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 authors of that document — called the "Framers" — chose the governmental structure they did. 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.[1] Also adopted was a 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

1 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 ideas.

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 . . . ."[2] As George Washington once remarked, the Articles of Confederation bound the states together with a "rope of sand."[3]

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 usually 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

2 Articles of Confederation, Art. II, http://www.usconstitution.net/articles.html.

3 George Washington: A Collection, compiled and edited by W.B. Allen (Indianapolis: Liberty Fund, 1988), oll.libertyfund.org/Texts/LFBooks/Washington0268/Collection/HTMLs/0026_Pt06_Chap06.html.

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

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4 James Madison (1751-1836) is considered the "father" of the Constitution (a title he himself rejected), because he played a pivotal role at the 1787 constitutional convention. His notes, taken at the convention, are the primary source of information about the proceedings at the convention. *See* www.yale.edu/lawweb/avalon/debates/debcont.htm. 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), www.yale.edu/lawweb/avalon/federal/fed.htm. *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, 2D ED. (West 2005). *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).

constitutions. The Federalists resisted discussing the issue, believing that the most 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

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6 *See* Chapter VIII, pp. 281-320 (4th, 5th, 6th and 8th Amendments as constitutional requirements in criminal procedure) and Chapter IX, pp. 363-390 (1st Amendment freedoms).

7 A copy of the Constitution is set out in the Appendix, pp. A15-A30.

8 *See* Debates in the Federal Convention of 1787 as reported by James Madison, *supra* note 4, notes for May 29, 1787.

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."

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 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) has 53 representatives in the next Congress, Michigan (9,955,829 residents) has 15 and Wyoming (only 493,782 residents) has 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

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."

unwieldy. The Framers settled upon a clause, set out in Article VI, which is referred to as the "supremacy clause":

> 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 execu-

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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 extremism 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, RICHARD H PILDES & PAMELA KARLEN WHEN ELECTIONS GO BAD, THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000 (West 2000).

tive branch, but they changed their minds and decided to leave that to Congress to accomplish by statute. To date, Congress has created 15 departments: Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Homeland Security, Housing and Urban Development, Interior, Justice, Labor, State, Transportation, Treasury, and Veterans Affairs. 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 each house of 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.

Presidential Power in Foreign Affairs The powers granted to 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.[22] The President is also made "Commander in Chief" of the armed forces.[23] 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 "[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."[24] However, the Framers provided for a shared responsibility with Congress for foreign policy. They gave Congress the power to regulate foreign com-

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 Art. II §2.

23 Art. II §2.

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

merce and to decide whether and to what extent to maintain and regulate the armed forces or to fund foreign involvements. In addition, Congress has the sole power to declare war and the Senate has the power to decide on ratification of treaties.[25]

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."[26] 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.[27]

The Framers did agree that it was important that the Supreme Court be established in the Constitution itself. Its original jurisdiction was limited and most cases falling within it today are suits between states.[28] Its appellate jurisdiction extends to all diversity and federal question cases coming from the lower federal courts and to state court decisions resolving issues of federal law. However, consistent with separation of powers principles, the Court's[29] appellate jurisdiction was established "with such Exceptions, and under such Regulations as the Congress shall make."[30]

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25 Art. I §8 cl. 3, 11-16. The President's and Congress's powers in foreign affairs are discussed in Chapter XVII, pp. 671-676, 674-676, 683-684.

26 For a more complete discussion of the jurisdiction of the United States Supreme Court and the lower federal courts, *see* Chapter V, pp. 173-176.

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

28 *See* Chapter V, p. 176

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. 332-333. The power of judicial review, which is not explicitly referred to in the Constitution, is also discussed in Chapter IX, pp. 321-326, and later in this chapter where developments since 1789 are considered. *See infra* pp. 9-11.

Judicial Tenure and Selection Concerns for judicial independence at the Convention can be traced to the Declaration of Independence, which stated as one of the colonists' grievances that the King had "made judges dependent upon his Will alone for the tenure of their offices and payment of their salaries." Judicial independence was thought necessary to assure immunity from pressure from the political branches to decide cases a particular way. So, Article III §1 provides that federal judges "shall hold their Offices during good Behaviour," subject only to impeachment by Congress, and that "Compensation . . . shall not be diminished during their Continuance in Office." Many of the Framers' disagreements focused on the method of selection 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.

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

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31 Art. III §1 and Art. II §4. The modern impact of the lifetime tenure requirement is discussed in Chapter VI, pp. 218-220. Impeachment of federal judges is discussed in Chapter V, pp. 182-183.

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).

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. But beginning at the end of the 19th century, it became a major force in law and government, profoundly affecting the balance of federalism, separation of powers and the relationship between individuals and all levels of government.

In the 75 years from 1789 until 1864, the Court held only two Acts of Congress unconstitutional. From 1789 to 1888, a period of 100 years, the total climbs only to 21 invalidations. But during the period 1889-1952, 64 years, there were 55 invalidations, with the Court from 1889-1940, invalidating 52 federal laws in 52 years. In the 52 years between 1953 and 2004, the Court invalidated 97 federal laws, or almost two per year. Though this surge in cases began with the "liberal" Warren Court (1953-1969), the more "conservative" Burger and Rehnquist Courts(1969-1986 and 1986-2005) were 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 only 25. The Rehnquist Court exceeded the Warren Court's rate at 38 cases invalidating federal-laws in 18 years.

A similar history can be seen with state laws. In the 75 years from 1789 until 1864, the Court held only 39 state laws unconstitutional. From 1789 to 1888, a period of 100 years, the total climbs only to 79 invalidations or less than one a year. But during the period 1889-1952, there were 452 invalidations, with the Court from 1889-1940, invalidating 389 federal laws in 52 years, a rate of over 7 per year. In the 52 years between 1953 and 2004, the Court invalidated 436 state laws, or around 8 per year.

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. 321-323.

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, 3D ED. 3-54 (West 2003). Although a casebook, this book has more than the average amount of narrative explanation and analysis.

Interestingly enough, the biggest surge in state law invalidations began, not with the "liberal" Warren Court (1953-1969), but well before that. In addition, the more "conservative" and "states' rights" oriented Burger and Rehnquist Courts since 1969 have presided over only slightly fewer invalidations per year than the Warren Court.[38]

Numbers do not tell the entire story. But it is as true qualitatively as quantitatively that the constitutional decisions of the Supreme Court and the lower federal courts have become a major source of law in many areas of the law.[39]

Dangers in Activist Judicial Review While judicial review has generally won praise, it has not usually 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 under the Constitution blacks were not "citizens" who could take advantage of the diversity jurisdiction of the federal courts, and then went on to state that Congress had no power to abolish slavery in its territories. 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* 54 years before.[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 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

38 These statistics are taken from DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS, 7TH ED. 31 (W.W. Norton 2005). 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 over 200 other federal statutes with the offending legislative veto provision were also 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 Constitutional decisions of the Supreme Court are discussed in Chapter IX. To locate the various other places in this book where constitutional decisions are discussed, *see* p. 321 note 1.

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).

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).

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 making this point 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 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.[52]

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47 This history is related in JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, 7TH ED. §§11.2-11.3 (West 2004).

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. 45.

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

52 Some would point to *Bush v. Gore*, 531 U.S. 98 (2000) (discussed *supra* note 19), as a serious setback for the Court's integrity and moral authority. In that case, a majority of the Court composed of Republican appointees prevented a recount of ballots ordered by the Florida Supreme Court pursuant to state election laws, effectively deciding the 2000 election in favor of the Republican candidate. A dissenter in the case observed: "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law." *Id.* at 129-129, Stevens, J., dissenting). However, the dire predictions of Justice Stevens have not come to pass, at least eyes of the public. The case has been largely forgotten and to the extent that criticisms of it are voiced, they have been largely dismissed as partisan rhetoric. It is interesting, however, that Justice Stevens was also a Republican appointee.

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"[53] — 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.[54] There have been "power grabs" by strong Presidents, but there have been many more willing delegations of power by Congress.[55]

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.[56]

Power Over Implementation of Legislative Programs The Constitution directs the President to "take Care that the Laws be faithfully executed,"[57] and the President is required to implement congressional programs.[58] But there is no requirement that the

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

54 *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.

55 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. 216 (legislative veto) and Chapter XVII, pp. 683-684 (war powers).

56 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.

57 Art. II §3.

58 *See Train v. City of New York*, 420 U.S. 35 (1975) (President may not "impound" for other uses money Congress has directed to be spent on programs it has enacted).

President do so enthusiastically. There are many opportunities for undermining legislative programs. There is usually considerable room for interpreting statutory directives and authority more narrowly than Congress might have intended. Such practices are especially likely when Congress enacts broad delegations of authority to an executive agency under a secretary in the President's cabinet.[59]

Limits on Presidential Power Despite the growth in presidential power, it must give way when it conflicts with the constitutional powers of the other branches. Three cases illustrate this.

In the first case, *Steel Seizure Case* or *Youngstown Sheet & Tube v. Sawyer*,[60] labor strikes at steel mills during the Korean War caused concern that 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 in the U.S. and 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*,[61] 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.

The third case was *Hamdan v. Rumsfeld*,[62] decided in 2006. In 2001, Congress granted the President sweeping authority to use "all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed, or aided" the September 11, 2001, attacks on the World Trade Center and the Pentagon.[63] In the ensuing invasion of Afghanistan, several hundred combatants were captured and were confined at the U.S. military base in Guantanamo, Cuba. One of them, Hamdan, was charged with conspiracy to commit various terrorist acts in connection with the September 11 attacks and was slated to be tried before a special military tribunal set up by the Bush Administration. Hamdan challenged the authority of the tribunal and its procedures, which permitted, among other things, the use of

59 In fact, there are many influences on both cabinet and independent administrative agencies. *See* Chapter VI, pp. 212-216 (discussing congressional and presidential means of controlling agency action). The two types of administrative agencies are discussed *infra* p. 16.

60 343 U.S. 579 (1952).

61 418 U.S. 683 (1974).

62 ___ U.S. ___, 126 S.Ct. ___ (2006).

63 U.S. Public Law No. 107-40, §2(a) (Sept. 18, 2001).

secret evidence. Relying on the *Steel Seizure Case*, the Supreme Court held that the President could not create such special military tribunals in the absence of more specific authorization by Congress. It also held that the tribunals as constituted did not follow the procedures required for trying U.S. soldiers for crimes, as mandated by other congressional legislation on military tribunals.[64] The Court also held that the tribunal procedures violated Geneva Convention protections concerning prisoners of war, particularly the provision requiring that any trials of prisoners be undertaken "by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[65]

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.[66] The first powerful federal administrative agency, the Interstate Commerce Commission, was established by Congress in 1887. But the greatest growth in the power of administrative agencies came in the 1930s. At the request of President Franklin D. Roosevelt, Congress passed legislation creating a wide variety of administrative agencies to provide relief to victims of the Great Depression and to regulate economic affairs in such a way as to remedy the mistakes of the past and to foster future economic recovery. To assure the swift and expert action necessary to accomplish these goals, Congress readily delegated a great deal of its legislative power to those agencies. This was only the beginning of a transformation of the country into what some has called "the administrative state."[67] States have taken similar action over the years. Today federal and state administrative agencies operate in a wide variety of areas — banking, social security, job health and safety, labor organizing and others.[68]

The principal impact agencies have is through their enactment of substantive law in the form of rules through delegated legislative power.[69] 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

64 *See also Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (rejecting the Bush administration's position that it could detain all "enemy combatants" without affording them the opportunity for a hearing to contest this classification was proper) (discussed in Chapter VI, p. 206); *Rasul v. Bush*, 542 U.S. 466 (2004) (rejecting Bush administration's position and holding that judicial remedy of *habeas corpus* is available to test the legality of Guantanamo detainees' detention; while Guantanamo is not within the territory of the U.S., it is under U.S. control).

65 The Court applied the Convention because Congress had directed in earlier legislation on military courts that the President follow the "law of war" in setting up all military tribunals. Thus, the decision does not change the established rule that treaties do not create judicially enforceable individual rights unless they are self-executing or are implemented by legislation. It also means that if Congress passes a clear statute that is contrary to Geneva Convention rules, that statute will prevail. *See* Chapter XVII, pp. 676-681, 673-674 and note 123. Congress can, of course, remedy the problem of lack of congressional authorization identified by the Court by passing more specific legislation. However, if it does so, it will have to debate and decide whether the tribunals must comply with international law — a highly charged political issue.

66 *See* Chapter VI, where the law of administrative agencies is set out.

67 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.

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

69 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. 217.

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.[70]

"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 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.[71] Congress determines in the relevant enabling legislation whether the agency will be "independent" or "executive."

Congress tends to use independent agencies to regulate in important areas where there is a greater need for continuity of policy and insulation from political control, given that their structure makes them less vulnerable to the effects of different presidential administrations, shifting blocks and 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 executive agency.

The size and practical independence of administrative agencies have led some commentators to refer to them as a "headless fourth branch of government."[72] 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.[73] However, at least some democratic control is reasserted through congressional and presidential influences on agency action.[74]

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70 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. 216-221.

71 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.

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

73 *See* CAPPELLETTI, *supra* note 68.

74 *See* Chapter VI, pp. 212-216.

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.[75] 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 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.

Before he became President, Woodrow Wilson 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."[76] 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."[77] However, for some committee hearings, 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.[78] Providing information and assistance essential to Congress's oversight role

75 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.

76 WOODROW WILSON, CONGRESSIONAL GOVERNMENT 303-04 (Houghton-Mifflin, Boston 1885).

77 *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927). *See* NOWAK & ROTUNDA, *supra* note 47, §§7.4-7.5.

78 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,

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.[79]

Investigations can take on political overtones and the more political congressional investigations are, the more controversial they are. Some such investigations have had 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.[80] 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.

CONGRESSIONAL STAFFS: THE INVISIBLE FORCE IN AMERICAN LAWMAKING (Free Press, N.Y. 1977).

79 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).

80 *See supra* p. 14.

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.[81] The text of the Tenth Amendment delineates this principle: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[82]

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.[83] 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

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

82 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).

83 For example, in Virginia, governors serve a four year term and consecutive terms are not allowed. Term limits in Alabama led Governor George Wallace to run his wife for governor in 1967, with the understanding that he would really be in charge. She was elected, but she died halfway through her term.

growth of the responsibilities of states in the last 40 years has caused most state governments to reorganize along more realistic lines.[84]

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.[85] Such 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.[86]

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."[87] 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.[88] 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

84 For more information on state governments and several useful short articles and charts, *see* BOOK OF THE STATES (Council of State Governments, Lexington, Ky. 2005).

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

86 Methods of judicial selection are discussed in Chapter V, pp. 179-182.

87 *See Luther v. Borden*, 48 U.S. 1 (1849). The political question doctrine is discussed in Chapter IX, pp. 330-332.

88 *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. 347-358.

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 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.[89]

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

89 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.

of the early years of the country.[90] He developed the notion of "implied powers" in the 1819 case of *McCulloch v. Maryland*.[91] 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 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."[92]

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*,[93] 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*.[94]

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

90 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. 321.

91 17 U.S. 316 (1819).

92 Art. I §8 cl. 18.

93 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.

94 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. 38.

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.[95] 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 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."[96]

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

95 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).

96 *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. 37 and Chapter VI, pp. 222-224. "Benefit of clergy" meant that being able to write would not save the person from the noose.

in *Dred Scott v. Sandford*.[97] In that case, a slave, Dred Scott, had sued for his freedom on the ground that he had lived in "free" territory of the United States 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 black people were not "citizens" of the United States and that Congress had no power to outlaw slavery in U.S. territories. 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.[98]

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.[99] 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.[100] 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."[101]

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 read rather narrowly by the Supreme Court.[102] 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

97 60 U.S. 393 (1857).

98 The rebel "Confederate States of America" comprised 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.

99 In a case decided after the Civil War, the Supreme Court held that the states had 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).

100 *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).

101 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.

102 *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 105 and accompanying text.

the greatest impact of the Civil War amendments has been felt through court decisions interpreting their provisions, particularly the due process and equal protection clauses of the 14th Amendment. This has resulted in the "constitutionalization" of many areas of law traditionally considered to be matters solely of state concern.[103] Two of the most important areas since 1953 have been the areas of criminal due process rights and discrimination based on race and sex.[104]

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,[105] the Court began to take a much broader view in 1938.[106] 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 commerce.[107] 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 national. Thus, in *Wickard v. Filburn*,[108] 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. 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.[109]

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."[110]

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, in *United States v. Lopez*,[111] the Court struck down 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

103 *See supra* pp. 10-11.

104 *See* Chapter VIII, pp. 281-320 (due process rights); Chapter IX. pp 348-351 (race) and 353-358 (sex).

105 *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").

106 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. 11-12.

107 *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).

108 317 U.S. 111 (1942).

109 *See* cases cited *supra* note 107.

110 *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.

111 514 U.S.549 (1995).

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 as 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 affect[s] interstate commerce." An example would be regulating labor practices of employers with a substantial number of employees or the regulating intrastate agricultural activity that had a cumulative effect on interstate commerce.[112]

In 2000, *United States v. Morrison*,[113] the Court struck down the Violence Against Women Act (VAWA), a federal law that authorized a civil claim to be brought by anyone who was the victim of violence that was carried out against that person because of her sex. Since the VAWA did not regulate commercial activity itself, it could be justified only under the third *Lopez* category. The Court found the kind of impact on interstate commerce involved to be just the kind rejected in *Lopez* — that ordinary crime has an economic impact. Yet, in a 2005 case, *Gonzales v. Raich*,[114] a different majority of the Court upheld the constitutionality of a federal law banning cultivation and use of marijuana even for medical purposes pursuant to a prescription, as was permitted under a California state law. The Court distinguished *Morrison* and *Lopez* on the ground that the federal drug law overall regulated the "quintessentially economic" activities of production and distribution of drugs. Then, relying on *Wickard v. Filburn*, it concluded that "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."

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*,[115] 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 law 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.

112 *Id.* at 558-559. *Lopez* and the other post-1995 cases are discussed in Chapter IX, pp. 335-338.

113 529 U.S. 598 (2000).

114 ___ U.S. ___, 125 S.Ct. 2195 (2005) (Congress had power to prohibit cultivation and possession of marijuana for medical use; drug regulation is "quintessentially economic").

115 505 U.S. 144 (1992).

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*,[116] 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.[117] Despite these exceptions, however, Congress still has quite broad power to pass legislation affecting the states.[118]

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 often can effectively do so through use of the device of "conditional spending" — offering financially grants to states on the condition that they 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 of the United States."[119] This means that spending clause can go beyond interstate commerce or any Article I enumerated power subject matters. Enactments need only be shown to be in "promotion of the general welfare."[120]

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 38% of income for individuals.[121] 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 "'simple expedient' of not yielding."[122] 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.

To be constitutional, conditions for receipt of particular federal money must be clear to the states and must have some rational relationship to the uses of the federal grant. In addition, the Court has suggested that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion,'" but it has adhered to its view in a long line of cases

116 521 U.S. 898 (1997).

117 These cases are discussed in more detail in Chapter IX, pp. 334-336. 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.

118 *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (federal minimum wage and maximum hour laws apply to state employees; law does not invade reserved powers of states).

119 Art. I §8 cl. 1.

120 *United States v. Butler*, 297 U.S. 1, 67 (1936) (rejecting argument that program of taxing agricultural processors to fund payment of subsidies to farmers who limit production in an effort to raise market prices must find a source in Art. I other than the spending clause).

121 *See* Chapter XVI, where income taxation is discussed in more detail.

122 *Oklahoma v. Civil Service Comm'n*, 330 U.S. 127, 143-144 (1947)(federal funding penalty against state for highway commission member who engaged in partisan political activities was constitutional).

that "to hold that motive or temptation is equivalent to coercion is to plunge the law into endless difficulties."[123]

One example of the effects of federal conditional spending programs is the minimum age of 21 for drinking alcoholic beverages imposed by all states. This was among the conditions attached to a portion of the federal highway construction money received by states. 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.[124]

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*,[125] the Court held the tax unconstitutional, calling the unrestricted right of interstate travel inherent in the very nature of the federal system.[126] In more recent times, the Court has spoken of the right to travel to travel as a "fundamental right" and has invalidated even indirect burdens on the exercise of that right. In *Shapiro v. Thompson*,[127] 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.[128]

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

123 *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (penalty of reduction of 5% of federal highway funding to states that did not pass laws establishing minimum drinking age of 21 is constitutional). It has been suggested that the *Dole* case and other liberal spending clause cases are linked to the pre-*Lopez* liberal commerce clause cases and may therefore be subject to revision in the future.

124 Federal-state coöperative assistance programs are discussed in Chapter IX, p. 335.

125 73 U.S. 35 (1867).

126 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).

127 394 U.S. 618 (1969).

128 *Shapiro* was decided as a "fundamental rights" equal protection case. *See* Chapter IX, p 351. A more recent case identified 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).

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."[129] 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. The category of "out-of-state businesses" includes international firms. In recent years, the instances of use of the dormant commerce clause have increased.[130]

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.[131] 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*,[132] 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.[133]

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 that other state would give it. 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.[134] 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 honored by the second state.[135] 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.

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

130 The dormant commerce clause is discussed at greater length in Chapter IX, pp. 341-344.

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

132 326 U.S. 310 (1945).

133 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. 251-256.

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

135 *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. 258-260.

Extradition of Fugitives from Justice The extradition clause of the Constitution assures the validity of a state's criminal convictions in other states.[136] 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.[137]

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 idea 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 broadly regulate most economic and a considerable amount of non-economic activity that has economic effects.[138] At the same time, states have retained their traditional sovereign power to make laws for all 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 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,

136 Art. IV §2 cl. 2.

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

138 *See supra* p. 26.

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.[139] 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.[140] 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.[141] In other cases, 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 the state law is otherwise an obstacle to accomplishing the federal goals or (2) Congress has expressed an intent to "occupy" an entire "field" of law even though the federal law does not directly conflict or interfere with federal goals. Conflict is relatively clear where the two laws set different standards of conduct and it is impossible to comply with both.[142] However, it is not always clear whether Congress intended the federal standard to be the *only* standard or only a *minimum* standard that could be supplemented by state law.[143] In such a case, the Court looks at whether the

139 *See* 42 U.S.C.A. §§651 *et seq.*, discussed in Chapter XIII, p. 525.

140 15 U.S.C.A. §1601 *et seq.* The same is true of other federal consumer legislation. *See generally* Chapter X, pp. 418-425, where state and federal consumer protection statutes are discussed.

141 However, preemption is not always clear even when the federal statute deals with it explicitly. *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 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).

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

143 *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).

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.[144] When the issue is not clear, there is a presumption *against* federal preemption.[145]

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 in which 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, as well as 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.[146]

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.

144 *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).

145 *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).

146 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. 314.

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[147] 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.[148]

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.[149] 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 substantive 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.[150]

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 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.

147 *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").

148 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.

149 *See* 28 U.S.C.A. §1652.

150 For more detail on state claims in federal court and federal claims in state court, *see* Chapter V, pp. 190-192.

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.[151] 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.[152]

Making things even more difficult is the fact that 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.[153] 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.[154]

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

151 *See International Shoe v. Washington*, discussed *supra* p. 29.

152 The variety of choice of law rules is discussed in Chapter VII, pp. 260-266.

153 Details of personal jurisdiction are set out in Chapter VII, pp. 251-256.

154 Laws do vary considerably from state to state, but the differences should not be overstated. Often the difference will be between majority and a minority on an issue, with relative consistency among states in each camp. In addition, "restatements" of the law by the American Law Institute provide a basis for uniformity when court adopt them or are influenced by them. *See* Chapter II, p. 76. Uniformity in statutory law has advance somewhat by the work of the Uniform Law Commissioners, a body established in 1892 that is made up of delegates from every state. The Commissioners draft Uniform and Model Acts (*see* www.nccusl.org/Update/). While they cannot force states to accept the laws they write, their drafts have persuasive force. Their principal success has been the Uniform Commercial Code (UCC) — adopted by every state except Louisiana — discussed in Chapter X, pp. 407-414, but it has also had some success in the areas of family law (Chapter XIII) and business organizations (Chapter XV).

Framers that a system of lower federal courts parallel to state courts was unnecessary and presented the potential for interference with the states.[155]

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.[156]

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.[157]

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.[158] 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 has noted, the common law-making process "involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives."[159]

Federal courts were long ago denied the power to punish common law crimes.[160] 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.[161]

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155 *See supra* p. 8. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION, 4TH ED. (Aspen 2003), for a discussion of the intricacies of federal court jurisdiction.

156 These justiciability limitations are discussed in more depth in Chapter IX, pp. 326-332.

157 *See* Chapter IX, p. 322. *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).

158 *See* Chapter II, p. 40.

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

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

161 *See generally* CHEMERINSKY, *supra* note 155, §§6.1-6.3.

This limitation on federal court common law power also has federalism underpinnings. *Erie, Lackawanna R.R. v. Tompkins*[162] established that federal courts must follow 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.[163]

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*.[164] 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.[165] According to the Supreme Court, the problem with free judicial creation of remedies is not only that it invades the legislative function, but that it effectively allows federal courts to expand their own jurisdiction, a function the Constitution gives solely to Congress in Article III.[166]

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 has created 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 other-

162 304 U.S. 64 (1938).

163 *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.

164 "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").

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

166 *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.")

wise to avoid a direct affront to the exercise of state judicial, administrative and legislative power.[167]

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 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*,[168] 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.[169]

167 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 155, §§12-14.

168 2 U.S. 419 (1793). The decision was not well-received in Georgia. *See supra* note 96.

169 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 law of the 11th Amendment, *see* Chapter VI, pp. 222-224. *See also generally* Chapter VI, pp. 221-226, where judicial remedies against state and federal governments and officials are discussed.