrative agencies exercise *executive* power when they enforce the law, exercise *legislative* power when they engage in rule-making and exercise *judicial* power when they adjudicate disputes under governing law. One might suppose that a system that purports to be based on separation of powers would have some difficulty with these mixed features of administrative agencies.[126] In fact, all these separation of powers questions have been settled by the Supreme Court in a way that has permitted longstanding agency practice to continue.

There are three dimensions to the separation of powers critique of federal administrative agencies: (1) that executive agencies are exercising legislative power, (2) that executive agencies are exercising judicial power, and (3) that one governmental organ, regardless of what branch it belongs to, combines executive,

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122 Another tool facilitating holding agencies accountable is the federal Freedom of Information Act (FOIA), which gives individual citizens the right to obtain records held by a federal agency, 5 U. S. C. §§552, unless the documents fall within enumerated exemptions, see §§552(b). "[C]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass." *Dept. of Justice v. Tax Analysts*, 492 U. S. 136, 151 (1989). *See also Dept. of the Interior v. Klamath Water Users Protective Ass'n.*, 532 U.S. 1 (2001) (exemption for certain "inter-agency or intra-agency memorandums or letters").

123 462 U.S. 919 (1983).

124 *See* Art. I §7 cl. 2 & 3. One method of avoiding presidential veto is to attach a "rider" affecting particular administrative action to a bill the President wants. The President has no "line-item veto" power and must either approve or veto the entire bill presented to him. *See infra* note 127.

125 A new form of legislative veto was enacted in 1996. It provides in general that any "major" agency rule (as defined, there are around 80-100 major rules a year) may not take effect for at least 60 days after it is submitted to Congress to give Congress the chance to pass a joint resolution of disapproval. In accord with *Chadha*, the resolution would be approved by both houses and signed by the President. If this occurs, the agency cannot re-issue the same rule unless Congress enacts legislation allowing it to do so. *See* 5 U.S.C.A. §§601-808. It is to be expected that Congress would not often be able to mobilize itself sufficiently within 60 days to stop most rules. However, it may pass the resolution any time, even after the rule goes into effect.

126 *See* Chapter I, pp. 9-18, 33-36, and Chapter IX, pp. 319-666, where separation of powers is discussed.

legislative and judicial functions "under one roof."

1. Agencies Exercising Legislative Power

The Court has viewed the problem of agencies exercising legislative power by promulgating rules as one of "delegation" of legislative power. The Court's position is that a statute does not improperly delegate legislative power so long as Congress provides "intelligible standards" to limit the discretion of the agency and to provide a basis for meaningful judicial review.[127] Only then can it be assured that the essentials of the legislative function of determining policy are being exercised by Congress and not by the agency. Thus, in *A.L.A. Schechter Poultry v. United States*,[128] the Court unanimously invalidated a statutory grant of administrative authority to establish "codes of fair competition" in various segments of business and industry with no indication of what the content of those codes should be.

The Court has never overruled the *Schechter* case, but the Court's standard for standards is quite low and in recent cases it has substituted the word "principle" for "standards."[129] It has held sustained as sufficient direction from Congress that the Federal Communications Commission regulate broadcast licensing in accord with the "public interest,"[130] that a government department define and recover "excess profits,"[131] and that the federal Price Administrator fix "fair and equitable" commodities prices.[132] In the recent case of *Whitman v. American Trucking Associations, Inc.*,[133] the Clean Air Act directed the Environmental Protection Agency to set maximum air pollution levels that would be "requisite to protect the public health" with "an adequate margin of safety." The Court interpreted the phrase as requiring clean air standards that were "sufficient, but not more than necessary" to protect public health and deemed it sufficient. It pointedly rejected the Court of Appeals requirement that Congress provide "determinate criterion" for saying "how much [harm] is too much."

Anti-delegation rules have somewhat more force on the state level, where one can find an occasional case decision striking down a state administrative rule for improper delegation of legislative power. But most states follow an approach similar to that used for the federal government.[134]

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127 *Yakus v. United States*, 321 U.S. 414 (1944). *See also Touby v. United States*, 500 U.S. 160 (1991). The Court has consistently rejected the idea that Congress may properly give away whatever power it wants. *See Clinton v. City of New York*, 524 U.S. 417 (1998) (the "line item veto" case, holding that Congress's attempt to give the President the power to cancel certain appropriations that have been enacted into law violated the "presentment" clause, Art. I §7, which permits only two actions of the President "before it become[s] a Law": the President, who "shall sign it" if he approves it or "return it," *i.e.*, "veto" it, if he does not).

128 295 U.S. 495 (1935).

129 *Whitman v. American Trucking Ass'ns., Inc.*, 531 U.S. 457 (2001).

130 *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-226 (1943).

131 *Lichter v. United States*, 334 U.S. 742, 778-786 (1948).

132 *Yakus v. United States*, 321 U.S. 414, 426-427 (1944). *See generally* Peter H. Aranson, Ernest Gellhorn, Glen O. Robinson, *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1 (1982). Some have suggested that the *Schechter* case might still be good law on its facts since it involved a grant of open-ended power directly to the President (rather than to an agency) to makes rules in a vast area (reorganization of the economy) without any of the procedural requirements for promulgating rules that agencies must follow today. *See* STRAUSS, *supra* note 2, at 20-21. Others have suggested even more broadly that the anti-delegation doctrine might be on its way back. *See* AMAN & MAYTON, *supra* note 2, at 23-27, and *National Cable Television Assoc., Inc. v. United States*, 415 U.S. 336 (1974).

133 531 U.S. 457 (2001).

134 *See* AMAN & MAYTON, *supra* note 2, at 7.

2. Agencies Exercising Judicial Power

In a common sense meaning of "judicial power," the hearing divisions of agencies clearly exercise judicial power when they hold hearings and decide disputes. If this is so, a problem arises with Article III of the Constitution, which specifies that "[t]he judicial Power of the United States, shall be vested in" federal courts staffed by "Article III" judges — judges whose independence in decision-making is protected by lifetime tenure subject only to removal by impeachment. Administrative adjudicators, sometimes referred to as "Article I" judges, do not have lifetime tenure.

The Court has had some difficulty with this issue. On the one hand, administrative agencies are a practical necessity in the modern age. On the other, there must be *some* limits on Congress's ability to assign the task of adjudicating disputes to non-lifetime-tenured adjudicators. Otherwise, Congress could give *all* federal judicial business to agencies or other non-life-tenured judges over whom it has greater influence. This would render the lifetime tenure requirements of Article III a nullity and defeat the Framers' purpose to establish a federal judiciary that is independent of Congress's will.[135]

There are three theories under which administrative adjudication by agencies is permitted, none of them entirely satisfying.

Public vs. Private Rights The traditional approach to the problem has been to divide potential judicial business into two categories: "public rights" and "private rights."[136] According to the Court, Article III judges are required only for adjudication of disputes over *private* rights. "Private rights" cases are tort, contract, property or other suits between private parties, including claims for damages between private parties provided for in federal statutes. The category also includes all criminal cases. These private rights are thought to be at the "core" of "judicial business" that cannot be handled by agencies, but must instead be adjudicated even in the first instance by an Article III judge or by a state court. "Public rights" are said to arise in matters between the government and individuals where the rights have been created by Congress and are thus subject to its control.[137] Public rights are said to include all manner of public benefits and privileges, such as Social Security payments, veterans' benefits, food stamps, and licenses. Congress can constitutionally create and assign determinations of public rights to purely administrative determination by Article I adjudicators.

The categories of public rights just listed are certainly the most numerous types of cases that administrative agencies handle and the private rights cases are the kinds of cases judges traditionally handled before the advent of the modern administrative state. However, the public-private rights distinction does not make much sense in terms of the purpose of Article III's lifetime tenure requirement as a safeguard against congressional influences on federal judges.[138] Any test of what cases require an independent Article III judge should include cases that are particularly subject to congressional intervention

135 Federal magistrate judges, bankruptcy judges and many of the judges on federal courts with specialized jurisdiction are also Article I judges. *See* Chapter V, pp. 175, 184-186. As such, the same constitutional difficulties and solutions that justify agency adjudicators apply to them.

136 *See Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) (legislation authorizing bankruptcy judges with 14-year terms to adjudicate private rights cases violates Article III).

137 *Atlas Roofing v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 450 (1977). Thus, under this theory Congress need not afford *any* judicial or administrative hearing remedies in public rights cases other than those required by procedural due process. *See supra*, pp. 202-206.

138 *See* Chapter I, p. 9.

and should exclude cases that are not. Many *public* rights cases, such as suits to protect and expand government health and welfare assistance or to stop pollution or cutting trees on federal lands, are exactly the kinds of cases that invite political interference. At the same time, many *private* rights cases, such as contract disputes between corporations and suits by creditors on debts, are not likely to attract much political attention and are therefore the least in need of a judge who has lifetime tenure. In many ways, the public-private distinction would make more sense if it were *reversed*.

Agencies as "Adjuncts" to Courts An alternative rationale explains Article I agency adjudicators as "adjuncts" to an Article III court. Under this theory, agencies are allowed to adjudicate many private rights cases on the principle that they are "assisting" a court in deciding the case, with the Article III court making the *ultimate* decision. Thus, in the typical agency arrangement, the agency adjudicates the case in the first instance, but there will be *judicial review* of that decision by an Article III court. Thus, "the essential attributes of judicial power" are reserved to Article III courts, and the rule against non-Article III adjudication of private rights is not offended.[139] The problem with this theory is that it does not comport with reality. Most administrative agency adjudications are really final and binding when rendered without any need for the agency to seek approval of an Article III court.[140] Even when there is judicial review, virtually conclusive effect is given to the Article I adjudicator's administrative fact-finding and courts give great deference even on issues of law.[141]

The Functional Approach Because of difficulties with the public-private right test and the adjunct theories, the Supreme Court has seemed to back off both theories. It has taken a "functional" approach similar to that employed to resolve other separation of powers problems: it has interpreted Article III's judicial qualifications requirement in a manner that may not do complete justice to its wording, but generally serves the constitutional *function* it was designed to serve.[142] Applying the functional approach to Article I adjudicators, the Court has sought to balance two opposing factors: (1) Congress's interest in efficiency and expertise in having a particular category of cases adjudicated by an Article I adjudicator and (2) the danger of congressional influence over that category of cases. Using this standard, the Court allowed Congress to assign some private rights disputes to administrative adjudication.[143]

The "functional" approach is subject to the usual criticisms of balancing tests — that it is impossible to balance dissimilar values against each other on any principled basis. Also, it ignores relatively clear text of the Constitution that vests "[t]he judicial Power" in Article III judges. Indeed, the Court's "functional" approach could be seen

139 *See Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. 833 (1986), quoting *Crowell v. Benson*, 285 U.S. 22, 51 (1932).

140 An exception is the NLRB, which must seek enforcement of its decisions. *See supra* p. 208.

141 *See supra* pp. 209-210. The "adjunct" theory works somewhat better in describing federal magistrates, also classified as non-tenured Article I adjudicators, who work under the close supervision of an Article III district judge and for the most part only recommend decisions. *See* Chapter V, p. 184.

142 This approach can be directly traced to Justice White's dissent in *Northern Pipeline*, the last case to take the pure public-versus-private rights approach. *See supra* note 136.

143 *See, e.g., Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, (1985) (approving administrative system of reimbursement for development costs of chemical); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (approving administrative adjudication of disputes between federally-licensed securities brokers and their clients). Another constitutional objection to administrative adjudication has been that it violates the 7th Amendment right to a jury trial in civil cases. The Court has rejected this argument. *See Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n.*, 430 U.S. 442, 461 (1977); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 61 (1989). See also AMAN & MAYTON, *supra* note 2, at 143-145 (criticizing the Court's view).

as nothing more than a device that allows the Court to switch to a higher level of generalization to avoid clear language. As such, it effectively reduces Article III's command to a standardless test of whether a particular arrangement offends the *general idea* of separation of powers as that idea is understood by a given majority of the Court at a given time.[144]

3. Intra-Agency Separation of Powers Problems

Even if the *inter-branch* separation of powers problems just discussed can be resolved, many argue that surely there must be an *intra-branch* separation of powers problem when rule-making, enforcement and adjudication functions are located "under one roof." As James Madison stated in Federalist No. 47, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[145] In addition there are the fundamental notions that "no man shall be a judge of his own cause" and that "the same persons should not both legislate and administer the laws."[146]

Professor Strauss has observed that "[i]t is hard to say as a theoretical matter why these arrangements satisfy the structural requirements of 'separation of powers,' although it is clear beyond doubt in the eyes of courts that they do."[147] The true reason why agencies have been sustained against constitutional challenge probably lies in the fact that they serve important functions in modern government, and that hobbling them by insisting on purity in separation of powers would not be a wise policy.

However, there is no need to resort to reasons of expediency, since, as just noted, separation of powers cases tend to require only that federal government power structures not offend the *functions served* by separation of powers. Applying this functional approach, agencies do not to violate separation of powers because they simply do not present the threat of tyranny that Madison and the other Framers were concerned about. First, modern agencies are relatively independent of all three branches and are not "captives" of any one branch. A greater threat would be presented if legislative, executive and judicial functions were combined in the President, the Congress or the courts. Second, while agencies enjoy a certain independence from any *one* branch, they are subject to the external and often competing influences exerted by *all three* branches noted earlier: the President appoints many agency heads and top officials, supervises their activities and may fire some of them, Congress monitors their operations through committee oversight and legislative mandates, and the courts review the legality of agency actions. This makes agencies less likely to threaten the tyranny Madison feared.[148]

A third reason agencies do not present serious separation of powers problems is said to found in that fact that, in reality, they combine enforcement, rule-making and adjudicative functions *only at the top levels*. The head of the agency and top advisors have the power to decide whether to promulgate a rule, whether and how to enforce the rule, and whether a contested case was properly adjudicated under the rule. Below the top level, functions are separated into different divisions of the agency. The most dangerous threat to fairness is probably influence by the enforcement division on the adjudicative division. Under the APA, however, ALJs may not be "responsible to or subject to" the "supervision or direction" of agency enforcement personnel and there may be no *ex parte* contact between them regarding a pending case.

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144 *See Morrison v. Olson*, 487 U.S. 654, 697 (Scalia, J., dissenting).

145 THE FEDERALIST PAPERS at 324 (Jacob E. Cooke ed.) (Wesleyan U. Press, Middletown, Conn. 1961) (originally published 1788).

146 *Buckley v. Valeo*, 424 U.S. 1, 272 (1967).

147 STRAUSS, *supra* note 2, at 16.

148 *See* STRAUSS, *supra* note 2, at 14-17. The Supreme Court has also rejected due process challenges to combining investigative and adjudicative functions in one agency. *See Withrow v. Larkin*, 421 U.S. 35 (1975) (rejecting physician's argument that due process was violated because the agency that handled charges of professional misconduct against doctors had the power to investigate those charges, present them, and then rule on their validity, unless a risk of actual bias or prejudgment could be shown)