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The Rule of Law, a Comparative Law Perspective

United States of America

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Abstract

This study forms part of a larger comparative law project which seeks to present the rule of law in a broad range of legal orders around the world.

The subject of this study is the United States federal legal system. It presents the main relevant sources regarding the rule of law (legislation in force, case law and literature) in the US.

America's rule of law principles have origins in selected philosophies, legal histories, and lived experiences. With this background, America's Founders created a system, with separate government functions and checks and balances, to ensure that no government branch successfully usurped the power of the other branches, and to promote stability across the government while it adapts to society's changing needs.

This study has been written by **Anna Liese PRICE**, Senior Legal Reference Librarian, Law Library of Congress, of the United States Library of Congress, at the request of the "Comparative Law Library" Unit, Directorate-General for Parliamentary Research Services (DG EPRS), General Secretariat of the European Parliament.

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List of abbreviations*

§	section *("§§" is an abbreviation for "sections")*
2d	second
3d	third
Am. Jur.	American Jurisprudence *(a legal encyclopedia)*
amend.	amendment
art.	article
ch.	chapter *(an early designation for public laws published in United States Statutes at Large)*
cl.	clause
Cir.	Circuit
Comm'n	Commission
Cong. Rsch. Serv.	Congressional Research Service
Corp.	Corporation
Cranch	William Cranch *(found in citations to early U.S. Reports during the time period when Cranch was that publication's editor)*
Dall.	Alexander J. Dallas *(found in citations to early U.S. Reports during the time period when Dallas was that publication's editor)*
Dep't	Department
Doc.	Document
e.g.	*exempli gratia (in citations, used to indicate that the authority states the proposition; other authorities also state the proposition but citation to them is not useful or is repetitive)*
ed.	Edition
EdN.	Editor's note
Educ.	Education
et seq.	*et sequitur (used to indicate that the cited reference includes additional sections that follow the initial section cited)*
ex rel.	*ex relatione (in case names, used as an abbreviation for expressions like "on behalf of")*

* Abbreviations are taken from *The Bluebook: A Uniform System of Citation* (21st ed. 2020). *The Bluebook* is an authoritative citation manual used in legal writing in the United States.

F.	Forum
F. Supp.	Federal Supplement (*case law reporter that includes select opinions of the United States district courts*)
Fed.	Federal
Gov't	Government
i.e.	*id est (in text, used as an abbreviation for "in other words")*
id.	*idem (in citations, used to refer to the immediately preceding authority cited)*
Inc.	Incorporated
Infra	in a subsequent section or page *(used to indicate the material will be discussed on a subsequent page)*
Int'l.	International
J.	Journal
L.	Law
L.Q.	Law Quarterly
L. Rev.	Law Review
Legis.	Legislation
Ltd.	Limited
Mass.	Massachusetts
Nat'l	National
No	number
Off.	Office
para.	paragraph
Pmbl.	Preamble
Pol'y	Policy
Pub.	Public
Rsch.	Research
rev.	revised
S.	Senate
S. Ct.	Supreme Court Reporter *(case law reporter that includes opinions of the United States Supreme Court*)

sec.	section
Serv.	Service
Stat.	United States Statutes at Large *(official publication of statutes passed in the United States, in chronological order)*
Supra	Above *(used to indicate that the material referenced was referenced in full in a prior footnote, but not in the immediately prior footnote)*
U.	University
U.S.	United States of America or United States Reporter *(in text, used as an adjective, as in, "U.S. history;" in citations, used to abbreviate "United States Reporter," the official case law reporter for opinions of the United States Supreme Court)*
U.S. Const.	United States Constitution
U.S.C.	United States Code *(official code containing the general and permanent laws of the United States)*
v.	versus *(in case names, used to delineate opposing parties)*
Wall.	John William Wallace *(found in citations to early U.S. Reports during the time period when Wallace was that publication's editor*)
Wheat.	Henry Wheaton *(found in citations to early U.S. Reports during the time period when Wheaton was that publication's editor)*

Executive Summary

This study aims to summarize the concept of "the rule of law"* as it is understood and practiced in the American legal system.

Various scholars, jurists, and government bodies have endeavored to define the rule of law. On one hand, the rule of law can be thought of as a set of principles that "*pulls society in the direction of knowable, predictable, rule-based decision making, toward limitations on the power entrusted to government officials, toward alignment of power with legitimacy*."[1] A more concise, yet similar, definition provides that the rule of law is "*a principle under which all persons, institutions, and entitles are accountable to laws that are: publicly promulgated[;] equally enforced[; and] independently adjudicated*."[2]

Although definitions may differ, American rule of law principles are evidenced in the nation's colonial history, government structure, and the lawmaking activities undertaken by all three branches.

This study begins by explaining how the rule of law evolved during America's founding, and describing its sources. Rule of law ideals can be found in the nation's founding documents, such as the Declaration of Independence, the Constitution, and the Bill of Rights. These texts refer to principles such as equality, life, liberty, justice,[3] popular sovereignty,[4] separation of

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* EdN.: see other studies published in the ***rule of law*** series:

- **Argentina** : Díaz Ricci, S. : *El Estado de Derecho, una perspectiva de Derecho Comparado: Argentina*, Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), junio 2023, XV y 199 pp., referencia PE 745.675;
- **Belgium**: Behrendt, C.: *L'État de droit, une perspective de droit comparé : Belgique*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), juin 2023, XII et 116 pp., référence PE 745.680;
- **Canada**: Zhou, H.-R. : *L'État de droit, une perspective de droit comparé : Canada*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), mai 2023, IX et 113 pp., référence PE 745.678;
- **Council of Europe**: Ziller, J.: *L'État de droit, une perspective de droit comparé : Conseil de l'Europe*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), mars 2023, X et 138 pp., référence PE 745.673;
- **France**: Ponthoreau, M.-C.: *L'État de droit, une perspective de droit comparé : France*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), avril 2023, IX et 119 pp., référence PE 745.676;
- **Germany** : Reimer, F.: *Der Rechtsstaat, eine rechtsvergleichende Perspektive: Deutschland*, Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), März 2023, XVI und 149 S., Referenz PE 745.674;
- **Mexico** : Ferrer Mac-Gregor Poisot, E. : *El Estado de Derecho, una perspectiva de Derecho Comparado: México*, Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), junio 2023, XIV y 161 pp., referencia PE 745.683;
- **Spain**: González-Trevijano Sánchez, P.: *El Estado de Derecho, una perspectiva de Derecho Comparado: España*, Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), abril de 2023, XIV y 157 pp., referencia PE 745.677;
- **Switzerland**: Hertig Randall, M. : *L'État de droit, une perspective de droit comparé : Suisse*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), mai 2023, XII et 183 pp., référence PE 745.684;

1 Cass, R.: *The Rule of Law in America*, The Johns Hopkins University Press, 2001, p. 4.

2 *Overview – Rule of Law*, Admin. Office of the U.S. Courts, https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law (last reviewed May 18, 2023).

3 *Declaration of Independence: A Transcription*, U.S. Nat'l Archives and Records Admin.: https://www.archives.gov/founding-docs/declaration-transcript (last reviewed Feb. 11, 2023).

4 U.S. Const. art. I, https://constitution.congress.gov/constitution/.

powers, checks and balances, impeachment,[5] and federalism,[6] among others. The tenets enshrined in those founding documents regarding the establishment of a "*government of laws and not of men*,"[7] were not, however, created in a vacuum. Instead, key philosophical beliefs underlying the rule of law in U.S. legal and government structures were formulated from a unique combination of written philosophy and the colonists' lived experiences in North America.

Historians have attributed early American philosophy as having originated from five systems or histories: Greek and Roman classical antiquity; English common law; English commonwealth or radical Whig philosophy; the European Enlightenment; and Christian thought, primarily Puritan theology from the 17th-century.[8] A brief summary of those origins of American law can aid in understanding the events giving rise to the American Revolutionary War, the needs addressed by the Constitutional Convention in 1787, the major concepts found within the U.S. Constitution, and the modern U.S. government system.

The continuation of these principles can be seen today when analyzing America's federal structure, or the demarcation of areas of responsibility between state and federal governments, and the separation of powers across the federal government branches.

Later sections of this study separately address the legislative, executive, and judicial branches, with examples offered in each section to provide insights into how powers and functions are balanced across the federal government.

This study discusses how American rule of law principles are focused on limiting government and maintaining safeguards to ensure that one government branch does not usurp the authority of the other branches. Although adherence to these constitutional restraints has often been contested, the Constitution's limitations on government have been a constant theme since America's founding, despite dramatic evolution as government has adapted to society's changing needs.

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5 *Id.* arts. I-III.

6 *Id.* amend. X.

7 MASS. CONST. art. XXX, 1780, https://malegislature.gov/Laws/Constitution. For more information about the significance of the Massachusetts Constitution in American history, see *John Adams & the Massachusetts Constitution*, COMMONWEALTH OF MASSACHUSETTS, https://www.mass.gov/guides/john-adams-the-massachusetts-constitution (last reviewed Feb. 11, 2023).

8 BAILYN, B.: *The Ideological Origins of the American Revolution*, Harvard University Press, enlarged ed. 1992, pp. 22-54.

I. Historical Introduction

Section I of this study introduces readers to the philosophical and historical background of America's founding. Focus is placed on Greek antiquity, English common law, radical Whig philosophy, Englightenment authors, and Puritan community and government structures in the 17th and 18th centuries. Section I.6 summarizes key historical facts regarding the end of British rule in the American colonies. The Declaration of Independence and Articles of Confederation are analyzed in Sections I.6.1 and I.6.2, respectively. This section concludes with a brief history of the Constitutional Convention in 1787.

I.1. Greek and Roman Classical Philosophy

While opinions differed on how to structure the government of what would later become the United States,[9] the founders[10] generally agreed that their aim was to establish a republic.[11] According to historian Gordon WOOD, "*There was . . . for all Whigs, English and American, one historical source of republican inspiration that was everywhere explicitly acknowledged–classical antiquity, where the greatest republics in history had flourished*."[12] John ADAMS noted that "*the principles of self-government, natural equality, and responsibility of the rulers to the ruled were the 'principles of Aristotle and Plato, of Livy and Cicero.'*"[13] The colonists' general understanding of Greek and Roman antiquity was, however, both filtered by and intertwined with their English Commonwealth heritage and the works of philosophers like MACHIAVELLI, ROUSSEAU, HOBBES and LOCKE.[14] "*The Americans . . . did not always possess an original or unglossed antiquity; they often saw a refracted image, saw the classical past as the Western world since the Renaissance had seen it*."[15] The selected Roman works available to the colonists and interpreted by 17th and

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[9] LUTZ, D.: "The Intellectual Background to the American Founding," *Texas Tech Law Review*, n. 21, 1990, pp. 2330-34, https://ttu-ir.tdl.org/handle/2346/87398 (discussing four definitions or structures of a "republican" government).

[10] The term "founders" connotes late 18th century leaders who participated in declaring independence from Great Britain and establishing the new republic. Some scholars refer to them as "founding fathers" or "framers" of the U.S. Constitution. The National Archives provides a list of the Constitution's signers. *Meet the Framers of the Constitution*, U.S. NAT'L ARCHIVES AND RECORDS ADMIN., https://www.archives.gov/founding-docs/founding-fathers (last reviewed June 15, 2023). The Library of Congress has a research guide on an expanded list of founders. *American Founders: A Guide to Their Online Papers and Publications*, LIB. CONG., https://guides.loc.gov/american-founders-papers (last reviewed June 15, 2023).

[11] U.S. CONST. art. IV, § 4; Cong. Rsch. Serv., *Republican Form of Government*, CONSTITUTION ANNOTATED: ANALYSIS AND INTERPRETATION OF THE U.S. CONSTITUTION, https://constitution.congress.gov/browse/essay/artIV-S4-3/ALDE_00013637/ (last visited Feb. 3, 2023) [hereinafter CONSTITUTION ANNOTATED]. (Discussing components of a republican form of government as listed by the founders, including popular sovereignty, separation of powers, majoritarian control, equality among citizens, and limited duration in public office).

[12] WOOD, G.: *The Creation of the American Republic 1776-1787*, University of North Carolina Press, 1998, p. 49.

[13] MULLETT, C.: "Classical Influences on the American Revolution," *The Classical Journal*, n. 35, 1939, p. 92.

[14] Scholars have provided anecdotes about the suprise that some founders felt once they actually read Plato and learned that his statements may have been antithetical to the American Revolution. Bernard Bailyn noted:

> *Jefferson, who actually read the Dialogues, discovered in them only the "sophisms, futilities, and incomprehensibilities" of a "foggy mind" – an idea concurred in with relief by John Adams, who in 1774 had cited Plato as an advocate of equality and self-government but who was so shocked when he finally studied the philosopher that he concluded that the Republic must have been meant as a satire.*

BAILYN, *supra* note 8, at 24-25, quoting MULLETT, *supra* note 13, at 93, 99.

[15] WOOD, *supra*, note 12 at p. 50 (discussing some of the works interpreting Greek and Roman philosophy, including Thomas GORDON'S *Sallust* and *Tacitus*, and Edward WORTLEY MONTAGU'S *Reflections on the Rise and Fall of the Ancient Republicks*).

18th century scholars were written at a time when the Roman Empire was no longer at its height. According to WOOD, "*pessimistic Romans—CICERO, SALLUST, TACITUS, PLUTARCH—contrasted the growing corruption and disorder they saw about them with an imagined earlier republican world of ordered simplicity and acadian virtue and sought continually to explain the transformation*."[16]

The founders saw parallels between Rome's fall and Britain's instability during colonial rule in North America. As summarized by historian Bernard BAILYN,

> *[The colonists] saw their own provincial virtues – rustic and old-fashioned, sturdy and effective – challenged by the corruption at the center of power [Great Britain], by the threat of tyranny, and by a constitution gone wrong. They found in their ideal selves, and to some extent their voices, in Brutus, in Cassius, and in Cicero . . . . They were simple, stoical Catos, desperate, self-sacrificing Brutuses, sliver-tongued Ciceros, and terse, sardonic Tacituses eulogizing Teutonic freedom and denouncing the decadence of Rome.*[17]

Put another way, "*Britain, it soon became clear, was to America 'what Caesar was to Rome*.'"[18]

FRAME 1

Aristotle, Politics, bk. III, XVI, § 1

He who commands that law should rule may thus be regarded as commanding that God and reason alone should rule; he who commands that a man should rule adds the character of the beast. Appetitle has that character; and high spirit, too, perverts the holders of office, even when they are the best of men. Law [as the pure voice of God and reason] may thus be defined as "Reason free from all passion."

Elements of legal philosophy and rule of law principles from classical antiquity can be found in the United States' founding principles. For example, the idea of natural law[19] was developed by the ancient Greeks, most notably ARISTOTLE, and was based on the notion that law is founded in reason and virtue.[20] This idea evolved into the belief of universal law by the Stoics, "*one of respect for law and order, a frequent concomitant of natural law theory*."[21] Stoics believed in a "*theory of rights of man natural to his being*,"[22] which has been described as "*a militant doctrine of rights as distinguished from law, of individual privilege as opposed to governmental power*."[23] Stoic beliefs moved west during the Roman Empire, where "*the conception of a universal law and of the brotherhood of man took on a character of concreteness*."[24] CICERO later deemed that natural law had divine origins and called it "*the highest reason implanted in Nature, which commands what ought to be done and forbids the opposite*."[25]

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16 *Id*. at 51.

17 BAILYN, *supra* note 8, at 26.

18 *Id*., quoting QUINCY, J.: *Memoir of the Life of Josiah Quincy Jun. of Massachusetts*, Boston, 1825, p. 435.

19 For an in-depth analysis of natural law in Ancient Greece, see LE BEL, M.: "Natural Law in the Greek Period," pp. 3-42, in SCANLAN, A.: *University of Notre Dame Natural Law Institute Proceedings, Vol. II*, University of Notre Dame College of Law, 1949.

20 ROSE, W. "The Law of Nature: An Introduction to American Legal Philosophy," *Ohio State Law Journal*, n. 13, 1952, p. 123.

21 *Id*. at 124.

22 *Id*.

23 *Id*. at 125.

24 *Id*. at 126.

25 *Id*. (quoting CICERO, M.: *On the Commonwealth* (Sabine and Smith trans.), Bk. III, XXII.).

FRAME 2

Cicero's *De Re Publica*, bk. III, XXII

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions . . . . We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and rule, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. . . .

These principles of universal and natural law were accepted by Enlightenment philosophers like ROUSSEAU, who famously wrote, "*Man was born free, and he is everywhere in chains*."[26] ROUSSEAU used the earlier theories of universal and natural laws coined by Greek and Roman philosophers to support notions of natural rights. Likewise, the Declaration of Independence leads with references to natural and universal laws agreed upon by the signers, including "*that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness*."[27]

In addition to these general beliefs about universal laws and natural rights, historians have found Greek and Roman origins in the American government structure. The checks-and-balances system may have origins in observations of governments by POLYBIUS (202-120 B.C.E.), a Greek historian who documented and analyzed features of various governments during his lifetime.[28] "*He praised the Roman system, especially as it existed at the time of the 'Hannibalic War' [218-201 B.C.E.] when consuls, senate, and populace were balanced and so mixed that it was impossible to tell whether the system was monarchical, aristocratic, or democratic.*"[29] The founders relied on POLYBIUS' histories, as he documented the warning signs and features of government decay. According to scholar Meyer REINHOLD, "*The paramount model for the Founding Fathers of a constitution structured to retard political decay and assure at the same time freedom and stability was the constitution of Rome of the end of the third-early second centuries B.C.—as analyzed by Polybius*[.]"[30]

Several founders cited CICERO as a source of republicanism. CICERO promoted the idea that an enduring and permanent government should be of a mixed form (monarchy, aristrocracy, and democracy).[31] He also encouraged citizen participation in government and stressed the values of ethics and equality, while promoting the idea of a constitution establishing the ethos of a government. According to one historian, CICERO "*recognized that just as man has a higher self that controls his ordinary self, so the state should have a higher or permanent self, embodied in a constitution that would set bounds to its ordinary self as expressed in the government or the popular will at any particular moment.*"[32] Additionally, some historians attribute principles of American jurisprudence to CICERO. According to William ROSE, among American law's "*several*

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[26] ROUSSEAU, J.: *The Social Contract*, Penguin Books, 1968, p. 49.

[27] *Declaration of Independence: A Transcription*, *supra* note 3.

[28] KIRKHAM, D.: "European Sources of American Constitutional Thought Before 1787," *United States Air Force Academy Journal of Legal Studies*, n. 3, 1992, p. 4.

[29] *Id*.

[30] REINHOLD, M.: *Classica Americana: The Greek and Roman Heritage in the United States*, Wayne State University Press, 1984, p. 101.

[31] KIRKHAM, *supra* note 28, at 5-6.

[32] WILKIN, R.: *Eternal Lawyer: A Legal Biography of Cicero*, Macmillan & Co., 1947, p. 217.

debts of ancestral lineage to CICERO's ideal law of reason" is that during the early history of American law,

> *judges adopt[ed] English rules to new environments, and regard[ed] reason as well as custom as the constitutent elements of the common law [and] could consequently rely not only upon their own training in legal reason for sources of new doctrine, but could borrow freely from the civil law writers examples of universal doctrine and reason*.[33]

Although classical thought is only one factor of several that contributed to America's founding, the founders' interpretation of it had a significant impact on modern legal and constitutional principles.

I.2. English Common Law

The colonists who first traveled to North America brought with them knowledge of the English common law tradition. The few legal resources that colonists had access to during this time period included writings from English jurists and lawyers who interpreted common law traditions dating back centuries. That tradition began to develop following the Norman Conquest in 1066 C.E.[34] A major milestone and focal point of common law development was the issuance of Magna Carta in 1215, which established that the monarch's power was subject to the rule of law.[35] Early common law scholars noted their system placed limits on the monarchy, including Henry DE BRACTON (1210-1268), who concluded that the king is subject "*under God and under the law, because law makes the king*[.]"[36] Elements of stoic theories also migrated to the English common law, with scholars like Christopher SAINT GERMAIN (1460-1540) noting, *"[t]he first ground of the law of England is the law of reason*."[37] Among the most prominent legal writers whose work was accessible to the colonists were Sir Edward COKE (1552-1634) and Sir William BLACKSTONE (1723-1780).[38]

COKE was the Chief Justice of the Court of Common Pleas, and his better known writings include *Treatise on Magna Charta*, *Commentary upon Littleton*,[39] and *Institutes of the Lawes of England*.[40] A champion of civil rights, COKE opposed what he viewed as a tyrannical monarchy; for his writings he was imprisoned by James I and harassed by Charles I.[41] COKE's work was

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[33] ROSE, *supra* note 20, at 127-28.

[34] *Id*. at 150. For more information on the relationship among civil, ecclesiastical/canon, and common law in England, see ROSE at 148-157.

[35] LUTZ, *supra* note 9, p. 2334. For more information about the history of Magna Carta and English common law, see THE BRITISH LIBRARY, "Magna Carta: An Introduction" (2014), https://www.bl.uk/magna-carta/articles/magna-carta-an-introduction and UK PARLIAMENT, "Magna Carta" (n.d.), https://www.parliament.uk/about/living-heritage/evolutionofparliament/originsofparliament/birthofparliament/overview/magnacarta/.

[36] BRACTON, H.: *De legibus et consuetudinibus Angliae*, 1883, vol. 2, p. 27. Bracton was employed as advisory counsel to Henry III and authored of one of the earlist common law treatises, which was published posthumously.

[37] SAINT GERMAIN, C.: *The Doctor and Student*, 1874, William Muchall, Gent., dialogue 1, ch. 5.

[38] KIRKHAM, *supra* note 28, at 7.

[39] COKE, E.: *The First Part of the Institutes of the Lawes of England; or, a Commentary upon Littleton*, M.F.I.H. and R.T. Assignes of I. More Esquire, 1633.

[40] The second, third, and fourth installments of *Institutes* were published posthumously between 1642 and 1648. For a full text of these volumes, see https://irlaw.umkc.edu/coke_institutes_lawes/.

[41] REINHARDT, J.: "Political Philosophy from John Locke to Thomas Jefferson," *University of Kansas City Law Review*, no. 13, 1944, p. 20.

popular among the American colonists for its focus on restraining the Crown's power,[42] particularly "*Coke's position that the Crown was limited by an 'ancient constitution' comprised of custom 'beyond the memory of man,' and the common law built upon such custom.*"[43] In particular, COKE's decision in *Bonham's Case* was popular among the colonists for its statement, "*the common law will controul acts of parliament, and sometimes adjudge them to be utterly void; for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such act to be void.*"[44] COKE also promoted applying principles of reason and precedent to the common law, writing, "*reason is the life of the law, nay the common law itselfe is nothing else but reason . . . gotten by long study, observation, and experience, and not of every man's natural reason.*"[45]

BLACKSTONE's primary work was the four-volume *Commentaries on the Laws of England*, published between 1765 and 1769.[46] BLACKSTONE's *Commentaries* summarized and expanded on COKE's common law theories, while merging them with principles of order he viewed as scientific. "*Just as Newton had found the laws underlying physical processes in nature, Blackstone consciously attempted to lay out the fundamental principles underlying British legal and political constitutions*" and his analysis was based on his belief in "*rational human nature – the view that all humans are capable of, and inclined to engage in, careful, reasoned calculations concerning their safety, comfort, and interests.*"[47] To that end, he praised the English common law system for its checks and balances, "*stressing Parliamentary government and common law as checks on royal tendencies to exercise arbitrary power.*"[48] As stated in BLACKSTONE's *Commentaries*:

> *It is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, though not the whole, of the legislature. The total union of them, we have seen, would be productive of tyranny . . . The crown cannot begin of itself any alterations in the present established law; but it may approve or disapprove of the alterations suggested and consented to by the two houses. The legislative therefore cannot abridge the executive power of any rights which it now has by law, without its own consent; since the law must perpetually stand as it now does, unless all the powers will agree to alter it.* ***And herein indeed consists the true excellence of the English government, that all the parts of it form a mutual check upon each other. In the legislature, the people are a check upon the nobility, and the nobility a check upon the people; by the mutual privilege of rejecting what the other has resolved: while the king is a check upon both, which preserves the executive power from encroachments. And this very executive power is again checked, and kept within due bounds by the two houses, through the privilege they have of enquiring into, impeaching, and punishing the conduct . . . of his evil and pernicious counsellors. Thus every branch of our civil polity supports and is supported, regulates and is regulated, by the rest****[.]*[49]

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42 In ROSE, *supra* note 20, at 155, the author describes Coke's admonishment of King James I for attempting to exert power outside his legal authority: "*On November 10, 1608, while Chief Justice of the Common Pleas, Coke, speaking for the judges of England, informed King James that although as king he might consult with the judges, he could not adjudge a case no remove a judge from the courts and decide it himself; that no king since the Conquest had done so; that the king in the upper house of Parliament has his court of last appeal; and that although the king was not below man, he was below God and the law.*"

43 LUTZ, *supra* note 9, at 2334-35.

44 COKE, E.: *The Reports of Sir Edward Coke*, vol. 4, J. Butterworth and Son, 1826, 375: https://catalog.hathitrust.org/Record/008595440.

45 COKE, *supra* note 39, at § 138.

46 LUTZ, *supra* note 43, at 2335.

47 *Id*.

48 KIRKHAM, *supra* note 28, at 8.

49 BLACKSTONE, W.: *Commentaries on the Laws of England. In Four Books*, J. B. Lippincott Company, 1893, p. 154-55 (emphasis added).

BLACKSTONE also put great weight on natural law theory. "*According to Blackstone man as a creature of God is subject to the will of his Creator, or in other words to the law of nature discoverable by reason. This law or system of laws is universal and no civil law is valid which contravenes it.*"[50] Tenets found in BLACKSTONE's work mirrored those of John Locke and similar Enlightenment philosophers, and were widely cited by the founders while drafting the U.S. Constitution.[51]

I.3. English Commonwealth or Radical Whig philosophy

For a substantial part of the colonial period, the British government was in upheaval. During the English Civil War (1642-1651), Parliament sentenced King Charles I to death and military leader Oliver Cromwell rose to power as Lord Protector of the Commonwealth for 11 years, an era known as the Interregnum (1649-1660).[52] During this period, republican/Whig (anti-royalist) philosophers emerged, one of the most prominent being Algernon SIDNEY (1622-1683). After the return of the monarchy in 1660, controversies arose during the rule of King James II (1685-1688), and the Glorious Revolution of 1688-1689. SIDNEY's *Discourses Concerning Government*[53] focused on the importance of legal limitations on government and the right to rebel against tyranny; his ideas were absorbed by colonial revolutionaries. SIDNEY's writings also emphasized the idea of liberty, which he equated to "*independence from the arbitrary will of another.*"[54] He wrote, "*liberty consists only in being subject to no man's will, and nothing denotes a slave but a dependence upon the will of another.*"[55] SIDNEY's influence can be seen in the founding documents and in anecdotes from early American history. Under Thomas Jefferson's guidance, for example, the University of Virginia's Board of Visitors adopted a resolution providing that *Discourses* contained the "*general principles of liberty and the rights of man*," and noted that it was one of the main documents to be taught at the school of law on American political and legal philosophy, alongside the Declaration of Independence, George Washington's valedictory address, and a few others.[56]

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50 ROSE, *supra* note 20, at 156.

51 LUTZ, *supra* note 9, at 2336. Blackstone was one of the most cited writers in political writings authored during America's founding. One study found that he was referenced more than Locke in key works of the founders, and only slightly less than Montesquieu. See LUTZ, D.: "The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought," *The American Political Science Review*, no. 78, 1984, pp. 192-196.

52 *The English Civil Wars: Origins, events and legacy*, ENGLISH HERITAGE, https://www.english-heritage.org.uk/learn/histories/the-english-civil-wars-history-and-stories/the-english-civil-wars/.

53 SIDNEY, A.: *Discourses Concerning Government*, Published from an Original Manuscript of the Author, 1698.

54 SELLERS, M.: "The Rule of Law in the United States of America," *American Journal of Comparative Law*, no. 70, 2022, pp. i35-i36.

55 SIDNEY, *supra* note 53, at 317.

56 ROBBINS, C.: "Algernon Sidney's Discourses Concerning Government: Textbook of Revolution," *The William and Mary Quarterly*, no. 4, 1947, p. 269 (citing PADOVER, S.: *The Complete Jefferson*, New York, 1943, p. 1112). That resolution provides:

> "*Resolved, that it is the opinion of this Board that as to the general principles of liberty and the rights of man, in nature and in society, the doctrines of Locke, in his "Essay concerning the true original extent and end of civil government", and of Sidney in his "Discourses on Government", may be considered as those generally approved by your fellow citizens of this, and the United States, and that on the distinctive principles of the government of our State and of that of the United States, the best guides are to be found in, I. The Declaration of Independence . . . 2. The book known by the title "The Federalist" . . . 3. The Resolutions of the General Assembly of Virginia in I799 . . . 4. The valedictory address of President Washington, as conveying political lessons of peculiar value. And that in the branch of the school of law, which is to treat on the subject of civil polity, these shall be used as the text and documents of the school.*"

Another well-regarded Commonwealth-era philosopher was James HARRINGTON (1611-1677). Harrington wrote *The Commonwealth of Oceana*, a treatise outlining a utopian government centered on a constitution, property ownership, and rotating executive power. John Adams leaned heavily on HARRINGTON's work while making passionate pleas in support of the U.S. Constitution. ADAMS cited HARRINGTON in particular in *A Defence of the Constitutions of Government of the United States of America*, when discussing the differences between *de jure* governments, meaning those that are "*instituted and preserved upon the foundation of the common interest*" as "*an empire of laws and not of men*," and *de facto* governments, where "*some man, or some few men, subject a city or a nation, and rule it according to his or their private interest.*"[57] Harkening back to rule of law principles enunciated by common law jurists,[58] ADAMS noted that *de facto* governments create arbitrary and unwarranted laws, amounting to an "*empire of men and not of laws.*"[59]

Other popular republican or Whig works include Henry NEVILLE's *Plato Redivivus* and John MILTON's writings from the 1640s through the 1660s.[60] NEVILLE's work was similar to HARRINGTON's, focusing on the importance of rotating government officials, restrictions on monarchal power, and the importance of private property.[61] MILTON's publications, on the other hand, were cited more for principles of republicanism, liberty, and constitution-making. Taken together, historians have noted that these and other writers of the commonwealth period had a lasting impact on American government and legal principles. According to Caroline ROBBINS, "*The rule of law, secured by a written constitution, and eventually by a bill of rights; by checks and balances; by separation of powers; and these all in turn guarded by ephors of a supreme court, would surely have delighted the seventeenth-century republicans*," along with constitutional restraints on state and federal governments.[62]

Commonwealth philosophy shifted slightly into the 18th century in England. According to historian Gordon WOOD, "*[o]pposition thought, in the form it acquired at the turn of the seventeenth century and in the early eighteenth century, was devoured by the colonists. From the earliest years of the century it nourished their political thought and sensibilities.*"[63]

Philosophical ideas from the early 18th century that became influential in the colonies were found in the writings of radical Whigs John TRENCHARD (1662-1723) and Thomas GORDON (1691-1750). Some American historians have stated that TRENCHARD and GORDON's impact on revolutionary America was larger than John LOCKE's, while Bernard BAILYN noted that TRENCHARD and GORDON "*more than any other single group of writers . . . shaped the mind of the American Revolutionary generation.*"[64] TRENCHARD and GORDON together wrote the famous

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57 ADAMS, J.: *A Defence of the Constitutions of Government of the United States of America, Vol. I*, 1787, p. 123 (quoting HARRINGTON, J.: *The Commonwealth of Oceana*, bk. 1, ch. 2 (1656)).

58 See section I.2.

59 ADAMS, *supra* note 57, at 123.

60 KIRKHAM, *supra* note 28, at 12. From this article, examples of Milton's influential works include: *Areopagitica* (1644), an argument for freedom of the press; *The Tenure of Kings and Magistrates* (1649), which argued that monarchs retained their divine right only while fulfilling God's purposes; *Eikonoklastes*, an attack on the *Eikon Basilike* which was attempting to set up Charles I as a holy martyr; first and second *Defences of the English People* (1651 and 1654), defending the execution of Charles I and the subsequent English experiment; and *The Ready and Easy Way to Establish a Free Commonwealth* (1660), a defense of republican principles somewhat undiplomatically published on the eve of the Restoration.

61 *Id*.

62 ROBBINS, C.: *Two English Republican Tracts: Plato Redivivus by Henry Neville; An Essay Upon the Constitution of the Roman Government by Walter Moyle*, Cambridge University Press, 1969, p. 58.

63 WOOD, *supra* note 12, at 43.

64 BAILYN, *supra* note 8, at 35.

publications *Cato's Letters*[65] and *The Independent Whig*,[66] which were first published in England then made their way to the colonies. These publications began with discussions of current events, but later branched out into general philosophy, covering topics such as "*the nature of liberty, public virtue, the importance of freedom of speech, and issues regarding Catholicism and the established church*."[67]

WOOD concisely summarized the connections and parallels that the colonists saw between themselves and the radical Whigs.

> *Throughout the eighteenth century the Americans had published, republished, read, cited, and even plagiarized these radical writings in their search for arguments to counter royal authority, to explain American deviations, or to justify peculiar American freedoms. . . . What the Whig radicals were saying about English government and society had so long been a part of the American mind, had so often been reinforced by their own first-hand observations of London life, and had possessed such an affinity to their own provincial interests and experience that it always seemed to the colonists to be what they had been trying to say all along.*[68]

Evidence of commonwealth and radical Whig philosophy can be found throughout the founding documents, as well as within the writings of famous colonists and revolutionaries. The contribution of these works to America's founding legal principles cannot be understated.

I.4. The Enlightenment

The Enlightenment period was geographically diffuse, and included diverse thought from a number of famous European philosophers and authors such as HOBBES, LOCKE, VOLTAIRE, and MONTESQUIEU. It has been described as "*roughly the eighteenth century, when the contributions of rational science transcended, and to some degree replaced older, more traditional philosophical and religious notions as the first principles of society*."[69] Although it is generally accepted that the founders were influenced by the Enlightenment, "*this amounts to saying little more than that the men writing betwen 1670 and 1787 had an impact on the thinking behind the Constitution*."[70] Historian Donald LUTZ categorizes the Enlightenment into four components:

> *[1] a radical, anti-religous strain that tended to emphasize pure reason; [2] a natural religion strain that attacked religous orthodoxy but was more interested in updating religion to be congruent with more modern, empirical views of human nature than in rejecting religion; [3] a moderate, liberal or constitutional strain that used both rationalism and empiricism and often emphasized the importance of economics; and [4] a scientific or empirical strain that took advancements in natural science as its model for advancing human knowledge about social, political, and economic matters.*[71]

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65 TRENCHARD, J. & GORDON, T.: *Cato's Letters, or Essays on Liberty, Civil and Religious, and Other Important Subjects*, 1720-1723, available at: https://www.nlnrac.org/earlymodern/radical-whigs-and-natural-rights/documents/cato-letters.

66 TRENCHARD, J. & GORDON, T.: *The Independent Whig,* 1743-1747, available at: https://oll.libertyfund.org/title/trenchard-the-independent-whig-4-vols-1720-1743.

67 KIRKHAM, *supra* note 28, at 14.

68 WOOD, *supra* note 12, at 17.

69 KIRKHAM, *supra* note 28, at 17.

70 LUTZ, *supra* note 9, at 2340-41.

71 *Id.* at 2341.

The founders primarily turned to writings that fit within LUTZ's third and fourth strains in crafting the Constitution and other founding documents. Evidence of the third strain can be found in "*ideas on specific institutions or problems such as checks and balances, prison reform, slavery, methods of holding elections, how to define citizenship, taxation, free trade, and the definition of a republic.*"[72] This group includes such writers as Hugo GROTIUS (1583–1645),[73] Gabriel BONNOT DE MABLY (1709-1785),[74] and Emer DE VATTEL (1714-1767).[75] But authors within LUTZ's fourth group—including John LOCKE (1632-1704), Samuel VON PUFENDORF (1632-1694), David HUME (1711-1776),[76] and MONTESQUIEU (1689-1755)—had the most significant impact on early America.[77]

LOCKE authored numerous essays, including one challenging the idea of the divine right of kings,[78] but his most famous work is the *Second Treatise on Civil Government*. Similar to some earlier philosophers, LOCKE proposed that before government, human beings were in a state of nature.[79] In LOCKE's conception of that state, "*men are subject to the law of reason which teaches all mankind that no one ought to harm another in his life, health, liberty, or possessions.*"[80] It was the absence of the rule of law in the state of nature, according to LOCKE, that justified forming a government.[81] In his *Second Treatise*, LOCKE summarized freedom under government as having "*a standing rule to live by, common to every one of that society, and made by the legislative power erected in it . . . not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man: as freedom of nature is, to be under no other restraint but the laws of nature.*"[82] Chief among the cornerstones of LOCKE's envisioned government were majority rule,[83] legal

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[72] *Id*.

[73] *Hugo Grotius*, ONLINE LIBRARY OF LIBERTY, https://oll.libertyfund.org/person/hugo-grotius (last reviewed Feb. 11, 2023).

[74] *Gabriel Bonnet Abbé de Mably*, ONLINE LIBRARY OF LIBERTY, https://oll.libertyfund.org/person/gabriel-bonnot-abbe-de-mably (last reviewed Feb. 11, 2023).

[75] LUTZ, *supra* note 9, at 2342. *Emer de Vattel*, ONLINE LIBRARY OF LIBERTY, https://oll.libertyfund.org/person/emer-de-vattel (last reviewed Feb. 11, 2023).

[76] Hume was part of the Scottish Enlightenment. For more on the principles of Hume and fellow philosophers in this group, including Adam Smith, Francis Hutcheson, Thomas Reid, and others, see TANAKA, H.: "The Scottish Enlightenment and Its Influence on the American Enlightenment," *The Kyoto Economic Review*, n. 79, 2010, pp. 16-39; ROBINSON, D.: "The Scottish Enlightenment and the American Founding," *The Monist*, n. 90, 2007, pp. 170-181; and HOWE, D.: "Why the Scottish Enlightenment Was Useful to the Framers of the American Constitution," *Comparative Studies in Society*, n. 31, 1989, pp. 572-587.

[77] LUTZ, *supra* note 9, at 2342.

[78] LOCKE, J.: *First Treatise of Government*, in *The Works of John Locke, vol. 4 Economic Writings and Two Treatises of Government*, Rivington, 1824. For other works see *John Locke*, ONLINE LIBRARY OF LIBERTY, https://oll.libertyfund.org/person/john-locke (last reviewed Feb. 11, 2023).

[79] The common counterpoint to Locke's positions was Thomas Hobbes, who was the chief philosopher during Charles I's (1625-1649) reign. Hobbes published his work *Leviathan* on absolutism, or the idea that once government is established its power is absolute and authoritative. Hobbes' state of nature is one filled with anarchy and hostility, as outlined in *Leviathan*, where he describes the state of nature as being a place where the "the life of man, solitary, poore, nasty, brutish, and short." From Hobbes' perspective, government with a strong leader (monarch) was necessary to avoid the anarchy present in the state of nature. See HOBBES, T.: *Leviathan*, Clarendon Press, 1909, p. 99.

[80] REINHARDT, *supra* note 41, at 26.

[81] BARNETT, R.: "Foreword: Unenumerated Constitutional Rights and the Rule of Law," *Harvard Journal of Law & Public Policy*, n. 14, 1991, at 615.

[82] LOCKE, J.: *The Second Treatise on Civil Government*, Prometheus Books, 1986, ch. IV, sec. 21, at 17.

[83] *Id*. §§ 95-97 and 120, at 54-55, 67-68.

limitations on individuals in power,[84] the power of the people to change their government,[85] the protection of property, including natural rights to "*life, liberty and estate*,"[86] separation of government powers, and checks and balances.[87]

While LOCKE's impact can be found throughout the founding documents, other Enlightenment era philosophers had a significant impact on America's founding. MONTESQUIEU, HUME, and PUFENDORF, in contrast to LOCKE's rationalist approach, adopted an empirical approach to understanding human behavior and created a political science based on those observations. As summarized by LUTZ, "*Americans learned from [Hume and Montesquieu] that humans display regularities in behavior that are compounded of simple, fundamental propensities in their common nature and certain central aspects of their environment, and that political institutions are critical aspects of the total environment.*"[88] While earlier philosophers created a system of beliefs based on a few key principles, "*Montesquieu and Hume . . . provided detailed analysis that explicitly linked human nature, the human environment, and political institutions with a variety of regularities in human behavior.*"[89] This empirical approach to government can be seen throughout *The Federalist*, where American political institutions were described as an "experiment"[90] that required observation and adaptability. HUME's impact in this regard is found in *Federalist No. 85*, where Alexander HAMILTON quoted HUME for the proposition that after observation, government, through the steps outlined in the Constitution, could be changed to correct any deficiencies:

> *To balance a large state or society . . . whether monarchical or republican, on general laws, is a work of so great difficulty, that no human genius, however comprehensive, is able, by the mere dint of reason and reflection, to effect it. The judgments of many must unite in the work; experience must guide their labor; time must bring it to perfection, and the feeling of inconveniences must correct the mistakes which they INEVITABLY fall into in their first trials and experiments.*[91]

In other words, through their adherence to scientific principles of experimentation and observation, Hume and the founders saw the importance of making an adaptable government that could change to reflect the needs of society. This emphasis on flexibility and experimentation can also be found in MONTESQUIEU's *The Spirit of Laws*, where he noted that laws should reflect the society where they are in force. His view was that

> *law consists of human reason by which men work out these relations. They should be in accord with the climate, soil and occupation of the natives, with their religion and wealth, and also with the degree of liberty which they enjoy. The sum of these relations constitutes the spirit of the laws*.[92]

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84 *Id*. §§ 134 and 136, at 73-76.

85 *Id*. §§ 205-208, at 110-113.

86 *Id*. §§ 87, 123, and 135, at 48-49, 69-70, 74-75.

87 *Id*. §§ 143-144, 146, 150, at 159-160, 80-81, 83, 89-90.

88 LUTZ, *supra* note 9, at 2344.

89 *Id*.

90 See e.g., THE FEDERALIST NOS. 2, 14, 16, 18, 23, 39, 43, 50, ETC. *Federalist Papers: Primary Documents in American History: Full Text of the Federalist Papers*, LIBRARY OF CONGRESS, https://guides.loc.gov/federalist-papers/full-text (last reviewed Feb. 11, 2023).

91 THE FEDERALIST NO. 85 (Alexander Hamilton) (quoting HUME, D.: "Of The Rise And Progress Of The Arts And Sciences," in *Essays*, vol. I, 1742, p. 128) (capitalization in original).

92 ROSE, *supra* note 20, at 140.

MONTESQUIEU noted that law changes "*as the will of man changes*."[93] The Constitution's framers intended for the Constitution to be adaptable and created a mechanism for amending the document.[94]

I.5. Puritan Theology

Among the earliest European settlers in North America were religious dissenters from England known as Puritans. Some historians have noted that Puritan ideology's impact on America's founding extended beyond religious doctrine; one example is the Puritan practice of creating covenants and compacts as governing documents. "*The contract theory as a basis for political ideas in the Colonies evolved from the fact that ecclesiastical organizations were predicated upon a contract basis.*"[95] Indeed, *"[t]he Puritan ideal of covenant proved to be a catalyst to the growth of the idea of the rule of law. [A covenant] was a legal and binding contract [that] naturally contributed to the eventual republican system of elected representatives who serve at the behest of their constituents*."[96] This covenant structure led to the creation of first colonial constitutions, and later the U.S. federal and state constitutions.

Philosophically, these covenants and compacts were centered on promoting equality, virtue, and the common good, stemming from Puritan religious beliefs. The Puritans found through their interpretation of Christian thought "*a theory of government and law which appeared to reconcile authority and justice.*"[97] Under this approach, "*[t]he cosmic order, emanating from the mind of God . . . provides a universal standard for the formulation and administration of human law by those invested with the care of the community. The objective of government and law is thus the common good.*"[98]

One of the first examples of this type of contract is the Mayflower Compact of 1620, written onboard the Mayflower, a ship transporting Puritans from England to the new world. The pilgrims pledged "*solemnly and mutually, in the presence of God and one another, to covenant and combine ourselves together into a civil body politic [and to enact] just and equal laws . . . into which we promise all due submission and obedience.*"[99] A few years later, the Fundamental Orders of Connecticut were written, establishing a government system for another Puritan settlement, the Connecticut Colony.[100] The Orders created a federal government structure across the colony, organizing a colonial government while simultaneously recognizing the independence of municipalities within the colony to govern their internal affairs.[101] The Orders also provided for a governor, magistrates, and deputies, with a corresponding method for popular election and rotational leadership.[102]

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93 *Id*. (quoting Montesquieu, *The Spirit of Laws, vol. 1*, Nugent trans., p. 4).

94 U.S. CONST. art. V.

95 REINHARDT, *supra* note 41, at 36.

96 HARVEY, B. & BRYNER, G.: *In Search of the Republic: Public Virtue and the Roots of American Government*, Rowman & Littlefield, 1987, p. 50.

97 HARVEY, B.: "The Rule of Law in Historical Perspective," *Michigan Law Review*, n. 59, 1961, p. 488.

98 *Id*. at 489.

99 BRIGHAM, W.: *The Compact with the Charter and Laws of the Colony of New Plymouth: Together with the Charter of the Council at Plymouth, and an Appendix Containing the Articles of Confederation of the United Colonies of New England and Other Valuable Documents*, Dutton and Wentworth, 1836, p. 19.

100 *Fundamental Orders of 1639*, YALE LAW SCHOOL, LILLIAN GOLDMAN LAW LIBRARY: https://avalon.law.yale.edu/17th_century/order.asp (last reviewed Mar. 2, 2023).

101 LUTZ, D.: *The Origins of American Constitutionalism*, Louisiana State University Press, 1988, pp. 43-44.

102 MCLAUGHLIN, A.: *The Foundations of American Constitutionalism*, Palladium Press, 2004, pp. 28-29.

While theocratic, parts of the Puritan political system were highly democratic, such as the emphasis on local government, popular sovereignty/majority rule, protections of civil rights, and the use of a contract to establish political units.[103] Additionally, Puritans had ideals related to liberty and equality. One historian has divided these concepts into natural liberty and civil liberty, noting "*the first kind [natural liberty] was absolute and unlimited, and could not be subjected to any restraint by government authority.*"[104] One can see similarities between this type of liberty and natural law theories espoused by Antiquity and Stoic philosophers, as well as founding constitutional principles such as life, liberty, and happiness. "*Civil or federal liberty, on the other hand . . . was constituted by the covenant between God and man, and by the political covenant.*"[105] Although the Puritans brought with them the rights as Englishmen, as guaranteed by the charter granted by King James I during their initial voyages, "*their greatest care . . . was to defend the independence of the political corporation from the attempted rule of Home government in England rather than the liberty of the individual within the state corporation.*"[106] Put another way, while Puritans respected civil rights and guarded against unwanted encroachments into their liberties by the Crown, equality of political rights among colonists was not accepted under this system. For example, these covenants typically enforced religious requirements for holding office.[107]

Various historians have concluded that "*the precedent of colonial charters and church covenants caused early American nationalists to anticipate a written constitution with restrictive governmental powers, and they assumed governmental acts that exceeded the provisions of the written document would be unconstitutionally void*."[108] Other historians have attributed fundamental American government and legal principles to concerns held and addressed by New England colonists, particularly methods of selecting leaders and representatives, proper limitations on political power, and creation of a "feasible federal organization."[109]

None of the five belief systems described above in parts I.1 to I.5 is solely responsible for the founding legal and government principles of what would become the United States. But considered in combination and within the context of the colonists' lived experiences in North America during the mid-18th century, the origins of the philosophical justifications for the American Revolution and eventual independence from Great Britain are apparent.

I.6. The End of British Rule in the American Colonies

As stated above, during America's colonial era, the British government endured significant turmoil, including the removal of monarchs, a civil war, and reform of the relationship between the Crown and Parliament. In addition to internal struggles, Britain clashed with other imperial powers in skirmishes that took place in North America, such as King William's War (1689-1697), Queen Anne's War (1702-1713), King George's War (1740-1748), and the French and Indian War (1754-1763).[110] By this time, the colonists had long since established their ways of life and

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[103] REINHARDT, *supra* note 41, at 35.

[104] *Id*. at 36.

[105] *Id*.

[106] *Id*.

[107] *Id*.

[108] KIRKHAM, *supra* note 28, at 27, citing VETTERLI, R. & BRYNER, G.: *In Search of the Republic: Public Virtue and the Roots of American Government,* Rowman & Littlefield, 1987, pp. 104-105.

[109] KIRKHAM, *supra* note 28, at 27, quoting BOORSTIN, D.: *The Americans: The Colonial Experience,* Vintage Books, 1858, p. 31.

[110] HEATHCOCK, C.: *The United States Constitution in Perspective*, Allyn and Bacon, Inc., 1972, p. 6.

had been governing themselves for over a century. During the reign of King George III, however, the British government began exerting more control over colonial government, trade, and activities.[111] A series of tax laws, including the Stamp Act and the Townshend Acts, imposed taxes on specific activities and commodities; these measures were swifty opposed by the colonists.[112] As discussed below, the colonists' reaction to these and other British government actions inspired key components of America's Constitution and the rule of law principles contained within it.

Simultaneously, the Crown began interfering with the checks-and-balances systems within the colonies. For example, the British government tried to exert greater influence over the local judiciary, such as by issuing an order "*permanently forbidding the issuance of judges' commissions anywhere on any tenure but that of 'the pleasure of the crown*.'"[113] The colonists realized that through this order, the "*possibility of having an independent judiciary as an effective check upon executive power would be wholly lost*."[114] The Crown also began appointing British loyalsts to colonial government positions, in some instances providing them with "*plural officeholding" in multiple government branches, described as "tending to destroy the protective mechanism of the separation of powers[.]*"[115] In 1768, the British government increased its presence in the colonies by sending multiple regiments to Boston.[116] While British troops had been present in the colonies during the French and Indian War, colonists opposed the presence of a standing army in peacetime without their consent.[117]

After a period of relative quiet and the removal of troops from Boston, a new series of legislation was then imposed by the British government. First was the Tea Tax in 1773, which led to the famous protest known as the "Boston Tea Party" that December.[118] In retribution, Parliament enacted punishing legislation, commonly known as the Coercive Acts or the Intolerable Acts, which attempted to curtail local colonial rule and allow greater British military authority in North America:

(1) The Boston Port Bill closed the port of Boston to further commerce with any nation. It further provided that the port would not reopen until the British East India Company had been fully repaid for the tea destroyed.

(2) The Massachusetts Government Act annulled the colony's charter and reduced it to direct rule, with the power of the people sharply curtailed.

(3) The Administration of Justice Act denied colonial courts the right to try British officials accused of serious offenses in connection with riots. These officials were to be sent to Great Britain for trial.

(4) The Quartering Act granted royal governors of all colonies the power to quarter British soldiers in barns, homes, and vacant buildings without the consent of the owners.[119]

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111 *Id*. at 8-9.

112 *Id*. at 9-11.

113 BAILYN, *supra* note 8, at 106, quoting KLEIN, M.: *"Prelude to Revolution in New York: Jury Trials and Judicial Tenure," William and Mary Quarterly*, n. 17, 1960, p. 452.

114 BAILYN, *supra* note 8, at 107.

115 *Id*. at 110.

116 *Id*. at 112.

117 *Id*. at 113-114.

118 *Id*. at 118.

119 HEATHCOCK, *supra* note 110, at 11-12.

All of these actions, viewed in concert, violated the rule of law principles that the colonists had established and lived under for over a century. As noted by BAILYN, "*Unconstitutional taxing, the invasion of placemen, the weakening of the judiciary, plural officeholding . . . standing armies – these were major evidences of a deliberate assault of power upon liberty*."[120] The Intolerable Acts in particular have been called the "*springboard for concerted action*"[121] that resulted in the creation of the Continental Congress in 1774.

I.6.1. Declaration of Independence

In September 1774, the colonies[122] selected delegates to represent their jurisdictions at the First Continental Congress in Philadelphia. The delegates initially agreed to various measures to respond to the Intolerable Acts with diplomacy, and submitted the Declaration of Rights and Resolves (also called the Declaration of Rights and Grievances) to Parliament.[123] In these Resolves, the delegates outlined the rights and privileges they believed the English constitution provided them as colonists, including "*life, liberty and property*," and the right to exercise and enjoy these rights "*as their local and other circumstances enable them[.]*"[124] The Resolves also discussed key principles that were later included in the U.S. Constitution, including the rights to trial by one's peers, peaceful assembly, and separation of powers. In response, the Crown refused to negotiate with the colonists.

By 1775, fighting between the British military and colonial militias broke out in New England, leading to the Second Continental Congress in May of that year. The Second Continental Congress established a standing army and appointed George Washington as its Commander in Chief.

During the Revolutionary Period (1775-1783), the colonists and delegates distilled and synthesized the political philosophy on the role of government and the rule of law that had been evolving in America for over a century. Pulling from the writings of their philosophical forebears, *infra* secs. I.1-I.5, as well as Thomas PAINE's *Common Sense*,[125] the delegates embraced rule of lawtenets including:

- The existence of pre-governmental state of nature, in which people had natural rights, no individual was born a ruler, and each was entitled to equality in ruling themselves (the origins of which were likely found in Classical Antiquity philosophy and Enlightenment theory).[126]

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[120] BAILYN, *supra* note 8, at 117.

[121] HEATHCOCK, *supra* note 110, at 12.

[122] All the original 13 colonies were represented, except Georgia. The remaining colonies were: New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, and South Carolina.

[123] *Declaration and Resolves of the First Continental Congress*, YALE LAW SCHOOL, LILLIAN GOLDMAN LAW LIBRARY, https://avalon.law.yale.edu/18th_century/resolves.asp (last reviewed Mar. 3, 2023).

[124] *Id*.

[125] PAINE, T.: *The Writings of Thomas Paine, Vol. 1*, G.P. Putnam's Sons, 1896, pp. 67-120. Paine's forceful and persuasive arguments in favor of American independence were popular among the colonists. The founders relied on and cited to *Common Sense* when drafting the founding documents. The pamphlet contains sections discussing the state of nature and the "necessary evil" of government, arguing against the idea of a hereditary monarchy, proposing a contintal charter and corresponding government structure, and suggesting that America could easily build a military.

[126] REINHARDT, *supra* note 41, at 41.

- A contract theory in which government is premised on the consent of the governed, as set forth in a written constitution—ideas connected to Puritan covenant practices, the English common law, and radical Whig philosophy).[127]
- Taxation without representation and legislation without consent amounting to forms of tyranny. [128] The right of the people to revolt when their government no longer served them (inspired by Enlightenment authors like LOCKE, HUME, and Thomas PAINE).[129]

The colonists based their justification for American Revolutionary War on the right of the people to resistance and revolution. As summarized by one historian,

> *The theory of revolution together with the theory of the state of nature, natural rights, the contract theory, and the theory of the sovereignty of the people, were all steps resulting in the Revolutionary War. The right of resistance seemed to be one of the fundamentals over which there was little dispute among the Colonies. They believed that their natural rights had been violated, and that they were justified in resisting the mother country. They contended that if their inherent and inalienable rights were attacked and abused by the British government, they were undoubtedly justified in armed rebellion. The Colonies contended that the Acts of Parliament in regard to the Colonies were unconstitutional, but that even if they were constitutional, these acts were in violation of the "natural rights" of the Colonies.*[130]

The Second Continental Congress consolidated these principles in the Declaration of Independence in 1776. The fact that the colonists organized American principles into a document is unsurprising, as *"[d]uring the colonial years, Americans had evolved the practice of using a compact to organize themselves as a people, to create a government, to set forth their basic values, and to describe the institutions for collective decision making*."[131] "*The Declaration of Independence has generally been regarded as the cornerstone of the American political system, and is the embodiment of the ideas of American political philosophy*."[132]

FRAME 3

Declaration of Independence (excerpt)

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

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new

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[127] *Id*. at 41-42. See also MCLAUGHLIN, *supra* note 102, at 92-105 (discussing the history of creating state governments during the Revolutionary War, and state constitutional conventions).

[128] REINHARDT, *supra* note 41, at 42.

[129] *Id*. at 43.

[130] *Id*.

[131] LUTZ, *supra* note 101, at 111.

[132] REINHARDT, *supra* note 41, at 40.

Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.--Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.

The document includes precepts published in earlier American writings, including the belief that "*all men are created equal*."[133] Thomas JEFFERSON, a key author of the Declaration, attributed its contents to a number of authors whom he considered to be the "*great writers on liberty—'Aristotle, Cicero, Locke, Sidney, etc.'*"[134] Its sources can also be traced to Puritan covenants and early state constitutions established prior to the U.S. Constitution.[135]

After formally declaring independence from Great Britain, the Revolutionary War raged through the Colonies until the parties signed the Treaty of Paris on September 3, 1783.

I.6.2. Articles of Confederation

In 1777, six years prior to the Revolutionary War's end, the Second Continental Congress adopted the Articles of Confederation.[136] This document created a framework of government authority that operated for the next several years.[137] In adopting the Articles, the founders rejected a unitary, centralized government under a monarch. "*In America, there had been several colonies, and after independence there were several states. Each had its own government that had existed for many years. No model of English government, which was unitary, could deal with these states.*"[138] Instead, the Articles established a confederation of states with decentralized power concentrated at the state level, and a weak central government. Each state retained its "*sovereignty, freedom and independence, and every Power, Jurisdiction and right*" not otherwise granted to the United States.[139] The states shared in mutual defense,[140] and citizens of a state enjoyed the privileges and immunities of citizens of other states and the

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133 LUTZ, *supra* note 101, at 113.

134 *Id*., quoting FORD, P.L.: *The Writings of Thomas Jefferson*, New York, 1892-1899, X, pp. 343-44.

135 LUTZ, *supra* note 101, at 114-116.

136 *Articles of Confederation (1777)*, U.S. NAT'L ARCHIVES AND RECORDS ADMIN., https://www.archives.gov/milestone-documents/articles-of-confederation (last reviewed Mar. 3, 2023). The Articles were not formally ratified by all thirteen states for four years, until March 1, 1781, due to various disputes.

137 Several authors have asserted that the Articles of Confederation, state constitutions, and the U.S. Constitution were influenced by the Iroquois League, or Iroquois Confederacy, which by some accounts has existed since 1142. For more information about the connections between the Iroquois Confederacy and America's founding documents, see: PAYNE, JR, S.: "The Iroquois League, the Articles of Confederation, and the Constitution," *The William and Mary Quarterly*, n. 53, 1996, pp. 605-620; SCHAAF, G.: "From the Great Law of Peace to the Constitution of the United States: A Revision of America's Democratic Roots," *American Indian Law Review*, n. 14, 1989, pp. 323-331; H.R. CON. RES. 331, 100th Cong. (1988) (enacted) (acknowledging the contribution of the Iroquois Confederacy to the U.S. Constitution's development).

138 LUTZ, *supra* note 101, p. 149.

139 ARTICLES OF CONFEDERATION OF 1781, art. II.

140 *Id.* art. III.

right to travel throughout states.[141] The Articles also set forth procedures for electing delegates, imposed term limits, and prohibited elected officials from holding more than one elected office simultaneously.[142]

The Articles of Confederation had several defects as a governing document. First, it provided for almost no central/federal government to speak of. When the states formed their constitutions, in every instance the structure included legislative, executive, and judicial branches; the Articles of Confederation, in contrast, gave the federal government no analogous institutions.[143] Additionally, the Articles limited the ability of the United States to use its powers in two significant ways. First, the United States could not coin money, grant letters of marque, engage in war, or take a number of additional actions "*unless nine States assent[ed] to the same.*"[144] Second, "*[o]bedience could not be compelled. There was merely the declaration that 'every State shall abide by the determination of the United States in Congress assembled.'*"[145] These provisions limited the United States government's ability to collect revenue, and the states failed to contribute to national coffers as dictated by the Articles.[146] The inability to raise revenue increased the government's foreign indebtedness, forcing Congress to "*procur[e[additional loans to pay the interest and installments due on previous loans*."[147]

After a series of failed attempts to convene and amend the Articles, a Constitutional Convention was called in 1787.

I.7. The Constitutional Convention

The Constitutional Convention met in Philadelphia in the summer of 1787 to discuss, debate, and negotiate amending the Articles of Confederation. Delegates from the state of Virginia proposed a strong central government having three branches, with the states' representation in Congress based on population.[148] Delegates from the state of New Jersey offered a competing plan providing for a national government with legislative and executive branches, with each state having equal representation in the legislature.[149] Finally, a delegate from South Carolina proposed a strong national government with overriding authority over state laws and other extensive legislative powers.[150] It soon became clear that a new charter was needed.

Rather than modifying the confederation system, the framers adopted a federal government structure with elements of the proposed plans, in a resolution known as the Great Compromise, or the Connecticut Compromise.[151] It included a legislature with two chambers, one with proportional representation (House of Representatives) and one with equal

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141 *Id.* art. IV.

142 *Id.* art. V.

143 HEATHCOCK, *supra* note 110, at 18.

144 ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 6.

145 HEATHCOCK, *supra* note 110, at 18, quoting ARTICLES OF CONFEDERATION OF 1781, art. XIII, para. 1.

146 *Id*. at 19.

147 *Id*.

148 MCLAUGHLIN, *supra* note 102, at 152.

149 HEATHCOCK, *supra* note 110, at 61.

150 *Id*. at 61-62.

151 *Id*. at 62.

representation (Senate); an executive branch headed by a President; and an independent judicial branch.[152] One historian has summarized the Constitutional Convention of 1787 thusly:

> *[T]he nation's founders endeavored to stitch together the various interests of the citizenry, cognizant of the differences among citizens at that time and of the inevitability that those interests would change over time. The founders embraced the notion of "the general welfare" as a goal for government action, but they did not expressly announce a more definite normative standard for social choices, nor would they have agreed on one. Some of the founders were strong believers that certain rights of citizens were natural rights, deriving from God or from an innate order not of our making. Other founders saw rights in narrower, positivistic terms. . . . [D]ifferences among the founders were compromised in a system that allows most substantive choices to be made as we go, with very few side constraints."*[153]

The Constitution was ratified by the requisite nine state conventions on June 21, 1788; Rhode Island, the final state to ratify the Constitution, did so on May 29, 1790.[154]

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[152] *Id*. at 63.

[153] CASS, *supra* note 1, at 20-21 (internal citations omitted).

[154] HEATHCOCK, *supra* note 110, at 73.

II. Current Legal Framework

II.1. The Constitution and Its Underlying Principles

This section discusses the U.S. Constitution and highlights some of its key principles. Section II.1.1 covers federalism, the American structure with dual-sovereignty shared by the federal government and fifty state governments. Section II.1.2 summarizes the Constitution's seven articles and the Bill of Rights, the first ten amendments to the Constitution. Finally, Section II.1.3 addresses the hierarchy of laws in the federal system.

At the outset, it is important to note that by its own terms, the Constitution is the "*supreme law of the land*."[155] Its preamble declares as its purposes to "*establish Justice . . . promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.*"[156] While the Constitution's preamble outines particular goals and ideals, "*the document itself—along with discussions that surrounded its creation and ratification, and the history of its interpretation—relies almost entirely on negative approaches, constraining the allocations of power and the incentives of its officials.*"[157] Through this document, the founders sought to create a stable government that was adaptive to society's evolving needs. To this end, the Constitution outlines a federal system with separation of powers and checks and balances, arranged so that "*ambition must be made to counteract ambition,*"[158] and to prevent one government branch from usurping the powers of another.

II.1.1. Federalism

The American governmental structure has a balance of powers across the federal, state, and local levels. This design is intended to safeguard state interests while creating a strong union led by an effective centralized national government. Additionally, it creates multiple access points for citizens to engage with the government.

Under this federal system, the state and national governments exercise dual sovereignty over the same territory.[159] American federalism features "*a division of powers between two levels of government, each supreme in some areas of policy making. This in turn requires two legislatures, each able to affect citizens directly, and something akin to dual citizenship whereby one is a citizen of a nation and of [a state].*"[160] One commentator has noted that "*[s]uch a system is scarcely workable unless it be founded upon law and bound by law. For each government must keep within the field marked out for it and must not force its way into the field of another.*"[161] The powers of the federal and state governments are laid out in the U.S. Constitution and are kept in check by the courts.

The Constitution enumerates several areas of federal responsibility, as set forth in greater detail in sec. II.1.2.1, *infra*. While the powers of the federal government are "*few and defined,*" the areas of responsibility that the Constitution grants to the states are "numerous and

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155 U.S. CONST. art. VI.

156 *Id.* pmbl.

157 CASS, *supra*, note 1 at 21, internal citations omitted.

158 THE FEDERALIST NO. 51, at 27 (James Madison).

159 MCLAUGHLIN, *supra* note 102, at 146.

160 LUTZ, *supra* note 101, at 64, emphasis in original.

161 MCLAUGHLIN, *supra* note 102, at 146.

indefinite."[162] Under the Tenth Amendment, "*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.*"[163] Each state operates its own government and is "*endowed with all the functions essential to separate and independent existence*."[164]

Federal law may supersede state law under limited circumstances. For example, if Congress enacts a federal statute with a "*valid grant of constitutional authority*,"[165] under the Supremacy Clause (art. VI, cl. 2), its legislation becomes the "*supreme Law of the Land*."[166] In these circumstances, the federal law will supplant any state laws that conflict, or are inconsistent with, the federal statute. This authority, however, is not absolute. Under Supremacy Clause jurisprudence, the federal government is prohibited from exceeding "*the powers granted it under the Constitution*,"[167] and legislation that oversteps its constitutional authority will be invalidated. "*States retain broad autonomy in structuring their governments and pursuing legislative objectives*,"[168] and they "*possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause*."[169] State law governs a variety of topics, including property, public schools, state criminal law, contracts, negligence, domestic relations, operations of state courts, and so on.

Although the Tenth Amendment discusses the states' authority, it makes no mention of the authority of local, municipal governments, such as cities, counties, and parishes. Under U.S. Supreme Court precedent, *"[m]unicipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them*," and their ability to exist and function "*rests in the absolute discretion of the State.*"[170] In general, "*local governments may exercise only (1) powers expressly granted by the state, (2) powers necessarily and fairly implied from the grant of power, and (3) powers crucial to the existence of local government*."[171] While these smaller subdivisions govern issues of local concern, from the national government to the smaller political subdivisions, each system has the power to make laws and a certain level of independence from one another.

Federalism concepts outlining boundaries between national and state government powers have been described as a "*check on abuses of government power," because "a healthy balance of power between the States and the federal government will reduce the risk of tyranny and abuse from either front*."[172] The Supreme Court also has noted that one of federalism's purposes is securing the people "*the liberties that derive from the diffusion of sovereign power.*"[173]

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[162] THE FEDERALIST NO. 45, at 308 (James Madison).

[163] U.S. CONST. amend. X.

[164] *Lane Cnty. V. Oregon*, 7 U.S. 97 Wall.) 71, 76 (1869), superseded by statute as recognized in *Leitch v. Dep't of Revenue*, 9 Or. Tax 256 (1982).

[165] HICKEY, K., ET AL, CONG. RSCH. SERV: *R45323, Federalism-Based Limitations on Congressional Power: An Overview*, 2023, p. 1.

[166] U.S. CONST. art. VI, cl.2.

[167] *Gregor v. Ashcroft*, 501 U.S. 529, 543 (2013).

[168] *Shelby Cnty. v. Holder*, 570 U.S 529, 543 (2013).

[169] *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

[170] *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

[171] PRICE, A. & MYERS, L., LAW LIBRARY OF CONGRESS, UNITED STATES: LOCAL GOVERNMENT RESPONSES TO COVID-19, 2 (2020) (citing *Cities 101—Delegation of Power*, National League of Cities (Dec. 13, 2016), https://perma.cc/QHR9-NCGZ).

[172] *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

[173] *New York v. United States*, 505 U.S. 144, 181 (1992), quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (Blackmun, J., dissenting).

Some historians have identified the British colonial system as the source of federalism in America.[174] During the colonial era, the colonies established their own government systems and laws, while simultaneously living under the supervision of the Crown and Parliament, and enjoying the rights and responsibilities of British subjects. The First Continental Congress noted this fact when negotiating with Great Britain before the Revolutionary War. In 1774, Congress proposed that if Great Britain permitted the colonies to continue governing themselves, without subjecting the colonies to unfair taxation, the Crown could continue overseeing matters of external commerce.[175] "Thus they asserted the possibility of distinguishing between one power and others; and they acknowledged the need, in the interest of both the colonies and the mother country, of one central authority to regulate commerce."[176] Historian Andrew MCLAUGHLIN summarizes this argument:

> *The principles of federalism were in reality embodied in the practice of the old Empire . . . the Empire in practice was not a thoroughly consolidated centralized Empire. Colonies did exist, and had long existed, in possession of governments of their own with many powers and with actual authority. Furthermore, the more conspicuous powers which had been exercised by the Home Government were those powers naturally belonging there from the necessity of the case, powers that could not well be exercised by the colonies—the post-office, naturalization, war and peace, foreign affairs, intercolonial and foreign commerce, establishment of new colonies, etc.—in other words, the powers which are the chief powers assigned to the central government in our own [American] federal system.*[177]

Another theory about federalism's origin hypothesizes that it was first recognized in the Fundamental Orders of Connecticut, which delineates the relationship between the Connecticut colony's government and the municipal governments within its borders. See sec. I.5, *supra*.

II.1.2. The Constitution's Articles

As originally enacted, the Constitution contained seven articles. The first three articles outlined the three branches of the federal government, while articles four through seven discussed other matters relating to the states, procedures for amending the Constitution, the Constitution's status among other laws, and the process for ratification. All subsequent changes to the Constitution have been captured in amendments. This section discusses each of the Constitution's seven articles, as well as key amendments.

II.1.2.1 Separation of Powers, Arts. I-III

The doctrine of "separation of powers" (also referred to as the separation of functions) includes what is known as the system of checks and balances. Within the national and state governments, each branch of government has specific authority, as well as certain powers, that affect or constrain the other branches. This system was created in response to the British government system, which had relatively few checks.[178] For example:

- The president can veto legislation passed by Congress and nominates heads of federal agencies.

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[174] MCLAUGHLIN, *supra* note 102, at 144-46.

[175] *Id.* at 144.

[176] *Id.*

[177] *Id.* at 145.

[178] LUTZ, *supra* note 101, at 157.

- The Senate approves treaties made by the executive, as well as presidential appointments.
- Congress can remove the president from office in exceptional circumstances through the impeachment process, in which the House of Representatives votes on articles of impeachment and the Senate serves as the impeachment trial body, with the Supreme Court Chief Justice presiding.
- Congress may override a President's veto with a two-thirds majority vote in both chambers. The Justices of the Supreme Court, who can overturn unconstitutional laws,[179] are nominated by the president and confirmed by the Senate.

II.1.2.1.a) Article I: Legislative Branch

Article I to the Constitution establishes Congress, the legislative branch. Congress consists of two chambers: the House of Representatives and the Senate.[180] The number of representatives a state has in the House depends on the state's population.[181] In contrast, each state has two Senators, regardless of its population.[182]

Federal statutes enacted by Congress must fall within the scope of Congress's enumerated, constitutional powers. Section 8 of Article I lists the subjects upon which Congress has authority to pass laws. These topics include, among others, taxation, borrowing money, creating courts subordinate to the U.S. Supreme Court, raising armies, and regulating commerce among the states.[183] Congress has relied on its power to regulate interstate commerce to pass significant legislation with nationwide effect. Additionally, art. I, § 8 provides that Congress may make "*all Laws which shall be necessary and proper*" for implementing other powers and provisions vested to the United States, as outlined in the Constitution.[184]

FRAME 4

U.S. Constitution, Article I, § 8

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

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[179] The theory of judicial review is not explicitly stated in the Constitution, but has been accepted doctrine since the U.S. Supreme Court issued its decision in *Marbury v. Madison*. See sec. III.1.1, *infra*.

[180] U.S. CONST. art. I, § 1.

[181] *Id.* art. I, § 2, cl. 1.

[182] *Id.* art. I, § 3, cl. 1.

[183] *Id.* art. I, § 8, cl. 1-17.

[184] *Id.* art. I, § 8, cl. 18.

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the Supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;–And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

In addition to granting powers to Congress, Article I expressly prohibits the states from undertaking certain activities. Some actions, like entering into treaties or creating a currency, are wholly forbidden.[185] Other actions, such as certain agreements between states, may be taken only with the consent of Congress.[186]

FRAME 5

U.S. Constitution, Article I, § 10

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

185 *Id.* art. I, § 10, cl. 1-2.

186 *Id.* art. I, § 10, cl. 3.

II.1.2.1.b) Article II: Executive Branch

Article II establishes that the executive power of the federal government is to be wielded by the President. In accordance with Article II, the executive branch is responsible for:

- Executing the laws;
- Serving as Commander in Chief of the armed forces;
- Requiring the opinion of officers of executive departments;
- Granting reprieves and pardons;
- Negotiating treaties, subject to a two-thirds majority of the Senate;
- Appointing executive officers and federal court judges (subject to Senate confirmation);
- Recommending and vetoing legislation;
- Receiving ambassadors;
- Giving Congress information on the state of the union; and
- Convening and adjourning Congress, under extraordinary circumstances.[187]

FRAME 6

U.S. Constitution, Article II, § 10

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

The President, Vice President, and other civil officers may be removed upon impeachment by the House of Representatives and conviction by the Senate for "*Treason, Bribery, or other high Crimes and Misdemeanors*."[188] In the modern era, the executive branch oversees federal agencies and departments, which issue rules and regulations under grants of authority given to them by Congress. For more information about federal regulations, see section II.3, *infra*.

II.1.2.1.c) Article III: Federal Judiciary

Article III describes the third branch of the federal government, the federal judiciary. The judicial power is vested in the Supreme Court and in lower courts that Congress creates.[189] Section 2 of Article III establishes the jurisdiction of the federal courts, which covers, among other matters:

- Cases under the Constitution, federal law, and treaties;

[187] *Id.* art. II, §§ 2-4.

[188] *Id.* art. II, § 4.

[189] *Id.* art. III, § 1.

- Controversies to which the United States is a party; and
- Disputes between states and between citizens of different states.[190]

FRAME 7

U.S. Constitution, Article III, § 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Article III provides that every judge appointed under its terms may hold office "*during good behavior*," meaning they enjoy lifetime apointments unless they are impeached by the House of Representatives and convicted by the Senate.[191] The founders saw a lifetime appointment for judges as a powerful form of protection that could defend against interference by other government branches. In *Federalist 78*, Alexander HAMILTON discussed the federal judiciary's important role, noting, "*The standard of good behaviour for continuance in office" is "the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws,*"[192] creating a "*citadel of public justice*."[193]

Some scholars have maintained that the creation of the federal court system removed the need for revolution—a need that previously united the colonists when declaring independence from English—because the courts became the avenue by which citizens could challenge laws and have them voided if the laws were deemed unconstitutional. This view of Article III courts finds support in *Federalist 78*, which notes that "the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."[194] MCLAUGHLIN further elucidates this theory:

> *[T]hey [the founders] made the Constitution law in the fullest sense of the word; they called upon courts to recognize the principle that an act beyond law is no law, and . . . used it as the basis for maintaining the permanence of the Union in a wide-flung empire. The right of revolution was, so to speak, domesticated, the right to oppose unconstitutional law; but if the theory of the Constitution was lived up to, there was no need of war and tumult to protect law; "no appeal to heaven" would be necessary, but an appeal to courts; so far as*

[190] *Id.* art. III, § 2.

[191] *Id.* art. III, § 1; art. 1, §§ 2, 3.

[192] THE FEDERALIST NO. 78 (Alexander Hamilton).

[193] *Id.*

[194] *Id.*

> *human ingenuity could solve the problem through institutions and practices, forceful revolution was made unnecessary by the injunction upon the courts to recognize and apply the fundamental law. Not to the masses of men in rebellion was the right assigned or conceded of opposing governmental violation of law, but to the individual litigant appearing in a court of justice.*[195]

II.1.2.1.d) Limits to the Government's Authority

In addition to setting forth the structure of the federal government's coequal branches, the Constitution's first three articles outline significant limits on the government's authority. For example, Article I, § 9 prohibits the government from suspending *habeas corpus*,[196] unless extraordinary circumstances are met. Also, this section prohibits *ex post facto*[197] laws, or laws that retroactively impose criminal liability or increase the punishment associated with a crime.

FRAME 8

U.S. Constitution, Article III, § 9

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

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195 MCLAUGHLIN, *supra* note 102, at 156.

196 DOYLE, C, CONG. RSCH. SERV: *RL33391*, *Federal Habeas Corpus: A Brief Legal Overview*, 2010.

197 LAMPE, J., CONG. RSCH. SERV: *IF11293*, *Retroactive Legislation: A Primer for Congress*, 2019.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.*

The bulk of this study focuses on the separation of powers in practice, with examples of how the federal government branches coordinate responsibilities and functions through legislation, regulatory rulemaking, and judicial decisions. See secs. II.2, II.3 and III, *infra*.

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* EdN: For a comparison of the ***abolition of privileges*** in other legal orders, see:

- **Austria**: after its defeat in the First World War and the subsequent abolition of the Monarchy, the Law of 13 April 1919 on the abolition of the nobility, orders of chivalry and lay female orders and certain titles and dignities (*Gesetz über die Aufhebung des Adels, der weltlichen Ritter- und Damenorden und gewisser Titel und Würden*) marked the abolition of the nobility as a social order and all privileges associated with it. See point I.3 of Vašek, M.: *Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive – Österreich*, Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Oktober 2020, VIII und 44 S., Referenz PE 659.277 (original German version), pp. 3-5, and of its version in French with comments: *Les principes d'égalité et de non-discrimination, une perspective de droit comparé - Allemagne*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), mars 2022, XIV et 111 pp., référence PE 729.295, pp. 3-5;
- **Belgium**: constitutional provisions relating to the status of nobility are set out in Article 113 of the Constitution, which reads: "*The King has the right to confer titles of nobility, but may never attach any privilege to them*". See Frame 2 of the study Behrendt, Ch. : *Les principes d'égalité et non-discrimination, une perspective de droit comparé - Belgique*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), février 2021, VIII et 44 pp., référence PE 679.087 (original French version), p. 2; *Los principios de igualdad y no discriminación, una perspectiva de Derecho Comparado - Bélgica*, Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), julio 2022, X y 82 pp., referencia PE 733.602 (Spanish version with added comments and update), p. 2; and *Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive – Belgien*, Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Dezember 2022, VIII und 106 S., Referenz PE 739.262 (German version with added comments and update), p. 3 ;
- **Germany**: the abolition of privileges and social orders is first addressed in the 19th century. See point I. in Reimer, F.: *Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive - Deutschland*, Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Oktober 2020, XIV und 77 S., Referenz PE 659.305 (original German version), pp. 1-18, and in its updated version in French: *Les principes d'égalité et de non-discrimination, une perspective de droit comparé - Allemagne*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), mars 2022, XIV et 111 pp., référence PE E 729.295, pp. 1-24;
- **Spain**: in its ruling STC 126/1997, the Constitutional Court ruled that a title of nobility in no way "*implies a hierarchical or privileged status or position, nor leads to the exercise of any public function.*" See point IV.3.1. of the study González-Trevijano Sanchez, P.: *Los principios de igualdad y no discriminación, una perspectiva de Derecho Comparado - España*, Unidad Biblioteca de Derecho Comparado, Servicio de Estudios del Parlamento Europeo (EPRS), octubre 2020, VIII y 104 pp., referencia PE 659.297 (original Spanish version), pp. 77-79; *Les principes d'égalité et non-discrimination, une perspective de droit comparé - Espagne*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), juin 2022, X et 167 pp., référence PE 733.554 (updated version in French with comments), pp. 108-110; *Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive – Spanien*, Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Januar 2023, X und 194 S., Referenz PE 739.207 (updated version in German with comments), pp. 131-133;
- **Switzerland**, Article 4 of the 1848 Constitution of the Swiss Confederation states that in Switzerland there are "no subjects, nor privileges of place, birth, person or family". See Frame 1 in Frei, N.: *Die Grundsätze der Gleichheit und der Nichtdiskriminierung, eine rechtsvergleichende Perspektive - Schweiz*, Bibliothek für Vergleichendes Recht, Wissenschaftlicher Dienst des Europäischen Parlaments (EPRS), Oktober 2020, X und 70 S., Referenz PE 659.292 (original German version), p. 1; *Les principes d'égalité et de non-discrimination, une perspective de droit comparé - Suisse*, Unité Bibliothèque de droit comparé, Service de recherche du Parlement européen (EPRS), mars 2022, X et 95 pp., référence PE 729.316 (French version with added comments), p. 1.

II.1.2.2 Constitution, Arts. IV-VII

The Constitution's other articles address the states' relationships to one another and the interplay between state and federal areas of authority.

II.1.2.2.a) Article IV: Recognition of the laws and judicial proceedings of other states

Article IV requires each state to recognize the laws and judicial proceedings of other states, in what is known as the "Full Faith and Credit Clause." For example, a validly-issued birth certificate or marriage license in one state must be recognized by another state, even if the latter state's laws have different legal requirements for issuing such documents. State courts are also generally required to give full faith and credit to out-of-state court judgments, and presume the correctness of the judgment.[198] A citizen of one state is also entitled to the "privileges and immunities" of other states, meaning that a state may not discriminate against citizens of other states in favor of its own citizens.[199] Other sections in Article IV discuss the extradition of individuals who are fleeing the criminal process;[200] the return of enslaved persons to the state from which they escaped;[201] the admission of new states to the union;[202] congressional authority over public lands;[203] and the requirement that each state must have a republican form of government.[204]

FRAME 9

U.S. Constitution, Article IV

Section 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

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198 *Thompson v. Thompson*, 484 U.S. 174, 180 (1988), https://www.loc.gov/item/usrep484174/ (holding that the Full Faith and Credit Clause requires states "to accord the same force to judgments as would be accorded by the courts of the State in which the judgment was entered"); *V.L. v. E.L.*, 577 U.S. 404, 407 (2016) (per curiam), https://www.supremecourt.gov/opinions/boundvolumes/577BV.pdf#page=606 ("With respect to judgments, 'the full faith and credit obligation is exacting.' . . . 'A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.'") (quoting *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998), https://www.loc.gov/item/usrep522222/); *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704 (1982), https://www.loc.gov/item/usrep455691/ ("[T]he judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced.") (citation omitted).

199 U.S. CONST. art. IV, § 2, cl. 1.

200 *Id.* art. IV, § 2, cl. 2.

201 *Id.* art. IV, § 2, cl. 3. This provision, known as the "Fugitive Slave Clause," was rendered obsolete when slavery was abolished in 1865 by ratification of the Thirteenth Amendment.

202 *Id.* art. IV, § 3, cl. 1.

203 *Id.* art. IV, § 3, cl. 2.

204 *Id.* art. IV, § 4.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

II.1.2.2.b) Article V: Requirements to amend the Constitution

The requirements to amend the Constitution* can be found in Article V.

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* EdN: For a comparison of ***constitutional reform procedures*** in other legal systems, see:

- **Austria**: The Austrian legal system makes a fundamental distinction between two layers of Constitutional Law, Ordinary Federal Constitutional Law and the fundamental principles or Constitution-building laws, which in their entirety – together with Article 44(3) of the Federal Constitution – form the basic constitutional order. Provisions of Ordinary Federal Constitutional Law can be generated by: (1) Partially amending constitutional laws, which require the presence of at least half the members of the *Nationalrat* (a higher quorum of presence than for ordinary laws) and a consensus quorum of two-thirds of the votes cast. They must be expressly designated as constitutional laws or constitutional provisions and published as such. (2) Constitutional laws changing the entire constitution: if one of the fundamental principles of the Constitution is abandoned (the number and content of which are discussed by doctrine, but which in any case include the principles of Democracy, Republic, Federal State and Rule of Law; some authors also include the liberal principle and the principle of separation of powers), or if the relationship between these fundamental principles is significantly altered, article 44 (3) of the Federal Constitution stipulates that, in addition to the procedure for the creation of a Constitutional law described above, a referendum must be held. Austria's accession to the European Union in 1995 was regarded as an amendment to the fundamental constitutional order and therefore had to be approved by the people in a referendum, which was held on June 12, 1994. The Federal Constitution also contains, in arts. 35 (4) and 44 (2), special requirements for the amendment of constitutional provisions relating to the representation of the Länder in the *Bundesrat* or limiting the powers of the Länder in legislative or executive matters. See among others MAYER, H., KUCSKO-STADLMAYER, G., STÖGER, K.: Grundriss des österreichischen Bundesverfassungsrechts, 11th edition, MANZ'sche Verlags- und Universitätsbuchhandlung, Vienna, 2015, points 146 and 481- 485 ;
- **Belgium**: Constitutional review is governed by Title VIII of the Constitution, which provides for a single constitutional review procedure. According to its Article 195, this procedure consists of three phases. In the first phase, the three branches of the federal legislative power – the House of Representatives, the Senate and the King (=the Government) – draw up, as pre-constituents, each independently, a declaration of revision of the Constitution. This contains a list of articles or parts of articles of the Constitution that are open to revision. The declarations of the House of Representatives and the Senate are approved by a simple majority. Only those provisions that are on all three lists, thus constituting the "intersection", are open to revision. In the second phase, the declarations are published in the Belgian official gazette, the *Moniteur belge*. This publication leads to the dissolution of the legislative chambers and elections must then be held. In the third and final phase, the new chambers and the King, as the constituent power, may revise the constitutional provisions subject to revision. However, they are not obliged to do so. A two-thirds majority is needed to revise a constitutional provision. See the fact sheet on the constitutional review procedure published on the official website of the Belgian Senate, as well as BEHRENDT, C. and VRANCKEN, M.: *Principes de droit constitutionnel belge*, La Charte, Brussels, 2019, 762 pp, (pp.367-371);

- **Canada**: Part V (sections 38 to 49) of the Constitution Act, 1982 provides for five constitutional amendment procedures. Depending on the scope and/or content of the constitutional amendment, the procedure to be followed is different. Section 38 of the Constitution Act regulates the "amendment by general procedure", known as the "7/50 formula", which applies when the other procedures are not applicable. Under this procedure, the proposed constitutional amendment is only approved if it has the support of the Senate, the House of Commons and at least two-thirds of the provinces (7), which must represent at least 50% of the population of Canada as a whole. The other procedures are the "amendment by unanimous consent " (Article 41), the "amendment of provisions relating to some but not all provinces" (Article 43), the "amendment by Parliament" (Article 44) and the "amendment by provincial legislatures" (Article 45). See PELLETIER, B.: "La modification et la réforme de la Constitution canadienne", *Revue générale de droit*, vol. 47, no. 2, 2017, pp. 461-515. For an in-depth study of this point, see also HOGG, P.W.: *Constitutional Law in Canada*, Thomson Carswell, vol. 1, Canada, 2005, 998 pp., (pp. 65-104).
- **European Union**: see Art. 48 TEU.
- **France**: Constitutional revision is governed by Title XVI of the Constitution, which includes a single article 89. However, the Constitution was revised twice on the basis of Article 11 of the Constitution, which allows the Head of State to "*submit to a referendum any Government Bill which deals with the organization of the public authorities*". First, in 1962, General de Gaulle decided to use Article 11 to submit to a referendum of the French people a constitutional amendment to Article 6 of the Constitution to provide for the election of the President of the Republic by direct universal suffrage (until then, the Head of State was elected by an electoral college). On October 28, 1962, the French people voted in favor of this constitutional amendment. Subsequently, in 1969, General de Gaulle again resorted to Article 11 to submit to the French people a constitutional amendment on the regionalization and transformation of the Senate. On April 27, 1969, the French people rejected this reform, which led to the resignation of General de Gaulle on April 28, 1969. Today, the use of Article 11 to push through constitutional reform initiatives remains controversial. See the fact sheet on constitutional reform published on the website of the French Constitutional Council. See also ARDANT, P. and MATHIEU B.: *Droit constitutionnel et institutions politiques*, LGDJ Lextenso, Paris, 2021, 638 pp, (pp. 91-100);
- **Germany**: Article 79 (3) of the German Basic Law ("*Grundgesetz*, GG") contains the so-called "eternity clause" as a substantive provision of constitutional protection: it prohibits any modification of the organization of the Federation into Länder, of the participation of the Länder in legislation, or of the principles laid down in Articles 1 GG (inviolability of human dignity) and 20 GG (structural principles of the State: Republic, Democracy, Federal State, Rule of Law; and, according to the prevailing but not undisputed opinion, Social State). The Federal Constitutional Court has described them as the "*intangible core of constitutional identity*". Outside this immutable core of the Basic Law, the procedure for amending it is the usual legislative procedure, with certain formal aggravations deriving from Article 79 (1) and (2) GG, which determine that the Basic Law can only be amended by a law expressly amending or supplementing its text (except for certain international treaties) and this must be approved by a two-thirds majority of the members of the *Bundestag* and the *Bundesrat*. Since its entry into force in 1949, the Basic Law has already undergone numerous amendments, some of them major – especially in the area of federal reform – and it is one of the constitutions with the most amendments. See, among others, DREIER, H. in VON BOGDANDY, A., CRUZ VILLALÓN, P., S. and HUBER, P.M. (eds.): *Handbuch Ius Publicum Europaeum*, Band I, C.F. Müller, Heidelberg, 2007, p. 23 et seq. and pp. 31-33, points 27-28 and 42-46 ;
- **Spain**: the Spanish Constitution provides for two constitutional reform procedures: the ordinary procedure (Article 167) and the aggravated procedure (Article 168). The aggravated procedure is governed by very restrictive rules. It only applies to the reform of certain parts of the Constitution (Preliminary Title; Chapter II, Section 1 of Title I and Title II).
- **Switzerland**: Article 192(1) of the Constitution provides that "*The Federal Constitution may be totally or partially revised at any time.*" A revision is total when it affects all or most of the provisions of the Constitution. Conversely, a revision is partial when it affects only certain specific provisions. Under Articles 193, paragraph 1, and 194, paragraph 1, of the Constitution, a revision – total or partial – of the Constitution may be proposed by the people or decreed by the Federal Assembly. When it is a fraction of the electorate, i.e. at least 100,000 active citizens, it is a popular initiative. If, on the other hand, the proposal for revision comes from the Federal Council, from one of the two Councils or from a canton, it is the initiative of an authority. The procedure is different in each case. If the procedure is initiated by an authority, the revision proposal is first submitted to a vote of the people and the cantons. If they agree, the two Councils and the Federal Council are renewed. If the revision procedure is initiated by a popular initiative, the lists on which signatures are to be affixed must first be submitted to the Federal Chancellery. The Chancellery then conducts a preliminary examination of the initiative. The initiative is then published in the Federal Gazette. The initiative committee then has 18 months to collect 100,000 signatures, validate them by the competent cantonal authority and submit them

The founders "*made it somewhat difficult to amend the Constitution.*"[205] Constitutional amendments can be broken down into a two-step process. First, amendments can be proposed by an affirmative vote of two-thirds of both the House and Senate or by two-thirds of the state legislatures calling upon a convention to propose amendments.[206] After the amendment is proposed, it must be ratified, which requires "*approval by the legislatures of three-fourths of the States or by conventions in three-fourths of the states*."[207] Although thousands of proposed amendments have been introduced over 200-plus years, the Constitution has been amended only 27 times, with the most recent amendment ratified in 1992.[208]

FRAME 10

U.S. Constitution, Article V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

II.1.2.2.c) Article VI: Supremacy Clause

Article VI is primarily known for the Supremacy Clause, which provides that the Constitution and other federal law is superior to and will preempt state and local law in the event of a conflict.[209] The framers inserted this clause into the Constitution in direct response to the Articles of Confederation's shortfalls, including their omission of a strong central government (see sec. I.6.2, *supra*). In *Gibbons v. Ogden*, a seminal case interpreting the Supremacy Clause, Chief Justice John Marshall emphasized that state laws running counter to federal law must be overruled by the federal counterpart because "the *framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it*."[210] His opinion went on to note, "*In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it*."[211] More information about the Supremacy Clause's application

all at once to the Federal Chancellery, which determines whether the initiative has collected the prescribed number of signatures. If so, the Federal Chancellery takes a decision on whether or not the initiative has been successful. Thereafter, the procedure differs depending on whether the initiative is for a total or partial revision of the Constitution. See AUER, A., MALINVERNI, G. and HOTTELIER, M.: *Droit constitutionnel suisse*, Stämpfli Editions SA Berne, vol 1, 2013, 833 pp, (pp.492-501).

205 HEATHCOCK, *supra* note 110, at 184.

206 U.S. CONST. art. V. The states have never called a constitutional convention to propose amendments.

207 HEATHCOCK, *supra* note 110, at 185.

208 *Id.*; U.S. CONST. amend. XXVII.

209 U.S. CONST. art. VI, cl. 2.

210 *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824), https://www.loc.gov/item/usrep022001/.

211 *Id.* at 211.

can be found in sections addressing federal preemption (sec. II.2.3, *infra*) and the hierarchy of laws (sec. II.1.3, *infra*).[212]

Other clauses in Article VI affirm the validity of preexisting debts from the state and federal government entered into prior to the Constitution,[213] mandate that elected officials will take an oath of office, and prohibit the use of religious tests to qualify for public office.[214]

FRAME 11

U.S. Constitution, Article VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

II.1.2.2.d) Article VII: Process to Ratify the Constitution

Article VII set forth the process for ratifying the Constitution, which occurred when nine states adopted the Constitution in 1788.[215] After ratification, the first Congress commenced on March 4, 1789.

II.1.2.3 The Bill of Rights

The Constitution's seven articles grant powers to the federal government, delineate the responsibilities of the legislative, executive, and judicial branches, and establish the relationship between the federal and state governments. These articles, however, contain few provisions affirming individual rights.[216] While drafting the Constitution, some delegates moved to add a bill of rights to the text, but these attempts were rejected.[217] A similar effort

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[212] For a brief history of Supreme Court jurisprudence related to the Supremacy Clause, see DOW, D.: "The Unambiguous Supremacy Clause," *Boston College Law Review,* 2012, n. 53, pp. 1012-1016; GARDBAUM, S.: "Nature of Preemption," *Cornell Law Review*, n. 79, 1994, p. 767; and CLARK, B.: "The Procedural Safeguards of Federalism," *Notre Dame Law* Review, 2008, n. 83, p. 1681.

[213] U.S. CONST. art. VI, cl. 1.

[214] *Id.* art. VI, cl. 3.

[215] The 13 states ratified the U.S. Constitution in the following order: Delaware (December 7, 1787); Pennsylvania (December 12, 1787); New Jersey (December 18, 1787); Georgia (January 2, 1788); Connecticut (January 9, 1788); Massachusetts (February 6, 1788); Maryland (April 28, 1788); South Carolina (May 23, 1788); New Hampshire (June 21, 1788); Virginia (June 25, 1788); New York (July 26, 1788); North Carolina (November 21, 1789); and Rhode Island (May 29, 1790). See *Ratification at a Glance*, UNIVERSITY OF WISCONSIN-MADISON, CENTER FOR THE STUDY OF THE AMERICAN CONSTITUTION, https://csac.history.wisc.edu/states-and-ratification/ (last reviewed Mar. 22, 2023).

[216] Individual liberties protected in Articles I-VII include the rights to *habeas corpus*, a jury trial in criminal cases, privileges and immunities of state citizens, and protections against ex post facto laws, bills of attainder, and religious tests.

[217] SCHWARTZ, B.: *The Great Rights of Mankind: A History of the American Bill of Rights*, Madison House, 1992, pp. 104-105.

was made by Congress, and quickly rejected, prior to the Constitution's ratification by the states.[218]

During the ratification process, Antifederalists (those opposed to ratifying the Constitution) feared that the federal government would become too powerful if the Constitution placed unclear limits on it, and "*strongly criticized the absence of a bill of rights, asserting that without one, the Constitution was not an adequate protection of individual rights and liberties*."[219] The Federalists, who supported the Constitution without a bill of rights, stated that further constitutional amendments to install a bill of rights were unnecessary. They argued that state constitutions contained their own bills of rights, Articles I-VII were sufficient to limit federal government overreach, and a bill of rights may suggest that rights omitted from it were not retained by the people.[220] These arguments were unavailing at many state ratifying conventions, where "*opposition to the new Constitution focused upon its failure to contain any bill of rights."*[221]

In late 1787, George MASON, a Virginia delegate to the Constitutional Convention, drafted a pamphlet called *Objections to the Constitution*. *Objections* included his concerns about the Constitution, including, among others, that because the Constitution declared federal laws supreme, "*the Declarations of Rights, in the separate States, are no security*."[222] Similar apprehensions at the time were later described by U.S. Supreme Court Justice Hugo Black:

> *The framers were well aware that the individual liberty rights they sought to protect might easily be nullified if subordinated to the general powers granted to Congress. One of the reasons for adoption of the Bill of Rights was to prevent just that. Specifically, the people feared that the "necessary and proper" clause [art. I, § 8 cl. 18] could be used to project the generally granted Congressional powers into the protected areas of individual rights*.[223]

During the state ratifying conventions, the Constitution's Federalist proponents promised that when the new federal Congress was assembled, legislation would be introduced to include a bill of rights to the Constitution.[224] The states also used this opportunity to propose language for these eventual amendments.[225] By some accounts, eight states proposed over 200 amendments, and *"[t]he state proposals reflected the consensus that had developed among Americans with regard to the fundamental rights that ought to be protected by any Bill of Rights[.]*"[226] Subjects that a majority of these eight states[227] proposed for inclusion in a federal bill of rights included religious freedom, free speech, limits on searches and seizures, a right to jury trials in civil cases, and reserving powers to the states.[228]

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[218] *Id.* at 105.

[219] *Id.* at 106.

[220] EPPS, G.: "The Bill of Rights," *Oregon Law Review*, n. 82, 2003, at 518, 1 Annals of Cong. 455-457 (1789); THE FEDERALIST NO. 84 (Alexander Hamilton).

[221] SCHWARTZ, *supra* note 217, at 119-120.

[222] Mason, G, *Transcription 1: George Mason's "Objections to This Constitution of Government" September 1787*, U.S. NAT'L ARCHIVES AND RECORDS ADMIN, https://www.archives.gov/files/legislative/resources/education/bill-of-rights/images/mason.pdf (last reviewed Mar. 23, 2023).

[223] BLACK, H.: "The Bill of Rights," *New York University Law Review*, n. 35, 1960, p. 865.

[224] SCHWARTZ, *supra* note 217, at 156.

[225] *Id.* at 156-157.

[226] *Id.* at 157.

[227] Pennsylvania, Massachusetts, Maryland, South Carolina, New Hampshire, New York, Virginia, and North Carolina.

[228] SCHWARTZ, *supra* note 217, at 157-158.

During the first Congress on June 8, 1789, James Madison proposed adding a bill of rights to the Constitution from the House floor.[229] A few weeks later, the House created a committee to draft a federal bill of rights, which delivered its first report on July 21, 1789.[230] The House debated the amendments[231] for the next month and agreed to them on August 24.[232] The act was then delivered to the Senate, which agreed to an amended version of the act on September 9.[233] After reviewing the Senate's amendments and making further changes to the act, the House approved the revised act to amend the Constitution by a vote of 37-14 on September 24;[234] the Senate agreed to these amendments on the following day.[235] On October 2, 1789, President Washington delivered to the states' governors copies of the amendments, thus beginning the state ratification process.[236] Although Congress had approved 12 amendments to the Constitution, all but the first two were ratified by three-quarters of the states by December 15, 1791;[237] these provisions, now known as the Bill of Rights, became the first ten amendments to the Constitution.

FRAME 12

The Bill of Rights

First Amendment

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

Second Amendment

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Third Amendment

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported

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229 1 ANNALS OF CONG. 440 (1789): https://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=221.

230 SCHWARTZ, *supra* note 217, at 171-172; 1 ANNALS OF CONG. 699 (1789): https://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=351.

231 For more information about the debates in the House and Senate and links to transcripts of floor proceedings, see the Library of Congress guide, *Bill of Rights: Primary Documents in American History: Digital Collections*, https://guides.loc.gov/bill-of-rights/digital-collections (last visited Mar. 24, 2023).

232 1 ANNALS OF CONG. 808-809 (1789): https://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=405.

233 *Id.* at 80, https://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=42.

234 *Id.* at 948 (1789): https://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=475.

235 *Id.* at 90 (1789), https://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=47.

236 SCHWARTZ, *supra* note 217, at 186.

237 *Bill of Rights (1791)*, U.S. NAT'L ARCHIVES AND RECORDS ADMIN., https://www.archives.gov/milestone-documents/bill-of-rights (last reviewed Mar. 24, 2023); 1 ANNALS OF CONG. 2033-2040 (1789), https://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=002/llac002.db&recNum=378.

by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

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

Sixth Amendment

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

Seventh Amendment

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Ninth Amendment

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Tenth Amendment

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.

Justice Black described the Bill of Rights as "*including all provisions of the original Constitution and Amendments that protect individual liberty by barring government from acting in a particular area or from acting except under certain prescribed procedures*."[238] While not lengthy, the Bill of Rights protects several liberty interests that were important to early Americans:

> *These include protections against attacks on religion, the press, and public assemblies (Amendment I), limitations on unwarranted searches (Amendment IV), defenses against condemnation without trial (Amendment VI), prohibitions against cruel and unusual punishments (Amendment [VIII]), and the prevention of other specific violations of the due process of law [Amendments V, VI]. This list was known by the framers of the Constitution to be partial and unavoidably incomplete, as any such list would be. They therefore included a Ninth Amendment, making it clear that the enumeration of rights in the Constitution "should not be construed to deny or disparage others retained by the people."*[239]

[238] BLACK, *supra* note 223, at 875.

[239] SELLERS, *supra* note 54, p. i31, citing THE FEDERALIST NO. 84 (Alexander Hamilton), at 344-357.

The Bill of Rights went further than the Constitution's seven articles, which "*had created a system of checks and balances in the exercise of the new government's powers*."[240] These amendments reified the relationship between the government and the people, creating "*an entirely new, comprehensive level of checks on all the powers created by the Constitution*," and affirming that the federal government would "*have only specifically enumerated powers and would have no general power over individual rights*."[241]

Subsequent to the Bill of Rights' ratification, additional amendments to the Constitution abolished slavery,[242] provided for women to have the right to vote,[243] and lowered the voting age to 18,[244] to name a few examples.

FRAME 13

U.S. Const., amend. XIV, § 1

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

It is worth emphasizing that the Bill of Rights protects individual liberties from federal government interference, but these amendments initially did not apply to state government actions.[245] This interpretation of the Bill of Rights was memorialized by the U.S. Supreme Court in the 1833 case of *Barron v. Baltimore*.[246] In rejecting an argument that the Bill of Rights applied to state and local government activities, the Court noted:

> *Had the framers of these amendments intended them to be limitations on the powers of state governments, they would have imitated the framers of the original constitution, and have expressed that intention. Had congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.*[247]

However, the Fourteenth Amendment the the Constitution, ratified following the American Civil War, significantly changed the relationship between the federal and state governments. One such change was that the Supreme Court gradually began applying parts of the Bill of Rights to the states. But rather than endorsing a wholesale application of the Bill of Rights to state government actions, "[*m*]*odern Supreme Court doctrine embraces the doctrine of selective incorporation of the Bill of Rights against the states . . . through the Fourteenth Amendment's Due*

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240 PAULSEN, M. AND PAULSEN, L.: *The Constitution: An Introduction*, Basic Books, 2015, at 91.

241 *Id.* at 93 (emphasis in original).

242 U.S. CONST. amend. XIII, § 1.

243 *Id.* amend. XIX.

244 *Id.* amend. XXVI, § 1.

245 BERGER, R.: *The Fourteenth Amendment and the Bill of Rights*, University of Oklahoma Press, 1989, at 6.

246 *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 243-44 (1833), https://www.loc.gov/item/usrep032243/.

247 *Id.* at 250.

Process Clause."[248] In practice, this means that the Court "*has held on a case-by-case basis that many of the provisions of the Bill of Rights limit state government action*."[249] The Due Process Clause provides that no *state* shall "*deprive any person of life, liberty, or property, without due process of law.*"[250] Through this process, most of the Bill of Rights has been applied to the states, including the free exercise of religion,[251] freedom of the press,[252] prohibitions against unreasonable searches and seizures,[253] and restrictions on excessive fines, among others.[254] "*By contrast, the Court has declined to apply to the states the Fifth Amendment's right to a grand jury indictment*[255] *and the Seventh Amendment's guarantee of a jury trial in civil cases in which the amount in controversy exceeds twenty dollars*."[256]

II.1.3. Hierarchy of Laws

In the American system, each branch of government makes laws: Congress enacts statutes; the executive branch crafts agency rules and regulations subject to congressional authority; and the judicial branch publishes court opinions, sometimes referred to as common law. The term "common law" in the American context usually refers to precedential holdings created by courts. Stewart Jay notes:

> *[The common law] brings to mind the image of a body of law, similar to the way in which courts once referred to the English common law as a corpus of specific rules and principles. Usually, however, the "common law" is taken by us to be a convenient expression for the process by which judges make binding judgments based on nonstatutory rules.*[257]

Regardless of the government branch making law, the U.S. Constitution is the most important, and most definitive, source of law in the U.S. system. The U.S. Constitution is the "*supreme law of the land*,"[258] and its clauses are binding on all other government entities.

The Constitution further states that legislation created by Congress within its constitutionally-defined authority is supreme, although the judiciary is bound by the Constitution and has the power to overrule unconstitutional legislation.[259] The U.S. legal system's hierarchy, however, further provides that legislation can override the common law and judicial decisions interpreting statutes. In other words, when judicial rules and precedent are based only on internal decisions, and do not stem from the Constitution, they may be overturned by

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[248] U.S. CONST. amend. XIV, § 1; Cong. Rsch. Serv., *Modern Doctrine on Selective Incorporation of Bill of Rights*, CONSTITUTION ANNOTATED (last visited Mar. 24, 2023): https://constitution.congress.gov/browse/essay/amdt14-S1-4-3/ALDE_00013746/#ALDF_00028676

[249] CONSTITUTION ANNOTATED, *supra* note 248.

[250] U.S. CONST. amend. XIV, § 1.

[251] *Hamilton v. Regents*, 293 U.S. 245, 262 (1934), https://www.loc.gov/item/usrep293245/; *Cantwell v. Connecticut*, 310 U.S. 296, 300, 303 (1940), https://www.loc.gov/item/usrep310296/.

[252] *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 701 (1931) https://www.loc.gov/item/usrep283697/.

[253] *Wolf v. Colorado*, 338 U.S. 25 (1949) https://www.loc.gov/item/usrep338025/; *Mapp v. Ohio*, 367 U.S. 643 (1961) https://www.loc.gov/item/usrep367643/.

[254] *Timbs v. Indiana*, No. 17-1091, slip op. (2019): https://www.supremecourt.gov/opinions/18pdf/17-1091_5536.pdf.

[255] *Hurtado v. California*, 110 U.S. 516 (1884), https://www.loc.gov/item/usrep110516/.

[256] *Adamson v. California*, 332 U.S. 46, 64-65 (1947) https://www.loc.gov/item/usrep332046/; CONSTITUTION ANNOTATED, *supra* note 248.

[257] JAY, S.: "Origins of Federal Common Law: Part One," *University of Pennsylvania Law Review*, n. 133, 1985, pp. 1006-1007.

[258] U.S. CONST. art. IV, cl. 2.

[259] *Id*.

legislative action. One legal historian described American common law doctrine as "*rights and duties that exist notwithstanding the lack of action by a legislative body with respect to the area in question*."[260] If the relevant common law is not based on a constitutional provision, "*a legislature may override what the court declares; but that merely alters the particular rule, not the general authority to make rules*."[261]

In addition to creating the common law and following judicial precedent, courts are charged with interpreting legislation and executive branch regulations. When courts interpret statutes, it is understood that *"[a]ll legislative power . . . shall be vested in a Congress*," and, "*[w]hen the words of a statute are unambiguous, then . . . 'judicial inquiry is complete.'*"[262] If legislation is ambiguous, however, courts follow rules, or canons, of statutory construction and interpretation.[263] Put another way, "*courts have the power to strike down statutes that violate the Constitution, but in all other respects, Congress has absolute authority to determine the contours of statutory law*."[264]

If Congress disagrees with a court's statutory interpretation, it can amend a statute to supersede or override the court's reading.[265] This process differs from overruling a court decision, which only courts are permitted to do, not Congress. "*Up to and until the time when a court subsequently considers the effect of the override, the prior case is not officially overruled."*[266]

Although the executive, judicial, and legislative branches make their own laws and enjoy a certain amount of autonomy, that independence is not absolute. The manner in which these branches create laws, or strike them down, and then respond to the law-making activity of a coordinate branch is a central feature of America's legal system. Learning how the government branches respond to one another's actions is key to understanding U.S. laws and the rule of law principles that undergird them.

II.2. Federal Statutes

It is difficult to point to specific federal statutes as demonstrating rule of law principles in American law. Instead, references to statutes are best understood conceptually or topically, alongside historical context and court decisions interpreting and applying those statutes. To illustrate how federal statutes have been enacted to preserve the rule of law in America, this section focuses on select topics: the creation and administration of lower federal courts; congressionally-authorized federal court powers generally; federal common law issues in criminal and civil cases; and federal preemption.

II.2.1. Congress and the Federal Courts

The Constitution establishes one federal court, the U.S. Supreme Court. Rather than forming lower federal courts in the Constitution, the Framers granted Congress the power to create

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260 JAY, *supra* note 257, at 1007.

261 *Id*.

262 *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992), https://www.loc.gov/item/usrep503249/ (quoting Rubin v. United States, 449 U.S. 424, 430 (1981), https://www.loc.gov/item/usrep449424/).

263 For more information about statutory interpretation, see BRANNON, V., CONG. RSCH. SERV.: *R45153, Statutory Interpretation: Theories, Tools, and Trends*, 2023.

264 WIDISS, D.: "Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides," *Notre Dame Law Review*, n. 84, 2009, p. 518.

265 EIG, L., CONG. RSCH. SERV.: *Statutory Interpretation: General Principles and Recent Trends*, 2014.

266 WIDISS, *supra* note 264, at 531.

federal courts as it "*may from time to time ordain and establish*,"[267] and to *"constitute Tribunals inferior to the [S]upreme Court*."[268] "*Because Congress has the authority to decide whether the lower federal courts should exist, the legislature is also understood to enjoy broad power to structure the lower courts, make procedural rules for them, and regulate their jurisdiction*."[269] Throughout U.S. history, Congress has regularly exercised this power by establishing federal district and appellate courts* and limiting the jurisdiction of the Supreme Court.

> *All of these courts, sometimes called "Article III courts" or "constitutional courts," share three key attributes. First, they exercise the "judicial power of the United States" to resolve "cases" and "controversies" falling within the constitutional grant of federal court jurisdiction. Second, they are staffed by judges who hold their offices "during good Behaviour," which the Supreme Court has interpreted to guarantee life tenure "subject only to removal by impeachment." Third, Article III judges' compensation cannot be "diminished during their Continuance in Office*."[270]

Additionally, Congress has created courts under Article III that enjoy limited jurisidiction over specific claims, issues, and categories of cases.[271] Judges serving on these courts receive lifetime appointments after nomination by the President and approval by the Senate.[272] One example of this type of specialized court is the U.S. Court of Appeals for the Federal Circuit,[273] which has nationwide jurisdiction in appellate cases involving "*international trade, government contracts, patents, trademarks, certain monetary claims against the United States government, federal personnel, veterans' benefits, and public safety officers' benefits claims.*"[274] Another example of a specialized Article III court is the Court of International Trade,[275] which has jurisdiction over civil actions relating to United States customs and international trade laws.[276]

In addition to Article III courts, Congress has authorized federal adjudicative bodies, sometimes referred to as legislative courts, Article I courts, or administrative courts, to decide

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[267] U.S. CONST., art. III, § 1.

[268] *Id.* art. I, § 8, cl. 9.

[269] Cong. Rsch. Serv., *Establishment of Inferior Federal Courts*, CONSTITUTION ANNOTATED (last visited Apr. 20, 2023) (Internal citations omitted): https://constitution.congress.gov/browse/essay/artIII-S1-8-4/ALDE_00013560/

* EdN: The **federal judicial organization of the United States** comprises three levels of jurisdiction. The federal district courts are trial courts. Together with the circuit courts of appeal, the first level of appeal, they constitute the "lower federal courts". The system is headed by the Supreme Court, which is the final level of appeal. For more information, please consult the table of American judicial organization in: EPSTEIN, L and WALKER, T.G.: I*nstitutional powers and Constraints, Constitutional Law for a Changing America*, 8th ed. SAGE publications, 2014, p. 14.

[270] Cong. Rsch. Serv., *Overview of Establishment of Article III Courts*, CONSTITUTION ANNOTATED: https://constitution.congress.gov/browse/essay/artIII-S1-8-1/ALDE_00013557/#ALDF_00025873 (last visited Apr. 19, 2023) (Internal citations omitted).

[271] NOLAN, A. & THOMPSON, R., CONG. RSCH. SERV.: *R43746, Congressional Power to Create Federal Courts: A Legal Overview*, 2015. (Internal citations omitted).

[272] Cong. Rsch. Serv., *Courts of Specialized Jurisdiction and Congress*, CONSTITUTION ANNOTATED: https://constitution.congress.gov/browse/essay/artIII-S1-8-6/ALDE_00013562/ (last visited Apr. 20, 2023).

[273] This court was created by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, https://www.govinfo.gov/content/pkg/STATUTE-96/pdf/STATUTE-96-Pg25.pdf.

[274] *Court Jurisdiction*, U.S. COURT OF APPEALS FOR THE FED. CIR., https://cafc.uscourts.gov/home/the-court/about-the-court/court-jurisdiction/ (last reviewed Apr. 20, 2023).

[275] This court was created by the Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727, https://www.govinfo.gov/content/pkg/STATUTE-94/pdf/STATUTE-94-Pg1727.pdf.

[276] *About the Court*, U.S. COURT OF INT'L TRADE, https://www.cit.uscourts.gov/about-court (last reviewed Apr. 19, 2023).

specific types of cases.[277] Unlike Article III judges, judges on legislative courts are not entitled to lifetime appointments or other protections found in Article III.[278] More information about the powers, dynamics, and distinctions across Article III and Article I courts can be found in sec. II.2.2.5, *infra*.

The following sections discuss Congress's power to prescribe the jurisdiction of the Supreme Court, its power to legislatively override Supreme Court decisions, and recent precedent regarding the authority of Article I judges.

II.2.1.1 The Exceptions Clause

The Constitution grants the Supreme Court original jurisdiction over a limited assortment of cases. These controversies are confined to litigation between states or disputes arising among ambassadors and other high-ranking ministers.[279] Article III further provides that Supreme Court appellate jurisdiction, distinguished from original jurisdiction, is subject to "*such Exceptions, and under such Regulations as the Congress shall make*."[280] Under this clause, the Constitution empowers Congress to have "*significant control over the Court's appellate jurisdiction and proceedings*."[281]

In various pieces of legislation, Congress has permitted Supreme Court appellate jurisdiction over specific subjects, dating back to the Judiciary Act of 1789.[282] Several Supreme Court cases have analyzed its appellate jurisdiction and the extent to which it has jurisdiction, absent congressional authorization. In *Wiscart v. D'Auchy*, the Court was tasked with determining whether it had appellate jurisdiction over admiralty cases.[283] In deciding that Congress had authorized the Supreme Court to hear these cases, Chief Justice Oliver Elsworth noted, "*If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it*."[284] Since the *Wiscart* decision in 1796, several subsequent cases have reaffirmed that the Supreme Court's appellate jurisdiction is constrained by congressional grants of authority, and "*the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress*."[285]

The limits on Supreme Court appellate review can be demonstrated by the case *Ex parte McCardle*.[286] The facts giving rise to *McCardle* occurred during Reconstruction, an era immediately after the Civil War during which Congress divided the former Confederacy into military districts and set forth requirements for readmittance into the Union. The party in

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277 NOLAN & THOMPSON, *supra* note 271, at 11.

278 Cong. Rsch. Serv., *Overview of Congressional Power to Establish Non-Article III Courts*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-9-1/ALDE_00013604/ (last visited Apr. 20, 2023).

279 U.S. CONST., art. III, § 2, cl. 2.

280 *Id*.

281 Cong. Rsch. Serv., *Exceptions Clause and Congressional Control over Appellate Jurisdiction*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C2-6/ALDE_00013618/ (last visited Apr. 20, 2023).

282 Judiciary Act of 1789, ch. 20, 1 Stat. 80-81 (providing for Supreme Court appellate jurisdiction over cases properly before federal district and circuit courts and a subset of cases included in the constitutional grant under U.S. CONST., art. III, § 2, cl. 1-2).

283 *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 321 (1796), https://www.loc.gov/item/usrep003321/.

284 *Wiscart*, 3 U.S. (3 Dall.) at 327.

285 *Barry v. Mercein*, 46 U.S. (5 How.) 103, 119 (1847), https://www.loc.gov/item/usrep046103/; *Daniels v. Railroad*, 70 U.S. (3 Wall.) 250, 254 (1865), https://www.loc.gov/item/usrep070250/; *Turner v. Bank of North America*, 4 U.S. (Dall.) 8, 10 (1799), https://www.loc.gov/item/usrep004008/.

286 *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), https://www.loc.gov/item/usrep074506/.

McCardle had been convicted of acts obstructing reconstruction and filed a writ of *habeas corpus* authorized under an 1867 statute, which the lower court denied in part. He subsequently filed a petition for *certiorari* with the Supreme Court, which granted review.[287]

> *Republican leaders in Congress feared that the Supreme Court, which had already indicated hostility toward the Reconstruction program, would use* McCardle *to hold much of that program unconstitutional. Consequently, Congress repealed the 1867 act on which McCardle's appeal was founded. This was an obvious attempt by Congress to use the exceptions clause to deprive the Court of its appellate power to review the substantive constitutionality of congressional acts. Moreover, the repealing act was not passed until after the case aready had been argued before the Supreme Court*.[288]

After the statute's enactment, the Supreme Court dismissed the case for want of jurisdiction. The Court explained:

> *We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.*
>
> *What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority, than upon principle.*[289]

Since *McCardle*, the Supreme Court has reaffirmed congressional authority to limit Supreme Court purview over classes of cases, or specific cases, an act sometimes referred to as "*jurisdiction stripping*."[290] While Congress is empowed to limit Supreme Court appellate jurisdiction, as well as the authority to regulate the existence, structure, and jurisdiction of lower federal courts, Congress's role regulating judicial affairs is not absolute.[291] Supreme Court precedent provides that under separation of powers principles, Congress may not dictate the "rule of decision" or ultimate outcome of litigation.[292] Conversely, federal legislation may remove federal court jurisdiction over particular matters or specific cases.[293] The reach of Congress over Supreme Court jurisdiction also does not extend to its original jurisdiction, as outlined in the Constitution.[294]

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[287] *Id.* at 508.

[288] ROSSUM, R.: "Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and Spirit of the Exceptions Clause," *William and Mary Law Review*, n. 24, 1983, p. 387.

[289] *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514.

[290] Cong. Rsch. Serv., *Exceptions Clause and Congressional Control over Appellate Jurisdiction*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C2-6/ALDE_00013618/#ALDF_00026829 (last visited Apr. 21, 2023).

[291] LEWIS, K., CONG. RSCH. SERV.: *R44967, Congress's Power over Courts: Jurisdiction Stripping and the Rule of* Klein, 2018.

[292] *United States v. Klein*, 80 U.S. 128 (1871), https://www.loc.gov/item/usrep080128/; *see also* LEWIS, *supra* note 291, at 6 ("the general consensus... is that Klein holds that Congress's authority to regulate federal court jurisdiction is limited by principles of separation of powers, in that it may not direct a court how to rule in a particular case or how to apply the law to the facts in the case at hand.").

[293] *See Patchak v. Zinke*, 583 U.S. ___, slip op. at 6 (2018), https://www.supremecourt.gov/opinions/17pdf/16-498_new_6j37.pdf (dismissing a case for lack of jurisdiction because "Congress can make laws that apply retroactively to pending lawsuits, even when it effectively ensures that one side wins."); *see also* Lewis, *supra* note 291, at 19-22 (summarizing modern jurisprudence on jurisdiction stripping and the limits of congressional authority on this topic).

[294] U.S. CONST. art. III, § 2, cl. 2.

II.2.1.2 Legislative Overrides

Congress is solely responsible for enacting statutes.[295] Courts are tasked with interpreting these statutes. "*[W]hen statutory language is unclear, or doesn't explicitly resolve a factual question that arises under a statute, courts must resolve the issue through statutory interpretation*."[296] If Congress disagrees with a court's interpretation of a statute, it may amend the law to clarify its meaning, which should bind the courts in future cases.

As stated previously (sec. II.1.3, *supra*), the Constitution prohibits Congress from overruling federal court decisions striking statutory provisions on constitutional grounds.[297] The authority to overrule constitutional Supreme Court precedent rests exclusively with the Court. But with respect to court decisions interpreting statutory language, Congress may enact a statute to "override" such interpretation.[298] "*[O]verrides often track relatively closely the specific holding or factual application of the decision they seek to supersede. Thus, a subsequent factual scenario that raises precisely the same questions under precisely the same statute as the case that led to the override will be easiliy resolved by the now-controlling [statute.]"*[299] Generally, these overrides are prospective only, unless Congress expresses a clear intent on retrospective application.[300]

How this process works in practice can be demonstrated by legislative actions taken subsequent to the case *Ledbetter v. Goodyear Tire & Rubber Co., Inc*.[301] In that case, the Supreme Court held that the plaintiff had failed to timely file a claim for workplace sex discrimination under Title VII of the Civil Rights Act, which had a two-year statute of limitations from the date on which the discriminatory act(s) occurred.[302] In response, Congress enacated the Lilly Ledbetter Fair Pay Act of 2009, which amended Title VII to clarify the congressional intent related the act's statute of limitations, and prevent cases similar to Ledbetter's from being dismissed as untimely. The findings of that law explain its legislative intent to override *Ledbetter*:

> *The Supreme Court in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The Ledbetter decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for*

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295 *Id.* art. I, § 1.

296 WIDISS, D. "How Courts Do – and Don't – Respond to Statutory Overrides," *Judicature*, n. 104, Spring 2020, p. 50, https://judicature.duke.edu/wp-content/uploads/2020/04/widiss-spring2020.pdf

297 WIDISS, *supra* note 264, at 531.

298 The topic of statutory interpretation by courts is a vast topic that this article is unable to fully address. However, this subject has been studied by many jurists and law professors, and has amassed a catalog of peer-reviewed articles, some of which include: ESKRIDGE, W. "Overriding Supreme Court Statutory Interpretation Decisions," *Yale Law Journal*, n. 101, 1991, p. 331 and GLUCK, A. AND POSNER, R. "Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals," *Harvard Law Revoew*, n. 131, 2018, p. 1302. For a more succinct discussion of the topic, see BRANNON, V., CONG. RSCH. SERV.: *R45153, Statutory Interpretation: Theories, Tools, and Trends*, 2023.

299 WIDISS, *supra* note 264, at 531.

300 *Id.* at 535. *See Landgraf v. USI Film Products*, 511 U.S. 244 (1994), https://www.loc.gov/item/usrep511244/ (noting that fairness dictates individual should "know what the law is" so they can conform their behavior to it and "settled expectations" are not interrupted); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994), https://www.loc.gov/item/usrep511298/ (holding that a statutory override had only a prospective effect, absent an express directive from Congress).

301 *Ledbetter v. Goodyear Tire & Rubber Co., Inc*, 550 U.S. 618 (2007), https://www.loc.gov/item/usrep550618/.

302 *Id.* at 621.

> *discriminatory compensation decisions or other practices, contrary to the intent of Congress.*[303]

This process has been described by one scholar as "core to maintaining democratic accountability for policy."[304]

II.2.2. Federal Statutes, Federal Courts and the Common Law

The Judiciary Act of 1789[305] was the first federal legislation to address the federal judiciary and create lower courts. Some provisions in this statute address the size of the Supreme Court, geographical boundaries and jurisdiction of district courts, oaths of office, and penalties for certain crimes, to name a few examples. Although this law outlined the structure and jurisdiction of the federal court system, questions remained about the extent of the judiciary's powers.

At the outset, it is important to note that federal courts created under the U.S. Constitution, art. III, and subsequent federal statutes do not have sweeping jurisdiction over all legal disputes. "*Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision*."[306] Instead, federal courts are understood to have "limited jurisdiction," which has been described as having "*cognizance, not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases which an unlimited jurisdiction would embrace*."[307] Succinctly stated by one author, "*federal jurisdiction is regarded as nonexistent unless the party invoking it can demonstrate authorization grounded in constitutional and statutory origins*."[308]

II.2.2.1 Early American Criminal Law Statutes

At the turn of the 19th century, disputes arose in Congress and among jurists as to the extent of the federal judiciary's authority.[309] Much of the debate during this time revolved around common-law crimes, or criminal charges for actions not explicitly proscribed by the Constitution or federal statute. Around the 1790s, Congress had enacted laws identifying crimes under the federal judiciary's purview, but some of this legislation was nebulous. For example, the Judiciary Act of 1789 provides that federal circuit courts "*shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein*."

In 1790, Congress enacted the first federal criminal statute.[310] This law focused on crimes against the United States, including:

> *treason, counterfeiting or forgery of public securities, theft or forgery of judicial records, perjury in federal courts or in depositions taken pursuant to the law of the United States,*

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303 Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 102, 123 Stat. 5 (2009): https://www.congress.gov/111/plaws/publ2/PLAW-111publ2.pdf.

304 WIDISS, *supra* note 296, at 51.

305 An Act to establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789), https://tile.loc.gov/storage-services/service/ll/llsl//llsl-c1/llsl-c1.pdf#page=192.

306 *Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981), https://www.loc.gov/item/usrep451304/.

307 *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8, 11 (1799), https://www.loc.gov/item/usrep004008/.

308 JAY, *supra* note 257, at 1004.

309 *Id.* at 1010.

310 An Act for the Punishment of certain Crimes against the United States, ch. 9, 1 Stat. 112 (1790), https://tile.loc.gov/storage-services/service/ll/llsl//llsl-c1/llsl-c1.pdf#page=231.

> *bribery of federal judges, rescue of federal prisoners committed or convicted of capital crimes and attempts to subject foreign ministers to arrest. In addition, on federal reservations and on navigable waters and the high seas, murder, manslaughter, robbery, mutiny, piracy, theft of federal implements of war, receiving stolen property and harboring felons were defined as crimes against the United States. Treason, murder, robbery, piracy, mutiny, accessories before the fact to such felonies and counterfeiting public securities were punished by death. Other offenses were punished by imprisonment and/or fine.*[311]

While these laws provided clear federal court jurisdiction over certain matters, questions remained over whether "laws of the United States" as set forth in the 1789 legislation included common-law crimes. According to one scholar, when analyzing statutory and constitutional authority against Supreme Court precedent, "*the judiciary could choose either to follow a properly federal common law or else insist on federal statutes to exercise those jurisdictions . . . . They chose to rely on federal statutes, so that the propriety of a federal common law of crime . . . was certainly dubious*" before the matter was formally settled by the Supreme Court.[312]

II.2.2.2 Federal Common-law Crimes

To understand the historical application of common-law crimes in federal courts, and the boundaries of federal court powers, contextual information found in relevant case law is helpful. In *Henfield's Case*, decided in 1793, American citizen Gideon Henfield was indicted for serving as prize master (an officer in charge of a seized ship) while aboard a French privateer when it was captured by a British vessel while American and Great Britain were at peace.[313] While it was argued that his actions did not technically amount to a crime listed in federal statutes, the charges asserted that Henfield's actions violated treaties between the United States and France's European enemies, as well as the U.S. Constitution, and were "*against the peace and dignity of the said United States*."[314] In response to the defendant's argument that the court could point to no law defining Henfield's actions as a crime, and that the federal court therefore lacked jurisdiction over the matter,[315] a judge hearing the case explained to the jury:

> *It is the joint and unanimous opinion of the court, that the United States, being in a state of neutrality relative to the present war, the acts of hostility committed by Gideon Henfield are an offence against this country, and punishable by its laws. It has been asked by his counsel, in their address to you, against what law has he offended? The answer is, against many and binding laws. As a citizen of the United States, he was bound to act no part which could injure the nation; he was bound to keep the peace in regard to all nations with whom we are at peace. This is the law of nations; not an ex post facto law, but a law that was in existence long before Gideon Henfield existed. There are, also, positive laws, existing previous to the offence committed, and expressly declared to be part of the supreme law of the land. The constitution of the United States has declared that all treaties made, or to be made, under the authority of the United States, shall be part of the supreme law of the*

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311 PREYER, K.: "Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic," *Law and History Review*, n. 4, 1986, pp. 225-226 (citing ch. 9, 1 Stat. 112 (1790)).

312 PALMER, R.: "The Federal Common Law of Crime," *Law and History Review*, n. 4, 1986, p. 272: https://scholarship.law.wm.edu/facpubs/900/.

313 *Henfield's Case*, 11 F. Cas. (C.C. Dist. of Pa. 1793) 1099, 1117, https://cite.case.law/f-cas/11/1099/.

314 JAY, *supra* note 257, at 1050 (quoting *Henfield*, 11 F. Cas. at 1109-1015).

315 Congress later made actions like Henfield's a crime in 1794. See An Act in addition to the act for the punishment of certain crimes against the United States. (a), ch. 50, 1 Stat. 381, https://tile.loc.gov/storage-services/service/ll/llsl//llsl-c3/llsl-c3.pdf#page=41, *repealed by* Act of April 20, 1818, ch. 88, 3 Stat. 450, https://tile.loc.gov/storage-services/service/ll/llsl//llsl-c15/llsl-c15.pdf#page=47.

> *land. I will state to you, gentlemen, so much of the several treaties in force between America and any of the powers at war with France, as applies to the present case*.[316]

A jury acquitted Henfield of these charges, without providing an explanation behind the acquittal.[317]

Although earlier courts had permitted indictments for criminal charges without a statutory basis, *Henfield* is described as being "the first that required extensive justification."[318] Cases decided around the same time as *Henfield* determined that federal courts could hear common-law criminal cases in some situations, although these circumstances were limited. See *U.S. v. Ravara* (upholding a conviction without statutory authority when the defendant committed a crime while serving as a foreign minister); [319] *Williams' Case* (finding jurisdiction under facts similar to *Henfield*);[320] and *United States v. Smith* (holding a common law indictment for counterfeiting could proceed because the U.S. Constitution granted federal court jurisdiction over "*all causes or cases . . . arising under. . .the laws of the United States,"* and the statute creating the Bank of the United States was a valid U.S. law).[321] As can be demonstrated from these examples, federal courts generally understood that they had jurisdiction over common-law crimes perpetrated against the United States, or committed in violation of the laws of nations.[322]

Although it was generally agreed that the law of nations could serve as a sufficient basis for common-law crimes, it was less clear that common-law crimes could survive in purely domestic matters. Further debates on this topic appeared in the 1798 case of *United States v. Worrall*.[323] Worrall was charged with attempted bribery of the Commissioner of Revenue over a federal lighthouse construction project. After Worrell was found guilty, the defense argued that the verdict should be set aside beause the charge had no constitutional or statutory basis.[324] In rejecting the idea that the crime was grounded in common law, the defense argued that the Constitution included:

> *no reference to a common law authority: Every power is [a] matter of definite and positive grant; and the very powers that are granted cannot take effect until they are exercised through the medium of a law. Congress had undoubtedly a power to make a law, which should render it criminal to offer a bribe to the commissioner of the revenue; but not having made the law the crime is not recognized by the federal code, constitutional or legislative; and, consequently, it is not a subject on which the judicial authority of the Union can operate*.[325]

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316 *Henfield*, 11 F. Cas. at 1120.

317 *Id.* at 1122.

318 JAY, *supra* note 257, at 1053; PREYER, *supra* note 311, at 227-228.

319 *U.S. v. Ravara*, 27 F. Cas. 713 (1793), https://cite.case.law/f-cas/27/713/.

320 *Williams' Case*, 29 F. Cas. 1330 (1799), https://cite.case.law/f-cas/29/1330/.

321 *U.S. v. Smith*, 27 F. Cas. 1147, 1147-1148 (1792), https://cite.case.law/f-cas/27/1147/. After the disposition of this case, Congress criminalized the act of counterfeiting against the Bank of the United States. See An Act to punish frauds committed on the Bank of the United States, ch. 61, 2 Stat. 573 (1798), https://tile.loc.gov/storage-services/service/ll/llsl//llsl-c5/llsl-c5.pdf#page=38.

322 PREYER, *supra* note 311, at 225-233; JAY, *supra* note 257, at 1053-1067.

323 *U.S. v. Worrell*, 28 F. Cas. 774 (1798), https://cite.case.law/f-cas/28/774/.

324 *Id.* at 776.

325 *Id.* at 777-778.

In response, the prosecution asserted that the indictment was supported at common law[326] and also arose under the laws of the United States. "*Since Congress had established the office of Commissioner of the Revenue, attempted corruption of that officer justified prosecution, even without prior congressional definition. Since Worrall could not have attempted the bribe had Congress not created the office, such an attempt was a case arising under the laws of the United States.*"[327]

Justice Samuel Chase ruled that constitutional principles could not condone the prosecution's argument, or a conviction stemming only from a common-law crime. In issuing his ruling, Justice Chase explained its basis in American history and federalism principles:

> *When the American colonies were first settled by our ancestors, it was held, as well by the settlers, as by the judges and lawyers of England, that they brought hither, as a birth-right and inheritance, so much of the common law as was applicable to their local situation and change of circumstances. But each colony judged for itself what parts of the common law were applicable to its new condition; and in various modes by legislative acts, by judicial decisions, or by constant usage, adopted some parts, and rejected others. Hence, he who shall travel through the different states, will soon discover, that the whole of the common law of England has been nowhere introduced; that some states have rejected what others have adopted; and that there is, in short, a great and essential diversity in the subjects to which the common law is applied, as well as in the extent of its application. The common law, therefore, of one state, is not the common law of another; but the common law of England, is the law of each state, so far as each state has adopted it; and it results from that position, connected with the judicial act, that the common law will always apply to suits between citizen and citizen, whether they are instituted in a federal or state court.*[328]

Several years later, the Supreme Court was presented with a similar inquiry about federal common-law crimes. In the 1812 case *United States v. Hudson*, it was asked to determine whether federal courts "*can exercise a common-law jurisdiction in criminal cases*" absent a grant of authority from Congress.[329] *Hudson* involved common-law criminal charges of seditious libel charges against various government actors who made derogatory statements against President Jefferson.[330] In answering that federal courts have no jurisdiction over these types of claims, the Court first addressed federalism, noting, "*The powers of the general Government are made up of concessions from the several states—whatever is not expressly given to the former,*

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[326] *Id.* at 778.

[327] PALMER, *supra* note 312, at 315.

[328] *U.S. v. Worrell*, 28 F. Cas. at 779. Judge Peters, also sitting on this case, offered a view of the state of the law contrasting from that of Justice Chase (at 779-780):

> *[T]he existence of the federal government would be precarious, and it could no longer be called an independent government, if, for the punishment of offences of this nature, tending to obstruct and pervert the administration of its affairs, an appeal must be made to the state tribunals, or the offenders must escape with absolute impunity.*
>
> *The power to punish misdemeanours is originally and strictly a common law power; of which I think the United States are constitutionally possessed. It might have been exercised by congress in the form of a legislative act; but it may also, in my opinion, be enforced in a course of judicial proceeding. Whenever an offence aims at the subversion of any federal institution, or at the corruption of its public officers, it is an offence against the well-being of the United States; from its very nature, it is cognizable under their authority; and, consequently, it is within the jurisdiction of this court, by virtue of the 11th section of the judicial act [of 1789, which section gave federal courts jurisdiction over "crimes and offences cognizable under the authority of the United States"].*

[329] *United States v. Hudson*, 11 U.S. (7 Cranch) 32, https://www.loc.gov/item/usrep011032/.

[330] JAY, *supra* note 257, at 1013 (citing Crosskey, W.: *Politics and the Constitution in the History of the United States*, University of Chicago Press, 1953, 771-72).

the latter expressly reserve." The Court further elaborated on its reasoning by discussing separation of powers among the three coordinate branches:

> *The judicial power of the United States is a constituent part of those concessions; that power is to be exercised by courts organized for the purpose; and brought into existence by an effort of the legislative power of the Union. Of all the courts which the United States may, under their general powers, constitute, the only, the supreme court, possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. All other courts created by the general government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general government will authorize them to confer*.[331]

As a result of this case history, American federal courts have no common law of crime.[332] Procedurally, crimes may be prosecuted in federal courts only if Congress has enacted a constitutional statute setting forth a crime's elements and penalty, and granted the federal judiciary jurisdiction over the offense.[333] A more concise way to understand this jurisdictional doctrine is, "*Courts created by statute can have no jurisdiction but such as the statute confers*."[334] While the line of cases leading up to the *Hudson* decision addressed common-law crimes, it would be decades before the Supreme Court would clarify aspects of the application of federal common law in the context of civil claims, as discussed, *infra*, sec. II.2.2.4.

II.2.2.3 Federal Rules of Civil Procedure

Congress passed the Rules Enabling Act in 1934, granting the U.S. Supreme Court the authority to create uniform civil procedure rules across the federal courts.[335] This legislation made significant changes to civil cases brought in federal courts. Prior to the the 1934 Act, the existence of uniform rules across the federal courts depended on whether the action sounded in equity or law, a distinction carried over from English law, which featured separate equity and common law courts.[336] The Rules of Decision Act of 1789 mandated that the procedural rules in federal courts "*in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same*."[337] In practice, this language meant that the procedural rules followed in federal courts differed across each district, and state court procedural rules dictated federal procedure. Additionally, the language "as are now used" was

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331 *United States v. Hudson*, 11 U.S. at 33.

332 PALMER, *supra* note 312, at 322. Federal courts continue to dismiss criminal charges in cases where the government fails to link the defendant's alleged activity to a criminal statute. See e.g. *U.S. v. Guertin*, No. 22-3011 (D.C. Cir., May 7, 2023): https://www.cadc.uscourts.gov/internet/opinions.nsf/8FD0A9B162C723E6852589B1004F2E13/$file/22-3011-1999388.pdf.

333 See U.S. Code, title 18 for federal criminal statutes: https://uscode.house.gov/browse/prelim@title18&edition=prelim.

334 *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850).

335 An Act To give the Supreme Court of the United States authority to make and publish rules in actions at law, ch. 651, 48 Stat. 1064 (1934), https://uscode.house.gov/statviewer.htm?volume=48&page=1064.

336 KITTLE, W.: "Courts of Law and Equity—Why They Exist and Why They Differ," *West Virginia Law Quarterly*, n. 26, 1919, pp. 21-34, https://researchrepository.wvu.edu/cgi/viewcontent.cgi?article=5716&context=wvlr

337 An Act to regulate Processes in the Courts of the United States, ch. 21, 1 Stat. 93 (1789): https://tile.loc.gov/storage-services/service/ll/llsl//llsl-c1/llsl-c1.pdf#page=212.

interpreted to mean that courts had to follow rules in place during 1789, despite the passage of time and amendments to procedural rules.[338]

FRAME 14

Judiciary Act of 1789, ch. 20, 1 Stat. 73, § 34

And be it further enacted, That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.

A later act provided that for states admitted to the union after 1789, their federal court procedural rules would match state rules of procedure as they existed when the state joined the union.[339] For example, Michigan was granted statehood in 1837, and thus its federal courts hearing cases in common law were required to follow state procedural rules in existence in 1837. This pre-1934 practice of federal courts adopting state procedural rules is referred to as conformity.[340]

FRAME 15

Rules of Decision Act of 1789, ch. 21, 1 Stat. 93, § 2

And be it further enacted, That until further provision shall be made, and except where by this act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, and modes of process and rates of fees, except fees to judges, in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same. And the forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction, shall be according to the course of the civil law; and the rates of fees the same as are or were last allowed by the states respectively in the court exercising supreme jurisdiction in such causes.

When federal courts heard cases in equity, on the other hand, they followed a different approach. In legislation known as the Process Act of 1792, Congress authorized the Supreme Court to establish uniform procedural rules for cases in equity and admiralty.[341] But outside of cases in equity and admiralty, federal courts' conformity to state practices resulted in different procedural rules that varied both by jurisdiction and subject matter, which created a source of friction across the federal courts.[342] *"The result was a patchwork of civil procedure in the nation's courts."*[343]

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338 BURBANK, S.: "The Rules Enabling Act of 1934," *University of Pennsylvania Law Review*, n. 130, 1982, p. 1037 (citing *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 32 (1825), https://www.loc.gov/item/usrep023001/).

339 An Act further to regulate processes in the courts of the United States, ch. 68, 20 Stat. 278 (1832): https://tile.loc.gov/storage-services/service/ll/llsl//llsl-c20/llsl-c20.pdf#page=33.

340 BURBANK, *supra* note 338, at 1036-1043.

341 An Act for regulating Processes in the Courts of the United States, and providing Compensations for the Officers of the said Courts, and for Jurors and Witnesses, ch. 36, 2 Stat. 275 (1792): https://tile.loc.gov/storage-services/service/ll/llsl//llsl-c2/llsl-c2.pdf#page=50.

342 BURBANK, *supra* note 338, at 1036.

343 HOLT, D.: "From Conformity to Uniformity: The Rules Enabling Act of 1934 and the Rise of Federal Judicial Authority," *The Federal Lawyer*, 2012, p. 48, https://www.fedbar.org/wp-content/uploads/2012/05/feature4-may12-pdf-1.pdf.

FRAME 16

Process Act of 1792, ch. 36, 2 Stat. 275, § 2

And be it further enacted, That the forms of writs, executions and other process except their style and the forms and modes of proceeding in suits in those of common law shall be the same as are now used in the said courts respectively in pursuance of the act, entitled " An act to regulate processes in the courts of the United States," in those of equity and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law; except so far as may have been provided for by the act to establish the judicial courts of the United States, subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same[.]

In 1872, Congress passed the Conformity Act, which provided for more flexibility for actions at law, and permitted federal courts to follow contemporary state procedural laws, rather than the earlier static approach.[344] In practice, however, true conformity was difficult to achieve.

> *The Conformity Act required that the "practice, pleadings, and forms and modes of proceeding" in civil cases in circuit and district courts "conform as near as may be" to those of the states in which they were held. The Supreme Court, however, interpreted the phrase "as near as may be" as giving judges broad discretion to differ from state procedure when a judged [sic] deemed it necessary to do so. "While the act of Congress is to a large extent mandatory," the Court stated in an 1875 opinion, "it is also to some extent only directory and advisory." Some state procedures were also specifically superseded by congressional statute. In addition, federal judges had a difficult time keeping up with the revisions in state procedural codes. . . . In addition, Congress had long ago empowered the Supreme Court to establish rules for equity procedure in the federal courts, which the Court did in 1822 and 1842. Thus, not only did states' procedural rules differ from one another as state legislatures continually amended their codes, but individual federal courts also had rules that were distinct both from the courts of the state in which they sat and the federal courts in other districts*.[345]

In the 1880s, members of the nascent American Bar Association (ABA)[346] began advocating for a more uniform approach to civil procedure across federal courts. The ABA submitted reports to Congress and members publicly expressed dissatisfaction with federal civil practice.[347] Over the next several decades, the ABA lobbied Congress to permit the courts to reform the system.[348]

Congress eventually passed the Rules Enabling Act in 1934, granting the Supreme Court the power to "*prescribe general rules of practice and procedure and rules of evidence*" for federal courts.[349] "*The Act has been described as a treaty between Congress and the judiciary and*

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[344] An Act to further the Administration of Justice, ch. 255, 17 Stat. 196 (1872): https://tile.loc.gov/storage-services/service/ll/llsl//llsl-c42/llsl-c42.pdf#page=238.

[345] HOLT, *supra* note 343, at 48 (internal footnotes omitted).

[346] The ABA was formed in 1878, only a few years before its advocacy push on uniform federal court rules. See *ABA Timeline*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/about_the_aba/timeline/ (last visited Mar. 31, 2023).

[347] BURBANK, *supra* note 338, at 1043-1047.

[348] *Id*. at 1050-1094.

[349] An Act To give the Supreme Court of the United States authority to make and publish rules in actions at law, ch. 651, 48 Stat. 1064 (1934), https://uscode.house.gov/statviewer.htm?volume=48&page=1064.

represents a manifestation of the traditional doctrine of separation of powers. Congress, through the Act, delegated the essential rulemaking function to a co-equal branch of government while retaining the ability to review and reject any rule adopted by the Supreme Court."[350] The legislation was limited in scope, focused only on granting of power to the Court; the act did not create federal court rules.

FRAME 17

Rules Enabling Act of 1934, ch. 651, 73 Stat. 1064

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: Provided, however, That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session.

In 1935, the Supreme Court appointed a committee to solicit feedback from federal judges and suggest rules.[351] The Supreme Court approved and adopted the first Federal Rules of Civil Procedure in 1938.[352] They "profoundly changed practice in the federal courts. The Federal Rules ushered in a system of simplified pleading, broad discovery, and judicial discretion[.]"[353] Additionally, the rules eliminated the disparate treatment between matters at common law and matters in equity; after the rules' adoption, civil procedure became uniform across all courts and cases.[354]

During subsequent years the Supreme Court adopted uniform federal rules on other matters, namely the Federal Rules of Criminal Procedure (1944), the Federal Rules of Appellate Procedure (1968), the Federal Rules of Evidence (1972), and the Federal Rules of Bankruptcy Procedure (1973). "*Over time, the work and oversight of the rulemaking process was delegated by the Court to committees of the Judicial Conference [of the United States].*"[355] In 1988, Congress amended the Rules Enabling Act to formalize the work of the Judicial Conference in statute.[356] Amendments to these rules are recommended to a Standing Committee on Rules of Practice

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[350] *Laws and Procedures Governing the Work of the Rules Committees*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, https://www.uscourts.gov/rules-policies/about-rulemaking-process/laws-and-procedures-governing-work-rules-committees (last reviewed Mar. 31, 2023).

[351] HOLT, *supra* note 343, at 51.

[352] *Id.*

[353] *Id.*

[354] *Federal Rules of Civil Procedure*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE: https://www.law.cornell.edu/wex/federal_rules_of_civil_procedure (last reviewed Mar. 31, 2023).

[355] *How the Rulemaking Process Works*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works (last reviewed Mar. 31, 2023).

[356] Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified as 28 U.S.C. § 2071 *et seq.*), https://www.congress.gov/bill/100th-congress/house-bill/4807/text/pl?overview=closed.

and Procedure by five advisory committees, each of which focus on a specific set of rules.[357] The Administrative Office of the U.S. Courts has summarized the amendment process, which involves congressional approval:

> *If an advisory committee pursues a proposal, it may seek permission from the Standing Committee to publish a draft of the contemplated amendment. Based on comments from the bench, bar, and general public, the advisory committee may then choose to discard, revise, or transmit the amendment as contemplated to the Standing Committee. The Standing Committee independently reviews the findings of the advisory committees and, if satisfied, recommends changes to the Judicial Conference, which in turn recommends changes to the Supreme Court. The Court considers the proposals and, if it concurs, officially promulgates the revised rules by order before May 1, to take effect no earlier than December 1 of the same year unless Congress enacts legislation to reject, modify, or defer the pending rules*.[358]

Each of the five sets of federal procedural rules have been amended several times since their adoption.[359]

II.2.2.4 Erie Doctrine

The advent of uniform procedural rules across federal courts were followed by another shift in federal court jurisprudence. The *Erie* Doctrine, named after the 1938 Supreme Court case from which it is derived, *Erie Railroad Co. v. Tompkins*, addresses how to determine which procedural and substantive laws the federal courts must follow when reviewing cases involving "diversity jurisdiction." While federal courts enjoy jurisdiction over cases against the U.S. government, matters involving the Constitution or federal laws, and controversies between states or between the U.S. government and foreign governments,[360] federal statutes[361] also confer federal court jurisdiction over claims and controversies between citizens of different states when the value of the claim exceeds a monetary threshold, known as diversity jurisdiction.

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[357] *Committee Membership Selection*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, https://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection (last reviewed Mar. 31, 2023).

[358] *How the Rulemaking Process Works*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works (last reviewed Mar. 31, 2023).

[359] See the historical notes under each set of rules to find data about their amendments: *Federal Rules of Civil Procedure*, CORNELL UNIVERSITY LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/rules/frcp (last reviewed Mar. 31, 2023); *Federal Rules of Appellate Procedure*, CORNELL UNIVERSITY LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/rules/frap (last reviewed Mar. 31, 2023); *Federal Rules of Criminal Procedure*, CORNELL UNIVERSITY LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/rules/frcrmp (last reviewed Mar. 31, 2023); *Federal Rules of Evidence*, CORNELL UNIVERSITY LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/rules/fre (last reviewed Mar. 31, 2023); *Federal Rules of Bankruptcy Procedure*, CORNELL UNIVERSITY LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/rules/frbp (last reviewed Mar. 31, 2023).

[360] U.S. CONST., art. III, § 2, cl. 1.

[361] This jurisdiction was originally granted under the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73. The law is now codified at 28 U.S.C. § 1332: https://uscode.house.gov/view.xhtml?req=(title:28%20section:1332%20edition:prelim)%20OR%20(granuleid:USC-prelim-title28-section1332)&f=treesort&num=0&edition=prelim.

FRAME 18

28 U.S.C. § 1332, Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between-

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title-

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of-

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

As courts of limited jurisdiction, federal courts must have jurisdiction not only over the parties before the court, but also over the subject matter of the suit. Diversity jurisdiction is one form of such subject matter jurisdiction. Federal court "*subject matter jurisdiction in diversity cases is predicated upon the fact that the opposing litigants are from different states*[.]"[362]

Because diversity cases may involve a mix of state and federal laws, a foundational question for courts is to determine which laws to apply to particular cases. Under the *Erie* Doctrine, federal courts in diversity cases must apply the substantive state law of the state where the court sits, unless federal law governs the issue.[363]

Prior to the *Erie* decision, federal courts overseeing diversity cases relied on the 1842 Supreme Court holding in *Swift v. Tyson*,[364] which stood for the proposition that federal courts did not need to adhere to state court precedent. In both *Swift* and *Erie*, the Supreme Court interpreted

[362] Cong. Rsch. Serv., *State Law in Diversity Cases and the Erie Doctrine*, CONSTITUTION ANNOTATED: https://constitution.congress.gov/browse/essay/artIII-S2-C1-16-6/ALDE_00013246/ (last visited Mar. 31, 2023).

[363] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 79-80 (1938), https://www.loc.gov/item/usrep304064/.

[364] *Swift v. Tyson*, 41 U.S. (16. Pet.) 1 (1842), https://www.loc.gov/item/usrep041001/.

section 34 of the Judiciary Act of 1789, which provides that the "*laws of the several states . . . shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply*."[365] The *Swift* Court determined that state court decisions could not be construed as "laws" under section 34, and therefore were not binding on federal judges, unless the underlying controversy involved a truly local issue.[366] "*For nearly a century after Swift, the Court issued a series of decisions that expanded the areas in which federal judges were free to construct a federal common law, while restricting the definition of 'local' laws*."[367]

While federal courts' adherence to *Swift's* holding was longstanding, its application was controversial among courts and in Congress. For example, in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, the Supreme Court had to decide whether it was permissible for a party to forum-shop by moving its business and subsequently filing a case in a federal district where the federal common law was more favorable to the facts of the case.[368] In *Black & White*, a Kentucky corporation reincorporated in a different state, but did not change its corporate name, officers, shareholders, or location of its business.[369] "*A Court majority, over a strong dissent by Justice Oliver Wendell Holmes, found no collusion and upheld diversity jurisdiction. The resulting application of federal common law allowed the corporation to prevail on its claims when it would have otherwise lost under state law had it sued in state court.*"[370]

Erie arose from a personal injury case by a citizen of Pennsylvania who was injured by a New York-incorporated railroad company's train while walking along the tracks.[371] Under Pennsylvania law, the railroad's liability would have been limited because the plaintiff was trespassing while he was injured; under federal common law, the defendant had greater liability because the plaintiff could have been designated as a licensee who was permitted to be on the property.[372] In reaching its holding that in diversity cases state law rather than federal common law must apply, the *Erie* Court noted several of *Swift's* "*defects, political and social*," and its "*mischevious results*," including a lack of uniformity in applying common law rights in federal and state courts located in the same jurisdiction.[373] "*In attempting to promote uniformity of law thorughout the United States, the doctrine had prevented uniformity in the administration of the law of the State*."[374] The Court emphasized that the "injustice and confusion incident to the doctrine of *Swift v. Tyson*," and the resulting "unconstitutionality" of *Swift's* impact compelled the Court to overturn this decision. Additionally, the Court reasoned that unless a federal court case arose from the Constitution or an act of Congress, "*the law to be applied in any case is the law of the State," because the Constitution does not grant to federal*

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365 Judiciary Act of 1789, ch. 20, 1 Stat. 73, § 34 (1789), https://tile.loc.gov/storage-services/service/ll/llsl//llsl-c1/llsl-c1.pdf#page=211. The current version of this statute is codified at 28 U.S.C. § 1652: https://uscode.house.gov/view.xhtml?req=(title:28%20section:1652%20edition:prelim)%20OR%20(granuleid:USC-prelim-title28-section1652)&f=treesort&num=0&edition=prelim.

366 *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842).

367 Cong. Rsch. Serv., *State Law in Diversity Cases and the Erie Doctrine*, CONSTITUTION ANNOTATED: https://constitution.congress.gov/browse/essay/artIII-S2-C1-16-6/ALDE_00013246/ (last visited Mar. 31, 2023).

368 *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928), https://www.loc.gov/item/usrep276518/.

369 *Id.* at 523.

370 Cong. Rsch. Serv., *State Law in Diversity Cases and the Erie Doctrine*, CONSTITUTION ANNOTATED: https://constitution.congress.gov/browse/essay/artIII-S2-C1-16-6/ALDE_00013246/ (last visited Mar. 31, 2023) (internal citations omitted).

371 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 69 (1938).

372 *Id.* at 69-70.

373 *Id.* at 74-75.

374 *Id.* at 75.

courts the power to establish a federal general common law, and "Congress has no power to declare substantive rules of common law applicable in a State[.]"[375]

II.2.2.5 Congressional Authority over Non-Article III Courts

As noted in sec. II.2.1, *supra*, the Constitution vests Congress with the power to create lower courts. Because Article III of the Constitution provides that "*the judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish*,"[376] it is easy to assume that judicial power might be confined to judges in courts established under Article III, who have lifetime tenure and other job protections to insulate them from external political forces. But Congress has also used its plenary legislative power to create non-Article III judicial bodies, which are charged with adjudicating specific cases and subjects. Examples of non-Article III courts include "*specialized standalone-courts, administrative agencies, and magistrate judges who serve under Article III judges.*"[377]

Non-Article III courts have been given multiple titles, including "Article I tribunals" (reflecting that they are created by Congress pursuant to Article 1 of the Constitution), "legislative courts," or "administrative courts."[378] Despite the different names, these courts have some common characteristics. Unlike Article III judges, Article I judges do not have salary protections[379] or lifetime appointments; instead, they serve for a specific term.[380] Additionally, they do not need to be nominated by the President and approved by the Senate, although recent Supreme Court case law has established that some of these judicial officers are subject to the Constitution's Appointments Clause.[381]

Legal experts, members of Congress, and jurists have given multiple justifications for establishing and maintaining non-Article III courts. To start, legislative courts promote judicial efficiency by buffering Article III courts from having to "*deal with the countless matters handled in administrative agencies and in specialized tribunals like bankruptcy courts*."[382] Additionally, while most Article III courts are generalist tribunals, "*Congress has established specialized non-Article III tribunals that focus on a particular area of law, with the understanding that an expert is needed to adjudicate disputes with respect to certain complex and technical areas of law*."[383] For example, judges on the Tax Court have specialized training and expertise on matters of

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375 *Id*. at 78.

376 U.S. CONST., art. III, § 1.

377 NOLAN & THOMPSON, *supra* note 271, at 11.

378 *Id*. at 11.

379 Some statutes grant non-Article III judges the same salary as those of U.S. District court judges, see, e.g, 26 U.S.C. § 7443(c) ("Each [Tax Court] judge shall receive salary at the same rate and in the same installments as judges of the district courts of the United States."), but Congress could amend these statutes at any time.

380 See, e.g., 28 U.S.C. § 631(e) ("The appointment of any individual as a full-time magistrate judge shall be for a term of eight years, and the appointment of any individuals as a part-time magistrate judge shall be for a term of four years[.]"); 26 U.S.C. § 7443 ("The term of office of any judge of the Tax Court shall expire 15 years after he takes office.").

381 U.S. CONST., art. II, § 2, cl. 2. Exceptions to this rule exist, such as with judges who preside over the Tax Court (26 U.S.C. § 7443(b)) and the United States Court of Federal Claims (28 U.S.C. § 171), which must be appointed by the President, with the advice and consent of the Senate. In contrast, a federal statute provides that magistrate judges who sit on the United States District Courts for the territories of Guam, the Northern Mariana Islands, and the U.S. Virgin Islands will be selected by judges at those respective district courts (28 U.S.C. § 631(a)).

382 CHEMERINSKY, E., *Federal Jurisdiction* § 4.1 (8th ed. 2021).

383 NOLAN & THOMPSON, *supra* note 271, at 13.

taxation. Relatedly, Congress may wish to create non-Article III courts because it "offers the advantages of efficiency and cost savings."[384]

Lastly, and importantly, Congress has created Article I courts as a workaround for the constitutional restrictions placed on Article III courts. For example, Article III courts are prohibited from giving advisory opinions, meaning that they cannot "*give opinions upon . . . abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before [them]*."[385] An instance where Congress took action to enable a court to issue advisory opinions occurred in 1982, when Congress reconstituted an Article III court, the United States Court of Claims, established to hear private claims against the federal government, into an Article I tribunal named the Court of Federal Claims,[386] "*in part so that the court could hear 'congressional reference' cases*."[387] In congressional reference cases, either the House or Senate creates a resolution with a bill for monetary relief, and refers it to the Claims Court; thereafter, the court reviews the bill's underlying merits and issues a report to Congress.[388] Congress may follow or disregard the Claims Court's report. Such reports are nonbinding and advisory and therefore cannot be issued by an Article III court. In other words, "*the only means by which Congress could have the Court of [Federal] Claims adjudicate congressional references cases was to reconstitute the court as a legislative tribunal*."[389]

Despite some core similarities, many distinctions exist among non-Article III courts, which historically have been organized into four separate types: territorial courts; military courts; courts hearing "public rights" claims; and adjuncts to federal courts.

The history of territorial courts dates back to the nation's founding era, when courts were established in organized provinces that had not yet joined the union. Justification for the jurisdiction of Article I courts over cases arising in the territories is found in the U.S. Constitution, art. IV, § 3, cl. 2, which provides Congress with the power to "*make all needful Rules and Regulations respecting the territory or other Property belonging to the United States*."[390] When the jurisdiction of these courts was challenged in the early 19th century, the Supreme Court interpreted Article IV's clause and affirmed that territorial courts were

> *created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested . . . is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States*.[391]

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384 CHEMERINSKY, *supra* note 382, at §4.1.

385 *Mills v. Green*, 159 U.S. 651, 653 (1895), https://www.loc.gov/item/usrep159651/.

386 Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25: https://uscode.house.gov/statutes/pl/97/164.pdf.

387 NOLAN & THOMPSON, *supra* note 271, at 13; see also PETROWITZ, H., "Federal Court Reform: The Federal Courts Improvement Act of 1982, *American University Law Review* n. 32, 1983, p. 558 ("The major reason for this change was to enable the Claims Court to continue to handle congressional reference cases.").

388 An example of this report can be seen in *Bear v. United States*, 147 Fed. Cl. 54 (Jan 9, 2020), https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2013cg0051-359-0, which stemmed from a House resolution, H.R. Res. 668, https://www.congress.gov/bill/112th-congress/house-resolution/668, referring H.R. 5862, entitled "A Bill relating to members of the Quapaw Tribe of Oklahoma (O-Gah-Pah)," https://www.congress.gov/bill/112th-congress/house-bill/5862.

389 NOLAN & THOMPSON, *supra* note 271, at 14.

390 U.S. CONST., art. II, § 2, cl. 2.

391 *American Insurance Co., v. 356 Bales of Cotton (Canter)*, 26 U.S. (1 Pet.) 511 (1828): https://www.loc.gov/item/usrep026511/.

Modern territorial courts exist today, and district courts in regions like Guam,[392] the U.S. Virgin Islands,[393] and the Northern Mariana Islands[394] are desigated as Article I courts. Congress similarly has authority over the courts of the District of Columbia under Article I of the Constitution, which gives it the power to "*exercise exclusive Legislation in all Cases whatsoever, over such District [that may become] the seat of the government of the United States.*"[395]

Military courts have been established under art. I, § 8, cl. 14 of the Constitution, which grants Congress the right "[*t]o make Rules for the Government and Regulation of the land and naval forces*." Congressional authority to create military courts was upheld by the Supreme Court in *Dynes v. Hoover*.[396] In that case, a court-martialed seaman argued that the military court had no jurisdiction over the subject matter of his case or sentencing. The Supreme Court disagreed, citing art. 1 § 8, and other provisions of the Constitution, noting, *"[t]hese provisions show that Congress has the power to provide for the trial and punishment of the military and naval offences . . . and that the power to do so is given without any connections between it and the 3d article of the Constitution defininig the judicial power of the United States; indeed, that the two powers are entirely independent of each other*."[397] The Court further noted that a statute establishing rules governing the Navy gave it broad authority to adjudicate *"[a]ll crimes committed by persons belonging to the navy*,"[398] and that all such cases arising in the naval service shall be tried before a court martial.[399] Although military courts have broad reach, their jurisdiction is generally limited, and they cannot try civilians,[400] the spouses of military members,[401] or former servicemembers.[402]

The third type of case generally considered by legislative courts is referred to as "public rights" cases. This litigation involves determinations over government benefits, such as social security or other claims against the government, arising "*between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments*."[403]

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392 48 U.S.C. § 1424: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title48-section1424&num=0&edition=prelim;
48 U.S.C. § 1424b: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title48-section1424b&num=0&edition=prelim.

393 48 U.S.C. § 1611: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title48-section1611&num=0&edition=prelim;
48 U.S.C. § 1614: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title48-section1614&num=0&edition=prelim.

394 48 U.S.C. § 1821: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title48-section1821&num=0&edition=prelim.

395 U.S. CONST., art. I, § 8, cl. 17.

396 *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858), https://www.loc.gov/item/usrep061065/.

397 *Dynes v. Hoover*, 61 U.S. (20 How.), 79.

398 An Act for the better government of the Navy of the United States, ch. 33, 2 Stat. 45, 49: https://tile.loc.gov/storage-services/service/ll/llsl//llsl-c6/llsl-c6.pdf#page=81.

399 *Id*. at 50, https://tile.loc.gov/storage-services/service/ll/llsl//llsl-c6/llsl-c6.pdf#page=86.

400 *Ex parte Milligan*, 71 U.S. 2, 121-22 (1867), https://www.loc.gov/item/usrep071002a/.

401 *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 249 (1960), https://www.loc.gov/item/usrep361234/.

402 *Solorio v. United States*, 483 U.S. 435 (1987), https://www.loc.gov/item/usrep361234/.

403 *Crowell v. Benson*, 285 U.S. 22, 50 (1932), https://www.loc.gov/item/usrep285022/. In contrast, this case desribes private rights cases as pertaining to "liability of one individual to another under the law as defined." *Crowell v. Benson*, 285 U.S. at 51.

The U.S. Tax Court, for example, was created to resolve disputes between taxpayers and the federal government.[404]

One legal justification for Article I jurisdiction over public rights cases lies in the fact that these claims are generally against the government, and under the doctrine of sovereign immunity, Congress may choose how it is sued and attach conditions to such lawsuits, including forum selection.[405] Further support for these Article I courts is found in history, and the fact that determinations presently decided by these judicial bodies were previously made by the executive and legislative branches. "*[A]s a result there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency*."[406] The jurisdictional scope of Article I courts is generally limited to issues that are traditionally resolved within the federal regulatory framework. For example, a 2011 Supreme Court opinion held that a bankruptcy court was prohibited from adjudicating a claim for tortious interference of a gift, a common law cause of action not created by federal law.[407]

The fourth scenario where non-Article III courts adjudicate federal questions is the use of "adjuncts." "*An 'adjunct' is an adjudicator—most often an administrative agency or a magistrate judge—that does not function as an independent court, but instead acts as a subordinate to the federal courts*."[408] In practice, adjuncts generally act subordinately to Article III courts; adjuncts may make factual determinations and initial legal questions, "*but questions of law must be subject to de novo[409] review in an Article III court*."[410] The Supreme Court has repeatedly upheld this application of adjuncts, observing that "*there is no requirement that, in order to maintain the essential attributes of judicial power, all determinations of fact in constitutional courts shall be made by judges.*"[411]

In 1968, Congress enacted the Federal Magistrates Act,[412] with the goal of updating the former commissioner system used by the federal courts since 1896.[413] These judicial officers are selected by district court judges and do not have lifetime appointments; instead, they can be removed for good cause or if the Judicial Conference "*determines that the services performed*

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404 26 U.S.C. § 7441, https://uscode.house.gov/view.xhtml?req=(title:26%20section:7441%20edition:prelim) ("There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court").

405 *Northern Pipeline Construction Co. V. Marathon Pipe Line Co.*, 458 U.S. 50, 67 (1982): https://www.loc.gov/item/usrep458050/.

406 *Id*. at 68. See also *Ex Parte Bakelite Corp*., 279 U.S. 438, 451 (1929), https://www.loc.gov/item/usrep279438/ ("The mode of determining [public rights cases] . . . is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.").

407 *Stern v. Marshall*, 564 U.S. 462, 493 (2011), https://www.loc.gov/item/usrep564462/. Supreme Court precedent on these types of jurisdictional issues with Article I courts and attendant common law claims has shifted over time. For a detailed history on this topic, see NOLAN & THOMPSON, *supra* note 271, at 17-19.

408 NOLAN & THOMPSON, *supra* note 271, at 20.

409 This type of review means that a second court deciding a case will make determinations "without reference to any legal conclusion or assumption made by the previous court to hear the case." *de novo*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE., https://www.law.cornell.edu/wex/de_novo (last reviewed May 1, 2023).

410 NOLAN & THOMPSON, *supra* note 271, at 20 (citing *Crowell v. Benson*, 285 U.S. 22, 51 (1932): https://www.loc.gov/item/usrep285022/).

411 *Crowell v. Benson*, 285 U.S. 22, 51 (1932), https://www.loc.gov/item/usrep285022/.

412 Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107, https://uscode.house.gov/statutes/pl/90/578.pdf.

413 MCCABE, P., FEDERAL BAR ASSOCIATION: *A Guide to the Federal Magistrate Judges System: A White Paper Prepared at the Request of the Federal Bar Association*, 2016, 3-9.

by [a magistrate's] office are no longer needed."[414] The role of magistrates has expanded over time, but they generally have the power to decide various motions, hear evidence, and try civil and criminal cases.[415] The Supreme Court has generally upheld the authority of magistrates to hear limited matters when the "*authority—and the responsibility—to make an informed, final determination . . . remains with the [Article III] judge.*"[416] Amendments to the act in 1979[417] expanded magistrate authority to permit these officers to "*preside over and enter final judgments in civil trials,[418] including jury trials, and misdemeanor criminal prosecutions.*"[419]

Even if a legal issue is one traditionally heard by Article III courts, the matter may be litigated by a legislative court upon the parties' consent. Several federal statutes include "consent" provisions permitting this practice, including the Federal Magistrates Act of 1979[420] and the Bankruptcy Amendments and Federal Judgeship Act of 1984.[421]

As demonstrated by the above examples, the Constitution established the Supreme Court, but permitted Congress to create lower federal courts. Congress has used its authority to create courts several times since the 1789. Although various types of federal tribunals exist, the extent of each court's respective scope is delineated by both the Constitution and federal statutes.

II.2.3. Federal Preemption

A final topic on congressional powers that implicates federalism, separation of powers, and fundamental constitutional principles is federal preemption.[422] The Constitution's Supremacy

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414 28 U.S.C. § 631(i): https://uscode.house.gov/view.xhtml?req=(title:28%20section:631%20edition:prelim)%20OR%20(granuleid:USC-prelim-title28-section631)&f=treesort&num=0&edition=prelim.

415 McCabe, *supra* note 413, at 19-20.

416 *Mathews v. Weber*, 423 U.S. 261, 271 (1975), https://www.loc.gov/item/usrep423261/. See also *Wingo v. Wedding*, 418 U.S. 461, 469 (1974), https://www.loc.gov/item/usrep418461/ (holding that a magistrate may propose to a district court judge whether an evidentiary hearing should be held, but could not hold such hearings); *United States v. Raddatz*, 447 U.S. 667, 682-83 (1980), https://www.loc.gov/item/usrep447667/ (holding that a district court review of a magistrate's evidentiary hearing is de novo of determinations, and a new hearing is not required).

417 Federal Magistrates Act of 1979, Pub. L. No. 96-82, 93 Stat. 643 (Oct. 10, 1979): https://uscode.house.gov/statutes/pl/96/82.pdf; McCabe, *supra* note 413, at 10-13.

418 28 U.S.C. § 636(c), https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title28-section636.

419 Nolan & Thompson, *supra* note 271, at 22; 18 U.S.C. § 3401: https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title18-section3401.

420 28 U.S.C. § 636(c)(1), https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title28-section636.

421 28 U.S.C. § 157(c)(2), https://uscode.house.gov/view.xhtml?hl=false&edition=prelim&req=granuleid%3AUSC-prelim-title28-section157.

422 This complex area of law touches on nuanced issues related to subjects such as statutory interpretation, federal agency authority, state products liability/tort laws, and the right to trial by jury, to name just a few examples. Federal preemption jurisprudence is too broad a topic to cover in depth in this study. Many peer-reviewed journals and constitutional law treatises cover the subtleties of this topic and the application of federal preemption across a wide range of topics, such as environmental law, insurance subrogation, arbitration clauses, and banking and consumer finance laws. Readers who are interested in learning more about the topic should consult the resources cited in this section.

Clause[423] provides that "*the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*"[424] "*[A]t the core of the doctrine, preemption arises when there is a conflict between state law and federal law. When that happens, the 'Supremacy Clause supplies a rule of priority.'*"[425] Supreme Court precedent has established two types of preemption: express preemption and implied preemption. Express preemption provides that a federal law will supplant a state law "*when a federal statute or regulation contains explicit preemptive language*."[426] Implied preemption occurs when the federal statute's "*structure and purpose implicitly reflect Congress's preemptive intent*."[427]

Implied preemption is a more complex area of study than explicit preemption, and can be broken down into four separate categories: conflict preemption, impossibility preemption, obstacle preemption, and field preemption.[428] As summarized by one scholar on this topic:

> *Implicit preemption can take one (or both) of the following forms. First, a state law may actually conflict with federal law, resulting in conflict preemption. Conflict exists when, for example, it may be impossible to comply simultaneously with the demands of state law and those of federal law. This subtype of conflict preemption is sometimes called impossibility preemption. The Court has concluded that conflict preemption may also arise when the state law at issue stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. This so-called obstacle preemption is more controversial than impossibility preemption because of the risk of inconsistency and subjectivity inherent in evaluating whether a state law creates an "obstacle" to a federal purpose and, if so, whether it is enough of an obstacle to justify preemption. How this assessment is to be conducted is not entirely clear; criticism of the doctrine is therefore unsurprising. The second type of implicit preemption is field preemption, which occurs when federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it*.[429]

Although federal preemption is based on constitutional principles, the analysis involved in reviewing these types of cases hinges less on congressional or administrative authority to create a federal law, and more on the intended effect of the law. As a result, federal courts have looked for specific statutory language when determining intent, and adopted canons of

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[423] Although it did not include a discussion of the preemption doctrine as we know it today, an early Supreme Court opinion addressing federal spheres of power related to state rights is *McCulloch v. Maryland*, 17 U.S. 316 (1819), https://www.loc.gov/item/usrep017316/. *McCulloch* arose from the 1816 establishment of the Second National Bank, created in response to states issuing unregulated currency. Many states believed the Second National Bank was unconstitutional and the state of Maryland enacted a statute levying taxes against all banks not chartered by the state. The Supreme Court ruled that the federal bank was properly established under the "necessary and proper" clause, which provides that Congress may "make all laws which shall be necessary and proper for carrying into execution." Additionally, the Supreme Court reaffirmed the power of the federal government in relation to the states, and held that states do not have the power to tax the federal government, noting that "the power to tax involves the power to destroy."

[424] U.S. CONST., art. IV, cl. 2.

[425] ELENGOLD, K. & GLATER, J.: "The Sovereign Shield," *Stanford Law Review*, 2021, n. 73, p. 981 (quoting *Va. Uranium, Inc. v. Warren*, No. 16-1275, slip op. (2019), https://www.supremecourt.gov/opinions/18pdf/16-1275_7lho.pdf.

[426] SYKES, J. & VANATKO, N., CONG. RSCH. SERV.: *R45825, Federal Preemption: A Legal Primer*, 2019, p. 2.

[427] *Id.*

[428] *Id.*

[429] ELENGOLD & GLATER, *supra* note 425, at 981-982 (internal quotations and citations omitted).

construction to interpret terms, phrases, and context.[430] While federal preemption analysis is triggered under many topics of federal law, some federal laws that have been more heavily scrutinized by federal courts are the Employee Retirement Income Security Act;[431] the Federal Arbitration Act;[432] and Food and Drug Administration (FDA) regulations related to drug labeling.[433]

II.3. Regulations Created by the Executive Branch

This section discusses regulations created by the executive branch, and the extent to which Congress and federal courts may be involved with this process. Section II.3.1 provides an overview of the administrative rulemaking process. Section II.3.2 discusses the manner in which courts review challenges to administrative agency actions, and the limitations on judicial review. This section closes with II.3.3, which introduces readers to a relatively new concept called the "major questions doctrine," with examples of relevant cases that may trigger this doctrine.

II.3.1. Federal Regulations and the Rulemaking Process

Federal regulatory law, also referred to as federal rulemaking or administrative law, is a vast topic that touches on nearly every aspect of daily life in the United States.[434] Federal regulations stem from a specific statutory delegation of power from Congress to a federal agency.[435] Agencies exist in all three branches of the federal government, but most fall within the executive branch.[436] In accordance with federal statutes, agencies promulgate rules and regulations under a strict set of procedures.[437] The first step in the process requires a law from Congress authorizing an agency to create rules and regulations on a specific topic.

In practice, Congress will pass a statute expressing an interest in regulating a policy area, and that statute will delegate to an executive branch agency the power to issue detailed rules or

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[430] BRANNON, V., CONG. RSCH. SERV.: *R45153, Statutory Interpretation: Theories, Tools, and Trends*, 2023; SYKES & VANATKO, *supra* note 426, at 6-12.

[431] 29 U.S.C. § 1001, *et seq*.: https://uscode.house.gov/view.xhtml?path=/prelim@title29/chapter18&edition=prelim; SHERMAN, J.: "Domestic Partnership and ERISA Preemption," *Tulane Law Reivew*, 2021, n. 76, p. 373; BOOTH, J.: "ERISA Preemption Doctrine as Health Policy," *Hofstra Law Reivew*, 2010, n. 39, p. 59; GOODYEAR, J.: "What Is an Employee Benefit Plan: ERISA Preemption of Any Willing Provider Laws after *Pegram*," *Columbia Law Reivew*, 2001, n. 101, p. 1107.

[432] 9 U.S.C. § 1, *et seq*., https://uscode.house.gov/view.xhtml?path=/prelim@title9&edition=prelim; DRAHOZAL, C.: "Federal Arbitration Act Preemption," *Indiana Law Reivew*, 2004, n. 79, p. 393, http://ilj.law.indiana.edu/articles/79/79_2_Drahozal.pdf; OPARIL, R.: "Preemption and the Federal Arbitration Act," *George Mason University Law Reivew*, 1990, n. 13, p. 325; BLANKLEY, K.: "Impact Preemption: A New Theory of Federal Arbitration Act Preemption," *Florida Law Reivew*, 2015, n. 67, p. 711.

[433] 21 C.F.R. § 201.1, *et seq*, https://www.ecfr.gov/current/title-21/chapter-I/subchapter-C/part-201?toc=1; SCARLETT, T.: "The Relationship among Adverse Drug Reaction Reporting, Drug Labeling, Product Liability, and Federal Preemption," *Food, Drug, Cosmetic Law Journal*, 1991, n. 46, p. 31; SHARKEY, C.: "Drug Advertising Claims: Preemption's New Frontier," *Loyola of Los Angeles Law Review*, 2007, n. 41, p. 1625; LINDENFELD, E. & TRAN, J.: "Beyond Preemption of Generic Drug Claims," *Southwestern Law Review*, 2015, n. 45, p. 241.

[434] For a more detailed explanation of the rulemaking process, see CAREY, M., CONG. RSCH. SERV.: *RL32240, The Federal Rulemaking Process: An Overview*, 2013.

[435] U.S. CONST., art. I, § 8, cl. 18 (Congress is authorized "[t]o make all Laws which shall be necessary and proper for carrying into Execution" the authority granted to federal agencies).

[436] COLE, J., CONG. RSCH. SERV.: *R44699, An Introduction to Judicial Review of Federal Agency Action*, 2016, n. 1.

[437] 5 U.S.C. § 551, *et seq*. : https://uscode.house.gov/view.xhtml?path=/prelim@title5/part1/chapter5/subchapter2&edition=prelim.

regulations for carrying out that law. For example, in 1970, Congress enacted the Clean Air Act (CAA),[438] declaring as one of its purposes "*to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population*."[439] Within the CAA, Congress delegated the authority to the Environmental Protection Agency (EPA) to create the detailed and specific rules or regulations to implement the law. Under this statutory authority, the EPA has created numerous regulations related to air quality standards for air pollutant emissions.[440] Under this process, the initial federal statute (in this case the CAA) is referred to as the "enabling" or "authority" statute because it gives an executive agency the authority to enact federal rule and regulations. While agencies can have broad leeway under federal statutes that give general directives to agencies, American rule of law principles prohibit them from creating regulations outside the scope of their delegated statutory authority.

Congress may decide to delegate rulemaking authority to agencies for several reasons. First, an agency has particular subject matter expertise on the topic or issue addressed by the statute, and civil servants who work for the agency may be better positioned to craft detailed, technical rules, basd on their knowlege, education, and training.[441] For example, the Department of Labor (DOL) would be expected to have extensive knowledge about labor and employment issues, and the EPA employs a broad range of scientists who understand technical minutiae in their respective fields. Additionally, agency rulemaking allows Congress to focus on big picture policy issues, while agencies can amend and update federal rules and regulations more quickly than Congress generally legislates, thereby saving Congress from the task of debating the technical details associated with implementing complex public policy.[442]

Unlike federal elected officials, agency personnel are civil servants whose agencies and departments are overseen by individuals nominated by the President and approved by the Senate.[443] This structure creates a figurative moat between agency actions and personnel and the general public; in contrast, the President and members of Congress are directly accountable to the electorate through periodic elections. To ameliorate this disconnect between the public and federal agencies, Congress enacted various statutes,[444] including the Federal Register Act (FRA) and the Administrative Procedure Act (APA).

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438 42 U.S.C. § 7401, *et seq.* : https://uscode.house.gov/view.xhtml?path=/prelim@title42/chapter85&edition=prelim.

439 42 U.S.C. § 7401(b)(1).

440 42 U.S.C. § 7408.

441 CAREY, M., CONG. RSCH. SERV.: *IF10003, An Overview of Federal Regulations and the Rulemaking Process*, 2021, p. 1.

442 CAREY, *supra* note 441 at 1.

443 U.S. CONST., art. II, § 2, cl. 2.

444 Congress has enacted several sweeping statutes governing agency activity, including: the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq*.: https://uscode.house.gov/view.xhtml?path=/prelim@title42/chapter55&edition=prelim;

the Paperwork Reduction Act, 44 U.S.C. § 3501, *et seq*.: https://uscode.house.gov/view.xhtml?path=/prelim@title44/chapter35&edition=prelim;

and the Regulatory Flexibility Act, 5 U.S.C. § 601, *et seq*.: https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title5-chapter6&saved=%7CKHRpdGxlOjUgc2VjdGlvbjo2MDIgZWRpdGlvbjpwcmVsaW0pIE9SIChncmFudWxlaWQ6VVNDLXByZWxpbS10aXRsZTUtc2VjdGlvbjYwMik%3D%7CdHJlZXNvcnQ%3D%7C%7C0%7Cfalse%7Cprelim&edition=prelim.

For more information about these federal statutes and others, see CAREY, *infra* note 447, at 8-24.

The FRA,[445] enacted in 1935, created a uniform system for handling agency regulations, and requires that information about agency activities must be delivered to the Office of the Federal Register, made available for public inspection, and published in the *Federal Register*,[446] a journal of agency actions that is published every day the federal government operates.[447] Permanent codification of these agency rules are thereafter published in the *Code of Federal Regulations*.[448]

The APA[449] was enacted in 1946 and "*instituted a number of procedural controls on agencies, such as ensuring that the public would have an opportunity for participation through public comment [.]*"[450] The APA also ensured that rulemaking activities across agencies were uniform. The APA outlines procedures for both "formal" and "informal" rulemaking. The formal rulemaking process involves a quasi-judicial, trial-type agency hearing, after which rules are made "on the record."[451] The more common process is informal rulemaking, otherwise known as "notice and comment" rulemaking. Informal rulemaking involves several major steps:

> *[A]n agency generally must first provide notice that it intends to promulgate a rule. An agency does this by publishing a notice of proposed rulemaking in the Federal Register. The notice must provide (1) the time, place, and nature of the rulemaking proceedings; (2) a reference to the legal authority under which the rule is proposed; and (3) either the terms or subject of the proposed rule.*
>
> *The agency must then allow "interested persons an opportunity" to comment on the proposed rule. Typically, an agency will provide at least 30 days for public comment. The agency is required to review the public comments and respond to "significant" comments received, and it may make changes to the proposal based on those comments.*
>
> *Once this process is complete, the agency may publish the final rule in the Federal Register along with a "concise general statement" of the rule's "basis and purpose." The rule may not go into effect until at least 30 days after it is published in the Federal Register, with certain exceptions*.[452]

Agency rules and regulations carry the force of law, as long as they follow the standards laid out by statute, including the processes laid out in the APA. A few types of rules are exempted from these requirements for increased openness, including:

- Rules involving "a military or foreign affairs function of the United States;"[453]
- Rules regarding the interpretation of regulatory language;
- Policy statements;
- Where "*public procedure is impracticable, unnecessary, or contrary to the public interest*."[454]

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[445] 44 U.S.C. § 1501, *et seq.* : https://uscode.house.gov/view.xhtml?path=/prelim@title44/chapter15&edition=prelim.

[446] The Federal Register is available at https://www.federalregister.gov/.

[447] CAREY, M., CONG. RSCH. SERV.: *RL32240, The Federal Rulemaking Process: An Overview*, 2013, p. 5.

[448] The Code of Federal Regulations is available at https://www.ecfr.gov/.

[449] 5 U.S.C. § 551, *et seq.* : https://uscode.house.gov/view.xhtml?path=/prelim@title5/part1/chapter5/subchapter2&edition=prelim.

[450] CAREY, *supra* note 441, at 1.

[451] *Id.* at 5.

[452] *Id.* at 1-2.

[453] 5 U.S.C. § 553(a)(1), https://uscode.house.gov/view.xhtml?req=(title:5%20section:553%20edition:prelim).

[454] CAREY, *supra* note 441, at 2.

Congress and the courts have the authority to review agency actions. In 1996, Congress enacted the Congressional Review Act (CRA), establishing "*a mechanism through which Congress could overturn federal regulations by enacting . . . a joint resolution of disapproval*."[455] The CRA further provides that agency actions with an impact on the economy of greater than $100 million must have a delayed effective date of at least 60 days, and these rules must be delivered to both chambers of Congress and the Government Accountability Office (GAO) before implementation. The CRA is seldom used to overturn agency action, and is used more frequently when Congress and the White House are controlled by different parties.[456]

Examples are provided in secs. II.3.2 and II.3.3 below describing how regulatory activity works in the federal government system in light of the separation of functions and powers under the Constitution. These examples focus on judicial review of agency rules, the boundaries of statutorily-granted agency authority, and a recently-developed concept referred to as the major questions doctrine.

II.3.2. Judicial Review of Agency Activity

As described in sec. II.1.2, *supra*, federal courts are courts of limited jurisdiction, and the outer bounds of their jurisdiction are governed by Congress and the Constitution. Federal courts are, however, empowered to hear legal challenges to final agency determinations through the APA.[457] As set forth above, the APA dictates the internal procedures that all federal agencies must follow when undertaking formal and informal rulemaking; the APA likewise authorizes federal courts to review an agency's compliance with APA mandates.[458] To understand how the federal government's separate functions operate with regard to federal regulations, this section summarizes the circumstances in which federal courts may review agency rules, the scope of review permitted by the APA, how federal courts analyze these cases in practice, and the standards of review employed by courts.

II.3.2.1 Statutory Authority Granting Judicial Review of Agency Actions

Judicial review of agency actions is governed by federal statutes, the Constitution, and prudential doctrines that have been developed in case law. Regarding statutory authority, a federal court will lack subject matter jurisdiction over a case unless a federal statute expressly grants it jurisdiction. While the APA outlines procedures for agencies and courts to follow, it omits any grant of subject matter jurisdiction; as a result, courts must rely on other statutes for jurisdiction.[459] Some statutes provide that particular cases will be heard in one of the U.S. Court

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[455] CAREY, M., CONG. RSCH. SERV.: *R43056, Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the* Federal Register, 2019, p. 3; 5 U.S.C. §§ 801-808, https://uscode.house.gov/view.xhtml?path=/prelim@title5/part1/chapter8&edition=prelim.

[456] For a list of the rules that have been overturned using the CRA, see *Congressional Review Act*, GOVERNMENT ACCOUNTABILITY OFFICE, https://www.gao.gov/legal/other-legal-work/congressional-review-act#faqs (last reviewed May 4, 2023); for a list of recent CRA activity, see *Congressional Review Act: Overview and Tracking*, NATIONAL CONFERENCE OF STATE LEGISLATURES, https://www.ncsl.org/state-federal/congressional-review-act-overview-and-tracking (last reviewed May 4, 2023).

[457] 5 U.S.C. § 551, *et seq.* : https://uscode.house.gov/view.xhtml?path=/prelim@title5/part1/chapter5/subchapter2&edition=prelim.

[458] COLE, *supra* note 436, at 2.

[459] *Califano v. Sanders*, 430 U.S. 99, 107 (1997), https://www.loc.gov/item/usrep430099/ (holding that "neither the text nore the history of the APA speaks in favor" of reading the statute as a grant of subject matter judisdiction to federal courts).

of Appeals,[460] or a specific court.[461] Additionally, 28 U.S.C. § 1331 provides that federal courts enjoy "*original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States*,"[462] which is sometimes referred to as federal question jurisdiction.

In addition to the requirement for an affirmative grant of subject matter jurisdiction, sovereign immunity principles may prohibit a federal court from exercising jurisdiction over a case. Under the principle of sovereign immunity, unless Congress has expressly[463] waived sovereign immunity through a statutory enactment, the United States has not given permission to be sued, thereby negating federal court jurisdiction. As noted in one Supreme Court decision, "*It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction*."[464] The following three acts waive federal sovereign immunity under particular circumstances:

- Amendments to the APA enacted in 1976[465] created a means for aggrieved individuals to file a lawsuit in federal court against federal agencies and employees acting in their official capacity, but prohibits damages[466] as a remedy.
- The Federal Tort Claims Act (FTCA)[467] permits federal courts to hear cases involving certain torts committed by agency employees in the course and scope of their employment.
- An 1887 statute known as the Tucker Act[468] (after the U.S. Representative who sponsored it) waives sovereign immunity for breach of contract cases against the federal government, as well as other monetary claims that do not result from torts.

Even if a federal court has subject matter jurisdiction, it may be unable to review a case if it was filed by a litigant who has no legal right to seek judicial redress. To have a valid cause of action, a plaintiff challenging an agency action must be "*a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court*."[469] Many statutes create a cause of action for specific claims, to "*enforce legal requirements against federal agencies*."[470]

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460 28 U.S.C. § 2342: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title28-section2342&num=0&edition=prelim.

461 42 U.S.C. § 4915: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title42-section4915&num=0&edition=prelim (bestowing the D.C. Circuit with review of certain administrative actions taken by the EPA and the Federal Aviation Administration).

462 28 U.S.C. § 1331: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title28-section1331&num=0&edition=prelim.

463 *Lane v. Pena*, 518 U.S. 187, 192 (1996), https://www.loc.gov/item/usrep518187/ ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text.").

464 *United States v. Mitchell*, 463 U.S. 206, 212 (1983), https://www.loc.gov/item/usrep463206/.

465 Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (Sep. 13, 1976): https://uscode.house.gov/statviewer.htm?volume=90&page=1241.

466 5 U.S.C. § 702: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title5-section702&num=0&edition=prelim.

467 28 U.S.C. § 2679: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title28-section2679&num=0&edition=prelim.

468 28 U.S.C. § 1346: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title28-section1346&num=0&edition=prelim;
28 U.S.C. § 1491: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title28-section1491&num=0&edition=prelim.

469 *Davis v. Passman*, 442 U.S. 228, 239-240 n. 18 (1979), https://www.loc.gov/item/usrep442228/.

470 COLE, *supra* note 436, at 5.

Examples of these stautes include the Toxic Substances Control Act[471] and the Clean Water Act.[472] Additionally, the APA creates a catchall cause of action for individuals aggrieved by a "*final agency action*" if "*there is no other adequate remedy in a court*."[473]

II.3.2.2 Scope of Judicial Review

Once a court determines that it properly has statutory jurisdiction to hear a claim related to an agency action, federal statutes and Supreme Court precedent may cabin the scope of judicial review and provide guidance on how evidence should be reviewed and weighed. One barrier that plaintiffs in these cases may face is the doctrine of standing, which is discussed in greater detail in sec. III.1.2, *infra*. This doctrine requires a plaintiff to demonstrate that they have suffered a concrete and actual "injury in fact," that there is a causal connection between the injury and the actions of the defendant, and that the injury will likely be redressed by a favorable decision.[474] This bar to judicial review is supported by separation of powers principle, with the goal of ensuring that the court preserves its abillity to say what the law is, without taking lightly requests to invalidate congressional legislation or administrative actions.[475] As noted by one scholar, "*[c]ourts must, of course, vindicate individuals rights, but the judicial power may not be harnessed into a monitoring role over federal agencies that should be conducted by Congress*."[476] Typically, federal courts dismiss cases on standing grounds when a plaintiff has not demonstrated a particularized injury and instead files a claim in pursuit of a generalized public interest.[477]

Additional principles that further constrain the court's ability to hear cases relate to the timing of a suit, such as the doctrines of ripeness, mootness, and exhaustion. Several federal statutes create deadlines for filing claims stemming from agency actions.[478] When no specific deadline is found in a statute discussing a particular agency's action, 28 U.S.C. § 2401 establishes statutes of limitations for several types of claims against the federal government.[479]

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[471] 15 U.S.C. § 2618: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title15-section2618&num=0&edition=prelim (authorizing individuals to seek judicial review of rules created under this statute).

[472] 33 U.S.C. § 1369: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title33-section1369&num=0&edition=prelim (allowing an interested party to seek judicial review of agency actions pursuant to this statute).

[473] 5 U.S.C. § 704: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title5-section704&num=0&edition=prelim (allowing an interested party to seek judicial review of agency actions pursuant to this statute).

[474] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), https://www.loc.gov/item/usrep504555/.

[475] *Valley Forge College v. Americans United*, 454 U.S. 464, 474 (1982), https://www.loc.gov/item/usrep454464/ ("Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury.").

[476] COLE, *supra* note 436, at 6 (citing *Allen v. Wright*, 468 U.S. 737, 760 (1984): https://www.loc.gov/item/usrep468737/).

[477] For a recent example of this type of dismissal, see *Air Incursions LLC v. Yellen*, No. 22-5125 (D.C. Cir. Apr. 18, 2023), https://www.cadc.uscourts.gov/internet/opinions.nsf/545B9E3F9A116D5285258995004E109C/$file/22-5125-1995213.pdf; see also *Sierra Club v. Morton*, 405 US. 727, 735 (1972), https://www.loc.gov/item/usrep405727/.

[478] See e.g., 30 U.S.C. § 1276(a)(1) (setting a 60-day deadline for filing a court case in response to certain EPA actions), https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title30-section1276&num=0&edition=prelim.

[479] 28 U.S.C. § 2401: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title28-section2401&num=0&edition=prelim.

Even if a party is able to withstand the procedural and jurisdictional hurdles described above, under the APA, federal courts may review only "final agency actions" that are separate from agency discretionary decisions or not otherwise precluded from review by statute. Agency actions are defined to include "*the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act*."[480] While this definition is broad, there are agency activities that fall outside it and are therefore unreviewable. For example, the Court of the Appeals for the District of Columbia Circuit has denied review of cases requesting review of agency publications[481] and news releases,[482] because these documents do not fit under the definitions of "rules," "orders" or "sanctions" under the APA.

An action is "final" if it (1) represents the "'culmination' of the agency's decisionmaking process,"[483] and (2) the action is one "*by which 'rights or obligations have been determined,' or from which 'legal consequences will flow*.'"[484] Agency actions that courts have construed as "not final" include an agency's nonbinding recommendations to the president[485] and agency guidance documents that have no binding effect on the public.[486] After an agency takes a final action, a party that has standing to challenge the action does not necessarily need to wait until they are harmed to file a case; instead, some courts have held that the issuance of binding regulations, absent agency enforcement activity, is sufficient to support judicial review.[487]

In addition, judicial review of agency determinations is prohibited when a statute precludes review, or when the agency's action is "*legally committed to an agency's discretion*."[488] While the APA establishes a "*basic presumption of judicial review*,"[489] other statutes sometimes prohibit federal court jurisdiction of specific agency actions.[490] Courts typically read preclusion provisions in statutes narrowly when reviewing cases alleging constitutional violations,[491] but the basic process in analyzing these matters involves examining the statute's "*express language, . . . the structure of the overall statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.*"[492]

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480 5 U.S.C. § 551(13): https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title5-section551&num=0&edition=prelim.

481 *Indus. Safety Equip. Ass'n, Inc. v. EPA*, 837 F.2d 1115, 1118-19 (D.C. Cir. 1988): https://casetext.com/case/industrial-safety-equipment-assn-v-epa.

482 *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 189 (D.C. Cir. 2006), https://cite.case.law/f3d/456/178/3352451/.

483 *Bennett v. Spear*, 520 U.S. 154, 178 (1997), https://www.loc.gov/item/usrep520154/.

484 *Id* at 178 (quoting *Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970): https://www.loc.gov/item/usrep400062/).

485 *Dalton v. Specter*, 511 U.S. 462, 469-70, (1994), https://www.loc.gov/item/usrep511462/; *Franklin v. Massachusetts*, 505 U.S. 788, 798 (1992), https://www.loc.gov/item/usrep505788/.

486 The "finality" of guidance documents is somewhat in dispute. See *Nat'l Mining Assoc. v. McCarthy*, 758 F.3d 243, 247 (D.C. Cir. 2014), https://cite.case.law/f3d/758/243/4158732/ (holding that a guidance document was not a final agency action); *cf. Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022-23 (D.C. Cir. 2000), https://casetext.com/case/appalachian-power-co-v-epa-6 (a guidance document was a final agency action).

487 *Abbott Labs v. Gardner*, 387 U.S. 136, 152-53 (1967), https://www.loc.gov/item/usrep387136/.

488 COLE, *supra* note 436, at 11.

489 *Abbott Labs,* 387 U.S. at 152-53.

490 *Johnson v. Robinson*, 415 U.S. 361, 365 (1974), https://www.loc.gov/item/usrep415361/ (reviewing a statute that barred judicial review of decisions from the Administrator of the Veterans Administration).

491 *McNary v. Haitian Refugee Ctr. Inc.*, 498 U.S. 479, 498 (1991), https://www.loc.gov/item/usrep498479 (statutory preclusion provision did not deprive courts of constitutional challenges to agency conduct); *Johnson*, 415 U.S. at 373-74 (same).

492 *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984), https://www.loc.gov/item/usrep467340/.

The APA precludes judicial review when the agency's action is "*committed to agency discretion by law*."[493] For example, no judicial review of agency action is permitted when "*statutes are drawn in such broad terms that in a given case there is no law to apply*."[494] Likewise, determinations by agencies not to initiate an enforcement action are "*generally committed to an agency's absolute discretion*"[495] and therefore unreviewable.

Although the ability of the courts to review challenges to agency actions is limited by statutes, the Constitution, and Supreme Court precedent, these cases take up a substantial percentage of federal court dockets.[496]

II.3.2.3 Deference to Agency Determinations

If a court determines that it has jurisdiction to hear a challenge to a final agency action, it must decide whether the agency's process and decisionmaking comports with legal requirements. The APA provides that courts may "set aside" an agency action when an action is "*in excess of statutory jurisdiction, authority, or limitations, or short of statutory right*," or otherwise "*not in accordance with law*."[497] This review requires both statutory interpretation and a factual review of agency activities; agency actions that run counter to statuory provisions will be set aside.[498]

When a court addresses a question of law, the standard of review is *de novo*, meaning that it gives no deference to a lower court's or agency's legal determinations and analyzes legal questions as if they were being reviewed for the first time.[499] When a statute related to administrative law is ambiguous, however, the analysis is a little more complex and fact-specific. The Supreme Court has established standards of review, or levels of deference, that courts must follow when reviewing these types of claims, which are named after their progenitor cases: *Chevron*[500] deference, *Auer*[501] or *Seminole Rock*[502] deference, and *Skidmore*[503] deference. The following paragraphs discuss each deference standard in turn.

Chevron deference has been targeted with considerable commentary in academic, legal, and political circles since it was created in 1984. In *Chevron*, the Supreme Court created a two-step process to employ when reviewing an agency's interpretation of a statute that the agency administers when such interpretation has the force of law. First, a reviewing court examines "*whether Congress has directly spoken to the precise question at issue*."[504] If a statute is clear and precise, that ends the inquiry, and courts and agencies must adhere to the "*unambiguously expressed intent of Congress*."[505] If a court finds ambiguity in the statute, or silence on the issue

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493 5 U.S.C. § 701, https://uscode.house.gov/view.xhtml?req=(title:5%20section:701%20edition:prelim).

494 *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971): https://www.loc.gov/item/usrep401402/ (quoting legislative history of the APA).

495 *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985), https://www.loc.gov/item/usrep470821/.

496 *Federal Judicial Caseload Statistics 2022*, ADMIN. OFFICE OF THE U.S. COURTS, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2022 (last reviewed May 11, 2023).

497 5 U.S.C. § 706, https://uscode.house.gov/view.xhtml?req=(title:5%20section:706%20edition:prelim).

498 *Brown v. Gardner*, 513 U.S. 115, 120 (1994), https://www.loc.gov/item/usrep513115/ (setting aside a Veterans Administration regulation that contradicted the intent of the underlying enabling statute).

499 GAFFNEY, J., CONG. RSCH. SERV.: *LSB10558, Judicial Review Under the Administrative Procedure Act (APA)*, 2020, 3.

500 *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), https://www.loc.gov/item/usrep467837/.

501 *Auer v. Robbins*, 519 U.S. 452 (1997), https://www.loc.gov/item/usrep519452/.

502 *Bowles v. Seminole Rock Co.*, 325 U.S. 410 (1945), https://www.loc.gov/item/usrep325410/.

503 *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), https://www.loc.gov/item/usrep323134/.

504 *Chevron*, 467 U.S. at 842.

505 *Id*. at 842-43.

at hand, courts are instructed to "*defer to a reasonable agency interpretation, even if the court would have otherwise reached a contrary conclusion*."[506]

The Court in *Chevron* grounded its holding in the fact that Congress delegates to agencies the authority to create rules and regulations consistent with the statutory policy objectives. As explained by the Court, "*[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute*."[507] Additionally, the Supreme Court has permitted agency interpretations of statutes to shift over time, so long as the interpretation is deemed reasonable by the Court.[508] *Chevron's* application is limited to cases were federal statutes delegate to an agency the authority to "*speak with the force of law*," and the agency's interpretation was "*promulgated in the exercise of that authority*."[509] Deciding this initial matter is sometimes referred to as "step zero" in the *Chevron* analysis.[510] When undertaking this inquiry, courts have generally decided that if Congress has granted an agency the authority adjudicate or to enact regulations through notice-and-comment rulemaking, Congress has granted the agency to speak with the force and effect of law.[511] On the other hand, "*interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law*,"[512] do not survive the "step zero" threshold of the *Chevron* analysis and are not entitled to deference. Other exceptions to *Chevron* deference have been determined in cases that have formed the major questions doctrine, discussed in sec. II.3.3, *infra*.

Chevron's critics have argued that leaving statutory interpretation to federal agencies is contrary to separation-of-powers principles. In a 2015 dissent, Justice Clarence Thomas argued that *Chevron* deference "*wrests from the Courts the ultimate interpretative authority 'to say what the law is,' and hands it over to*" the executive branch.[513] In 2022, Justice Neil Gorsuch dissented from a denial of review, and expressed his opinion on how "overreading" *Chevron* impedes federal government functions:

> *Overreading Chevron has profound consequences for how our government operates as well. It encourages executive officials to write ever more ambitious rules on the strength of ever thinner statutory terms, all in the hope that some later court will find their work to be at least marginally reasonable. When one administration departs and the next arrives, a broad reading of Chevron frees new officials to undo the ambitious work of their predecessors and proceed in the opposite direction with equal zeal. In the process, we*

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[506] COLE, *supra* note 436, at 13; *Chevron*, 467 U.S. at 842-44 ("In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

[507] *Chevron*, 467 U.S. at 843-44.

[508] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009), https://www.loc.gov/item/usrep556502/ (under the "arbitrary and capricious" standard, courts should defer to agency interpration of a statute and refrain from a "more searching review" when an agency modifies its interpretation).

[509] *United States v. Mead Corp.*, 533 U.S. 218, 226-27, 229 (2001), https://www.loc.gov/item/usrep533218/.

[510] SUNSTEIN, C.: "Step Zero," *Virginia Law Review*, n. 92, 2006, p. 191.

[511] *United States v. Mead Corp.*, 533 U.S. 218, 229-230 (2001), https://www.loc.gov/item/usrep533218/.

[512] *Christiansen v. Harris County*, 529 U.S. 576, 587 (2000), https://www.loc.gov/item/usrep529576/.

[513] *Michigan et al. v. Environmental Protection Agency*, 576 U.S. 743, 761 (Thomas, J., dissenting) (quoting *Marbury v. Madison*, 1 U.S. (Cranch) 137, 177 (1803)): https://www.supremecourt.gov/opinions/boundvolumes/576BV.pdf#page=788.

> *encourage executive agents not to aspire to fidelity to the statutes Congress has adopted, but to do what they might while they can*.[514]

He further opined that the Court "*should acknowledge forthrightly that Chevron did not undo, and could not have undone, the judicial duty to provide an independent judgment of the law's meaning in the cases that come before the Nation's courts*."[515] The U.S. Supreme Court recently granted *certiorari* on a case challenging *Chevron*, which will be heard during the Court's October 2023 term, and should be decided by the end of that term in June 2024.[516]

A separate line of cases provides deference standards to employ when reviewing an agency's informal interpretation of a statute, known commonly as *Skidmore* deference. *Skidmore* deference is at play when an agency interprets a "*regulatory scheme [that] is highly detailed*" and the agency has "*the benefit of specialized experience*."[517] In these cases, a federal court will give the agency's interpretation "a respect proportional to its 'power to persuade.'"[518]

> *[A] court applying Skidmore deference accords an agency's interpretation of a statute a certain amount of respect or weight correlated with the strength of the agency's reasoning. Courts will give consideration to the agency's interpretation, the "weight" of which "will depend upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade*."[519]

Unlike *Chevron*, *Skidmore* deference does not require that agency interpretations be "controlling on the courts."[520]

A third deference standard is used when analyzing an agency's interpretation of its own regulations, known as *Auer* or *Seminole Rock* deference. *Auer* provides that courts should defer to an agency's interpretations of its own regulations unless that interpretation is "*plainly erroneous*."[521] *Auer* deference operates similarly to *Chevron's* analysis; if an agency's interpretation of its regulation is reasonable, courts give that determination "*controlling weight*."[522] Unlike *Chevron*, *Auer* deference can apply to informal agency actions, but it does not apply uniformly across all agency regulations.[523] For example, the Supreme Court has held that when an agency's regulation mirrors or paraphrases the language found in the enabling or authorizing statute, the agency has no special authority to interpret the regulation.[524] Similarly to *Chevron* deference cases, some Justices have expressed skepticisim with *Auer* in

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[514] *Buffington v. McDonough*, 598 U.S. ___, No. 21-972, slip op. at 11-12 (2022): https://www.supremecourt.gov/opinions/22pdf/21-972_mkhn.pdf.

[515] *Id.* at 16.

[516] *See No. 22-451: Loper Bright Enterprises, et al., Petititoners v. Gina Raimondo, Secretary of Commerce, et al.*, U.S. SUPREME COURT., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-451.html (last reviewed May 11, 2023).

[517] *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001), https://www.loc.gov/item/usrep533218/.

[518] *Id.* (quoting *Skidmore,* 323 U.S. at 140).

[519] COLE, *supra* note 436, at 15-16 (quoting *Skidmore,* 323 U.S. at 140 (some internal citations omitted)).

[520] *Skidmore*, 323 U.S. at 140.

[521] *Auer*, 519 U.S. at 461.

[522] *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945), https://www.loc.gov/item/usrep325410/.

[523] *Auer,* 519 U.S. at 462.

[524] *Gonzales v. Oregon*, 546 U.S. 243, 256-57 (2006), https://www.loc.gov/item/usrep546243/.

recent concurring and dissenting opinions,[525] although no cases currently before the Supreme Court ask for its disavowal.

II.3.3. The Major Questions Doctrine and Pending Questions on Administrative Law

One relatively new doctrine that impacts judicial review of agency actions is the major questions doctrine. Prior to the Supreme Court's 2022 decision in *West Virginia v. EPA*,[526] the term "major questions doctrine" had been used only by commentators and in Court concurrences or dissents, but had never been fully adopted or described by a majority opinion.[527] In brief, this doctrine has been used to reject an agency's claims of regulatory authority based on a broad reading of a statute when "*(1) the underlying claim of authority concerns an issue of 'vast economic and political significance,' and (2) Congress has not clearly empowered the agency*."[528] Some examples of cases where the Supreme Court has employed principles that have been identified with this doctrine to reject agency claims of statutory authority include:

- The Food And Drug Administration's (FDA) regulation of the tobacco industry based on its statutory authority over "drugs" and "devices"[529]
- The Attorney General's regulation of assisted suicide drugs under his statutory authority over controlled substances[530]
- The Centers for Disease Control and Prevention's (CDC) nationwide eviction moratium, based on statutory language about the Surgeon General's ability to take action to prevent the spread of communicable diseases[531]
- The Occupational Safety and Health Administration's (OSHA) emergency temporary standard imposing COVID-19 vaccinations and testing requirements for certain portions of the workforce[532]

The major questions doctrine typically arises in cases where *Chevron* deference may be considered by federal courts, because the challenge to agency action is based on the agency's interpretation of a statute, but the doctrine's relationship to *Chevron* is unsettled.[533]

In the recent case of *West Virginia v. EPA*, the Court formally referred to the major questions doctrine and adopted it when rejecting the EPA's method for creating emission guidelines for existing fossil fuel-fired power plants, finding that the statutory provision relied on by the EPA

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525 COLE, *supra* note 436, at n. 166.

526 *West Virginia v. EPA*, No. 20-1530, slip op. (2022): https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf.

527 BOWERS, K. & SHEFFNER, D., CONG. RSCH. SERV.: *LSB10745*: *The Supreme Court's "Major Questions" Doctrine: Background and Recent Developments*, 2022, 2.

528 *Id*. at 1 (citing *Util. Air Regul. Grp (UARG) v. EPA*, 573 U.S. 302, 324 (2014): https://www.supremecourt.gov/opinions/boundvolumes/573BV.pdf#page=345).

529 *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120 (2000): https://www.loc.gov/item/usrep529120/.

530 *Gonzales v. Oregon*, 546 U.S. 243 (2006): https://www.loc.gov/item/usrep546243/.

531 *Alabama Association of Realtors v. HHS*, No. 21A23 (2021) (per curiam): https://www.supremecourt.gov/opinions/20pdf/21a23_ap6c.pdf.

532 *National Federation of Independent Business v. OSHA*, Nos. 21A244 and 21A247 (2022) (per curiam): https://www.supremecourt.gov/opinions/21pdf/21a244_hgci.pdf.

533 BOWERS, K., CONG. RSCH. SERV.: *IF12077, The Major Questions Doctrine*, 2022, 2.

was insufficiently clear to authorize the agency's far-reaching plan to reduce power plant emissions.[534]

Despite the Court's formal adoption of the major questions doctrine, it it unclear what circumstances will trigger its use in future litigation. The Court may employ the doctrine to "*closely review agency actions that address novel problems, rely on statutory provisions that are infrequently used (or use provisions in a way that deviates from past practice), or could have significant economic or political repercussions*."[535]

In two recent cases, the parties argued about the potential application of the major questions doctrine in a challenge to a plan of the U.S. Department of Education to provide student loan debt relief.[536] In support of the debt relief package, the Department of Education cited a statute referred to as the HEROES Act, enacted after the September 11, 2001 attacks, permitting the Secretary of the Department of Education to "*waive or modify any statuory or regulatory provision*" related to student-loan programs to prevent borrowers from being "placed in a worse position financially" because of a national emergency. The federal government has argued that the HEROES Act[537] provides clear statutory authority to relieve student loan debt in response to the coronavirus pandemic, while opponents rely in part on the major questions doctrine, arguing that a decision with such broad economic consequences could not have been delegated to an agency. The Supreme Court issued its opinion in *Biden v. Nebraska* on June 30, 2023, rejecting the government's argument that it had legal authority to waive $430 billion of student loan debt. "*We hold today that the Act allows the Secretary to 'waive or modify' existing statutory or regulatory provisions applicable to financial assistance programs under the Education Act, not to rewrite that statute from the ground up*."[538] In the second case addressing this topic, the Supreme Court held that the plaintiffs in the underlying action did not have standing to pursue their claims, and therefore did not reach conclusions on the merits of the case.[539]

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534 *West Virginia v. EPA*, No. 20-1530, slip op. (2022): https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf.

535 BOWERS, K., CONG. RSCH. SERV.: *LSB10791 Supreme Court Addresses Major Questions Doctrine and EPA's Regulation of Greenhouse Gas Emissions*, 2022, 5.

536 *See No. 22-506: Biden v. Nebraska*, U.S. SUPREME COURT: https://www.supremecourt.gov/docket/docketfiles/html/public/22-506.html (last reviewed May 12, 2023);
No. 22-535: Department of Education v. Brown, U.S. SUPREME COURT: https://www.supremecourt.gov/docket/docketfiles/html/public/22-535.html (last reviewed May 12, 2023).

537 Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108-76, 117 Stat. 904 (codified at 20 U.S.C. §§ 1098aa–1098ee: https://uscode.house.gov/view.xhtml?req=(title:20%20section:1098aa%20edition:prelim)).

538 *Biden v. Nebraska*, 600 U.S. ___, No. 22-506, slip op. at 12 (2023): https://www.supremecourt.gov/opinions/22pdf/22-506_nmip.pdf

539 *Department of Education v. Brown*, 600 U.S. ___, No. 22–535, slip. op. at 2 (2023): https://www.supremecourt.gov/opinions/22pdf/22-535_i3kn.pdf

III. Case Law

Section III discusses the powers and responsibilities of the the judiciary. As has been discussed throughout other sections, the judicial branch holds a unique place in the American system because it is the final arbiter of what the law is, and enforces key rule of law principles, such as government restraint consistent with the Constitution. One scholar described the Supreme Court's role as it relates to the rule of law:

> *Recourse to disinterested tribunals to protect the citizen's rights and to check abuses of authority by executive and administrative officers and agencies is a feature usually judged indispensable to any concept of Rule of Law or of government under law. . . . Our Supreme Court, and here it symbolizes the entire judicial authority, assumes the function not only of determining whether officers of the government act within the limits of authority defined by law but the authority also to determine whether the law-making power has observed limits prescribed by the Constitution.*
>
> *It is because acts of both Congress and the state legislatures may be challenged before the Supreme Court to determine their constitutional validity, by reference either to the distribution of powers under the Constitution or by reference to basic rights safe-guarded by the Constitution, that the concept of the Rule of Law, in the sense that governmental authority is itself subject to law, assumes an extraordinarily large significance under our system.*[540]

The below sections provide examples of issues related to the judiciary in both civil and criminal cases.

III.1. Select Issues in Civil Cases

This section discusses federal court matters in civil cases. Section III.1.1 covers judicial review, including a brief history of how this practice was enshrined during Chief Justice Marshall's tenure on the Supreme Court. Section III.1.2 explains Article III standing, which is a necessary element for federal court jurisdiction over a case.

III.1.1. Judicial Review

The U.S. Constitution delineates the powers of the federal government branches, including the powers of the federal courts.[541] Omitted from Article III's express provisions, however, is a statement regarding federal court authority to exercise judicial review. Evidence of the Framers' intent to grant to the federal courts the ability to review cases, and declare unconstitutional laws invalid is found throughout early American texts, including statements made during the Constitutional Convention[542] and those written in *The Federalist*.[543] After the Constititonal Convention, congressional support for judicial review is found in early statutes,

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[540] KAUPER, P.: "The Supreme Court and the Rule of Law," *Michigan Law Review*, n. 59, 1961, p. 532.

[541] U.S. CONST., art. III.

[542] Cong. Rsch. Serv., *Historical Background on Judicial Review*, CONSTITUTION ANNOTATED, N. 3: https://constitution.congress.gov/browse/essay/artIII-S1-2/ALDE_00013513/ (last visited May 13, 2023).

[543] THE FEDERALIST NO. 78 (Alexander Hamilton) ("The interpretation of the laws is the proper and peculiar province of the courts. A constitution, is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.").

such as the Judiciary Act of 1789,[544] which bestowed the federal courts with various powers and jurisdiction over specific cases. Although these actions implicitly affirmed the judiciary's role in reviewing cases and evaluating the constitutionality of laws, it was not until the Supreme Court's decision in *Marbury v. Madison* that the doctrine of judicial review was explicitly embraced.[545]

In *Marbury*, the Supreme Court had to measure a plaintiff's assertion of government authority against the limits outlined in the Constitution.[546] Marbury, the plaintiff in the case, invoked section 13 of the Judiciary Act of 1789[547] to seek a form of judicial action called a mandamus,[548] to compel the executive branch to take a specific action in his favor. Section 13 provided that the U.S. Supreme Court would have original jurisdiction in cases like this. The Supreme Court agreed with Marbury that the Judicary Act granted the Supreme Court original jurisdiction in this type of case, but it declined to issue the writ, holding that section 13 impermissibly expanded the Court's original jurisdiction as set forth in the Constitution, and was therefore void.[549] In the course of ruling against Marbury's claim, the Court thus established that it had the power to invalidate unconstitutional statutes.

Writing for the Court, Chief Justice Marshall explained the contextual background of America's founding, the establishment of the Constitution, and the role of the Supreme Court in the federal government's structure. "*The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest*."[550] In affirming that the Supreme Court has the authority to void unconstitutional laws, Chief Justice Marshall discussed the importance of separation of powers and the limits placed on government by the Constitution. He concluded that these constitutional safeguards would serve no purpose "*if these limits may, at any time, be passed by those intended to be restrained[.]*"[551] Because the Constitution, by its own terms, is "*a superior paramount law, unchangeable by ordinary means, . . . a legislative act contrary to the constitution is not law*."[552] Justice Marshall went on to conclude, "*It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each*."[553] Because "*the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply*."[554]

Although *Marbury* addressed a conflict between a federal statute and the Constitution, the Supreme Court has similarly used its power of judicial review to evaluate the constitutionality

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544 Judiciary Act of 1789, ch. 20, 1 Stat. 73.

545 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), https://www.loc.gov/item/usrep005137/.

546 KAHN, P.: *Legitimacy and History: Self-Government in American Constitutional Theory*, Yale University Press, 1992, p. 24.

547 1 Stat. 73, 80.

548 *Mandamus*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/mandamus (last reviewed May 15, 2023).

549 *Marbury v. Madison*, 5 U.S. at 173-80.

550 *Id.* at 176.

551 *Id*.

552 *Id.* at 177.

553 *Id*.

554 *Id.* at 177-78.

of other types of laws, including state statutes and federal and state executive actions.[555] Additionally, the doctrine of judicial review has been adopted by state governments since *Marbury*, with one researcher documenting that all states had enacted constitutional provisions related to judicial review in their constitutions by 1850.[556]

Marbury's progeny cases on judicial review have reaffirmed the Court's power to make sweeping decisions affecting all federal and state government offices. For example, the 1958 case of *Cooper v. Aaron* was filed after the Arkansas governor and legislature openly resisted desegrating public schools, required by the Supreme Court's decision in *Brown v. Board of Education*.[557] Members of a Little Rock, Akansas school board filed suit to halt integrating the schools; the main question before the Court was whether Arkansas officials were bound by federal court orders mandating desegregation.[558] The Court affirmed its decision in *Brown* that school segregation was impermissible under the 14th Amendment's Equal Protection Clause, and went on to explain the Supreme Court's role under the Constitution and its precedent.[559]

The Court first looked to the Supremacy Clause of Article VI, which made the U.S. Constitution the supreme law of the land.[560] Invoking *Marbury*, the Court restated that as the final interpreter of the Constitution, the Supreme Court's precedent in *Brown* was the supreme law of the land and was therefore binding on all the states, notwithstanding any state laws to the contrary.[561] Quoting other Supreme Court precedent, the Court in *Cooper* noted,

> *No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. . . . If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery. A Governor who asserts a power to nullify a federal court order is similarly restrained. If he had such power . . . it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases.*[562]

While the Supreme Court as the highest court in the land is the focus of most discussions of judicial review in the U.S., the power to nullify unconstitutional statutes and regulations is not limited to that court. Lower federal courts may rule on the constitutionality of federal statutes and regulations, and state courts of general jurisdiction may similarly rule on the constitutionality of state governmental actions.[563]

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[555] See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), https://www.loc.gov/item/usrep010087/; *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), https://www.loc.gov/item/usrep006170/; *Cooper v. Aaron*, 358 U.S. 1 (1958), https://www.loc.gov/item/usrep358001/.

[556] NELSON, W.: "Changing Conceptions of Judicial Review: The Evolution of Constitution Theory in the State, 1790–1860," *University of Pennsylvania Law Review*, n. 120, 1972, p. 1166.

[557] *Brown v. Board of Education* 347 U.S. 483 (1954), https://www.loc.gov/item/usrep347483/; *Brown v. Board of Education (Brown II)*, https://www.loc.gov/item/usrep349294/.

[558] *Cooper v. Aaron*, 358 U.S. 1, 17 (1958), https://www.loc.gov/item/usrep358001/.

[559] *Id.*; U.S. Const., amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[560] *Cooper,* 358 U.S. at 18.

[561] *Id*.

[562] *Id.* at 18-19 (1958) (citations and internal quotations omitted).

[563] CASS, *supra* note 1, at 64.

III.1.2. Article III Standing

The Constitution provides that the federal courts may hear "cases" and "controversies" arising under federal law, as set forth in the Constitution and congressional acts.[564] Courts review several factors to determine whether the claims before them qualify as cases or controversies.[565] To meet this threshold, parties must demonstrate adversity (a dispute between or among parties, with actual matters in contention), the existence of a real interest (as opposed to a hypothetical or speculative issue), and standing (a plaintiff who is entitled to sue).[566] This section focuses on the standing requirement under Article III and summarizes the factors that courts weigh when analyzing this issue.

FRAME 19

U.S. Const., art III, § 2, cl. 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

To establish standing, a plaintiff in a civil case must demonstrate their "*right to make a legal claim or seek judicial enforcement of a duty or right*."[567] A standing analysis involves a plaintiff alleging (and eventually proving) "*(1) a concrete and particularized injury; (2) that is traceable to the allegedly unlawful actions of the opposing party; and (3) that is redressable by a favorable*

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564 U.S. Const., art III, § 2, cl. 1.

565 One related topic is the "political question" doctrine. It provides that federal courts may not hear cases that resolve only policy matters, decide factual disputes beyond the Court's purview, or otherwise invade the provinces of the the executive and legislative branches. Supreme Court cases have grounded the doctrine in Article III's case or controversy requirement. As stated by the Court, "no justiciable 'controversy' exists when parties seek adjudication of a political question." *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007), https://www.loc.gov/item/usrep549497/. Political question cases are unreviewable even if they meet all other factors for justiciability. Examples of disputes that do not meet the case or controversy requirement were listed in the 1962 Supreme Court decision of *Baker v. Carr*:

> *Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.*

Baker v. Carr, 369 U.S. 186, 217 (1962), https://www.loc.gov/item/usrep369186/. For more discussion on the political question doctrine, see DODSON, S.: "Article III and the Political Question Doctrine," *Northwestern University Law Review*, n. 116, 2021, p. 681; WHITAKER, L., CONG. RSCH. SERV.: *LSB10324, Partisan Gerrymandering Claims Not Subject to Federal Court Review: Considerations Going Forward*, 2019; LAMPE, J., CONG. RSCH. SERV.: *LSB10791, The Political Question Doctrine: An Introduction (Part 1)*, 2022 (first essay in a six-part series, all of which are available at crsreports.congress.gov).

566 Cong. Rsch. Serv., *Overview of Cases or Controversies*, CONSTITUTION ANNOTATED: https://constitution.congress.gov/browse/essay/artIII-S2-C1-1/ALDE_00013375/ (last visited May 13, 2023).

567 *Standing*, Black's Law Dictionary (11th ed. 2019).

judicial decision."[568] The burden to establish standing rests with plaintiffs (individuals filing the initial suit), as well as intervenors[569] and appellants.[570] If a required party cannot prove standing, the case could be dismissed before the court offers a decision on the merits.[571]

The Supreme Court has offered various rationales in its standing jurisprudence. One explanation is rooted in the Constitution's separation of powers, and the notion that Congress and the executive branch are responsible for making policy determinations that affect the public at large and "*vindicating the public interest*." A century ago, the Supreme Court expounded upon this notion:

> *We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy.*[572]

By carving out a narrow set of factors to establish standing, the federal courts reaffirm their status as courts of limited jurisdiction and uphold American rule of law principles related to limiting government actions. Other justifications for the standing requirement include judicial efficiency, preserving the court's limited resources, and the ability of the court to set forth relief that is limited to the facts before it, rather than based on abstract claims from a party that has no discernable interest in a case's outcome beyond that of a concerned bystander. [573]

Among other matters, courts regularly undertake standing analyses when reviewing cases arising from challenges to administrative agency actions or inaction related to environmental pollution. For example, *Lujan v. Defenders of Wildlife*, the case outlining the three-factor standing test that is applied today, involved a regulation of the Departments of the Interior and Commerce that limited application of the Endangered Species Act to federal agency actions taken in the United States or the high seas and excluded its application to federal agency actions in foreign nations.[574] In response, an environmental group sued the Department of the Interior. To demonstrate that the plaintiffs were injured by the agency's actions, they stated that they had traveled abroad to see endangered species in the past, and had plans to do so again in the future; if the agency failed to apply the ESA overseas, the agency's actions, they alleged, would interfere with the claimants' future trips abroad.[575] The Supreme Court held that these averments were insufficient to establish harm under Article III standing.

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[568] Cong. Rsch. Serv., *Overview of Standing*, CONSTITUTION ANNOTATED: https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-1/ALDE_00012992/ (last visited May 13, 2023) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), https://www.loc.gov/item/usrep504555/).

[569] *Town of Chester, New York v. Laroe Estates, Inc.*, 581 U.S. 433, 435 (2017): https://www.supremecourt.gov/opinions/preliminaryprint/581US2PP_Web.pdf#page=141.

[570] *Diamond v. Charles*, 476 U.S. 54, 56 (1986), https://www.loc.gov/item/usrep476054/.

[571] *See, e.g., Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983), https://www.loc.gov/item/usrep461095/.

[572] *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923), https://www.loc.gov/item/usrep262447/.

[573] *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs.*, 528 U.S. 167, 191 (2000), https://www.loc.gov/item/usrep528167/ ("Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake.").

[574] SUNSTEIN, C.: "What's Standing after Lujan--Of Citizen Suits, Injuries, and Article III," *Michigan Law Review*, n. 91, 1992, pp. 198-99.

[575] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563-66 (1992), https://www.loc.gov/item/usrep504555/.

Under the standing doctrine's first prong, a plaintiff must demonstrate both concrete *and* particularized injury. In *Lujan*, the plaintiffs could not demonstrate a *concrete* injury, one that was real and not abstract, but noneconomic damages may be sufficient to establish injury for purposes of standing. Examples of these concete harms include aesthetic injuries (harm to a plaintiff's ability to observe the environment, such as a particular species);[576] recreational injuries (harm to a plaintiff's ability to enjoy or use the environment);[577] and procedural injuries (harm to concrete interests resulting from an agency's failure to follow procedural requirements).[578]

Under Supreme Court precedent, a *particularized* injury is one that affects the paintiff in a "*personal and individual way*."[579] The *Lujan* court described the rationale behind requiring proof of this type of injury:

> *We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy*.[580]

The interplay of "concrete" and "particularized" injuries was demonstrated in the 2016 Supreme Court decision *Spokeo, Inc. v. Robins*.[581] In *Spokeo*, the plaintiff sued a company operating a "people search engine" for violating the Fair Credit Reporting Act (FCRA), a consumer protection statute involving fairness, accuracy and privacy protections for consumer credit reporting.[582] The plaintiff sued after Spokeo reported incorrect information about him and other class members on its website. The Supreme Court held that such statutory violations, even if they resulted in particularized injuries to class members, may not be sufficient to establish *concrete* injuries because "*not all inaccuracies cause harm or present any material risk of harm*."[583] The Court held that

> *a defendant's actions, even if contrary to a procedural duty established by a federal statute providing a damages remedy and sufficient for a particularized injury, might not amount to a concrete injury sufficient for Article III standing if such injuries do not actually present a material risk of harm to the litigant*.[584]

A plaintiff proffering evidence of standing must demonstrate that the claimed injury was caused by, or "fairly traceable" to, the defendant's actions.[585] Courts may dismiss a case if the injury was caused by an intervening third party or when "the line of causation between the

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576 *Id*. at 562-63.

577 *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686–87 (1973): https://www.loc.gov/item/usrep412669/.

578 *FEC v. Akins*, 524 U.S. 11, 21 (1998), https://www.loc.gov/item/usrep524011/; *Lujan,* 504 U.S. at 572 n.7.

579 *Lujan*, 504 U.S. at 560 n. 1.

580 *Id*. at 573-74.

581 578 U.S. 330 (2016), https://www.supremecourt.gov/opinions/preliminaryprint/578US2PP_Web.pdf#page=85.

582 Fair Credit Reporting Act 15 U.S.C. §§ 1681e, et seq.: https://uscode.house.gov/view.xhtml?req=(title:15%20section:1681e%20edition:prelim).

583 *Spokeo Inc. v. Robins*, 578 U.S. 330, 342 (2016): https://www.supremecourt.gov/opinions/preliminaryprint/578US2PP_Web.pdf#page=85.

584 Cong. Rsch. Serv., *Particularized Injury*, CONSTITUTION ANNOTATED: https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-4-3/ALDE_00012998/ (last visited May 13, 2023).

585 *Lujan,* 504 U.S. at 560-61.

illegal conduct and injury [is] too attenuated."[586] The Supreme Court reviewed the causation prong in *Allen v. Wright*. In that case, the parents of Black children who attended public schools challenged an IRS decision to allow racially discriminatory private schools to qualify for federal tax exemptions, thereby impeding desegregation efforts.[587] The Supreme Court concluded that the connection between regulations allowing tax exemptions to private schools and racial segregation in public schools was too tenuous and speculative to establish causation.[588]

The final prong of the standing test requires a plaintiff to show that the injury would likely be redressed, or remedied, if the court granted the requested relief. In reviewing these cases, federal courts look to the specific relief requested in the complaint and the factual background giving rise to the claims. For example, when litigants file suit for ongoing violations that threaten future harm, the Supreme Court has held that available remedies may include injunctive relief or civil penalties paid to the U.S. Treasury. The Court faced this scenario in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, in which the plaintiff sued under the Clean Water Act to compel the defendant to comply with the statute's requirements.[589] The requested relief sought by the plaintiff was for fines to be paid to the U.S. Treasury for each future violation; by seeking this remedy, the plaintiff intended to deter future statutory violations.[590] The Supreme Court agreed with the plaintiff's reasoning and held that the alleged injuries could be redressed by the requested relief listed in the complaint.[591] In reaching its holding, the Supreme Court noted that

> *for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description. To the extent that they encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.*[592]

In contrast, the Supreme Court has determined that plaintiffs lack standing when they seek injunctive relief for past violations of a statute. In *Steel Co. v. Citizens for a Better Environment*, the defendant failed to fulfill a statutory obligation to submit timely information about its storage of hazardous chemicals.[593] The company eventually filed these required forms, and the plaintiffs sued, seeking the court to declare that the company had violated the underlying statute, as well as other forms of injunctive relief and civil penalties for past violations.[594] In rejecting the plaintiffs' standing arguments, the Court stated that none of the plaintiffs' requested forms of relief would remedy the defendant's past conduct or the alleged injuries, and it therefore lacked jurisdiction to adjudicate the claims.[595] In other words, because the plaintiffs' requested relief would not remedy past injuries, the claimed injuries were not redressable, and standing was therefore absent.

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[586] *Allen v. Wright*, 468 U.S. 737, 752 (1984), https://www.loc.gov/item/usrep468737/.

[587] *Id*. at 739–40.

[588] *Id*. at 757–59.

[589] *Friends of the Earth v. Laidlaw*, 528 U.S. at 173, https://www.loc.gov/item/usrep528167/

[590] *Id*.

[591] *Id*. at 185-186.

[592] *Id*.

[593] *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 88 (1998), https://www.loc.gov/item/usrep523083/.

[594] *Id*. at 105.

[595] *Id*. at 105-106.

As demonstrated by the above examples and cases, plaintiffs must surmount several hurdles when filing claims in federal court. Along with technical procedural requirements found in sources such as the *Federal Rules of Civil Procedure* and statutes of limitations, federal plaintiffs must allege sufficient facts to establish (1) a concrete and particularized injury; (2) that is traceable to the defendant's unlawful actions; and (3) redressable by a favorable court decision.

III.2. Select Issues in Criminal law

Most of the discussion throughout this study has centered on civil law matters, but important rule of law principles enshrined in the Constitution touch on the rights of criminal defendants, most notably those under the Fourth, Fifth, Sixth, and Fourteenth amendments. The sections below focus on discovery and disclosure of evidence in criminal proceedings and the exclusionary rule, a doctrine sometimes referred to as the "*fruit of the poisonous tree*." These topics were selected because they are based on broad constitutional provisions, and the remedy for errors in these cases can be severe, up to and including vacating convictions or dismissing criminal charges against a person who almost assuredly committed a crime. Despite public safety and law enforcement concerns, the Supreme Court has determined that these remedies are justified to deter criminal prosecutions and police searches that interfere with liberty interests in violation of the U.S. Constitution. Additionally, unlike other matters discussed throughout the study that have demonstrated how the work of all federal government branches can impact one topic, the examples discussed below involve issues that are nearly exclusive to the court system.

Other significant constitutional issues in criminal procedure and practice are not covered here, including the right to a speedy trial, the right to face one's accuser, prohibitions against double jeopardy, and the right against self-incrimination.

III.2.1. Discovery

In both criminal and civil cases, discovery is a pretrial process that involves the exchange of evidence relevant to the case, to allow the parties to fully prepare and strategize for trial. The Supreme Court has explained the policy considerations that underlie the discovery process. "[Discovery rules] are based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maxiumum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial."[596] The U.S. Constitution contains no clauses about civil or criminal discovery, and prior to the passage of the *Federal Rules of Criminal Procedure* in 1944, discovery procedures in criminal cases were limited and inconsistent, varying considerably across federal courts and state jurisdictions.[597] The stated purposes of these rules were to "secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay."[598]

FRAME 20

U.S. Const., amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual

[596] *Wardius v. Oregon*, 412 U.S. 470, 473 (1972), https://www.loc.gov/item/usrep412470/.

[597] MCCONKIE, D.: "The Local Rules Revolution in Criminal Discovery," *Cardozo Law Review*, n. 39, 2017, p. 65.

[598] FED. R. CRIM. P. 2.

service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

In 1963, the Supreme Court decided *Brady v. Maryland*, holding that the due process clause under the Fifth and Fourteenth Amendments requires prosecutors to hand over exculpatory evidence, that is, evidence that is favorable to the defense and material to the defendant's guilt or punishment.[599] In this case, Brady and his codefendant were charged with murder. Pretrial, the codefendant admitted to the police that he had committed the murder, but this statement was never disclosed to Brady, even after Brady's attorney requested from the government any statements made the codefendant. During trial, Brady and his counsel employed a courtroom strategy to cast blame on Brady's codefendant, while minimizing Brady's involvement, based on the belief that his codefendant had not admitted to the murder.[600] "*This strategy, if successful, would assure a conviction for murder, but would avoid the death penalty.*"[601] A jury convicted Brady and the codefendant of first degree murder under Maryland laws. After Brady *"had been tried, convicted, and sentenced, and after his conviction had been affirmed*," he learned for the first time about his codefendant's confession.[602]

The Supreme Court held that "*the suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution*."[603] The *Brady* decision expressly recognized both a defendant's constitutional right to certain discovery and a corresponding duty upon the prosecutor/government to disclose exculpatory evidence.[604]

A defendant's right to discovery, however, is not absolute. The Supreme Court has subsequently held that "*the Constitution does not provide the defendant with access to 'everything known to the prosecutor.'*"[605] Likewise, a criminal defendant cannot realistically expect to have access to "*all police investigatory work on a case*."[606] Put another way, "There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one."[607] *Brady* and its progeny instead stand for the proposition that prosecutors "*must disclose certain*

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599 *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963), https://www.loc.gov/item/usrep373083/.

600 *Id*. at 84.

601 RIGG, R.: "Investigation, Discovery, and Disclosure in Criminal Cases," *Drake Law Review*, n. 52, 2004, p. 780 (citing *Brady v. Maryland*, 373 U.S. 83, 84-85 (1963), https://www.loc.gov/item/usrep373083/).

602 *Brady,* 373 U.S. at 84.

603 *Id*. at 87.

604 The *Brady* decision culminated from a series of criminal cases decided prior to 1963. See *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), https://www.loc.gov/item/usrep294103/ (prosecutor violated due process by attempting to deprive a defendant of liberty "through a deliberate deception of the court and jury by the presentation of testimony known to be perjured"); *Pyle v. Kansas*, 317 U.S. 213 (1942), https://www.loc.gov/item/usrep317213/ (government deliberately used perjured testimony and denied the defense an opportunity to impeach the government's witness); *Alcorta v. Texas*, 355 U.S. 28 (1957), https://www.loc.gov/item/usrep355028/ (conviction vacated because a prosecutor failed to correct a material witness' false trial testimony about his extramarital affair with the defendant's wife prior to her murder); *Napue v. Illinois*, 360 U.S. 264 (1959), https://www.loc.gov/item/usrep360264/ (conviction vacated when a prosecutor did not correct a witness' untrue trial testimony that related to the motivation of the witness' testimony).

605 HALL, J.: "The Constitutional Right to Discovery: A Question of Fairness," *FBI Law Enforcement Bulletin*, n. 57, 1988, p. 26 (quoting *United States v. Agurs*, 427 U.S. 97, 106 (1976), https://www.loc.gov/item/usrep427097/).

606 *Moore v. Illinois*, 408 U.S. 786, 795 (1972), https://www.loc.gov/item/usrep408786/.

607 *Weatherford v. Bursey*, 429 U.S. 545 (1977), https://www.loc.gov/item/usrep429545/.

'material' evidence and information that is favorable to the accused—that is, certain evidence and information that either exculpates the defendant or impeaches prosecution witnesses."[608]

The question of "materiality" lies at the heart of most post-*Brady* challenges to undisclosed evidence. The Supreme Court has concluded that "*evidence is not material unless it might have tipped the balance between a conviction and an acquittal*."[609] Evidence may also be material if it can be demonstrated that its non-disclosure "*undermines confidence in the outcome of the trial*."[610] Evidence that is not admissible at trial falls outside *Brady's* disclosure requirements,[611] and prosecutors are not required to disclose evidence that is not in their possession or otherwise obtainable by the defense.[612]

Disclosure practices in criminal cases are guided by the *Federal Rules of Criminal Procedure*, federal statutes, and local court rules. Disclosure requirements are found in Fed. R. Crim. P. 16.[613]

> *The Federal Rules of Criminal Procedure have mandated far more discovery than Brady requires. Rule 16, which was strongly influenced by the civil discovery rules, now requires prosecutors to produce statements of the defendant, documents and objects relevant to the case, the defendant's criminal history, reports of examinations and tests, and expert witness reports. Trial judges have broad discretion to enforce violations of the rule. Rule 16 does not prescribe any time limits except that disclosures should be made before the trial.*[614]

Rules 12.1, 12.2, 12.3, 12.4, and 26.2 further regulate discovery in federal criminal proceedings. Importantly, apart from mandates outlined in the *Federal Rules of Criminal Procedure*, the government is not required to disclose evidence that the defense fails to specifically request.[615]

Most criminal prosecutions in the United States occur at the state or municipal level. State court rules on the discovery vary considerably by jurisdiction, but "many states provide the defense with far greater access to evidence [than under the *Federal Rules*]."[616] In some states, defendants must receive witness lists,[617] while in others, a defendant may request the entire prosecution file[618] or depose witnesses pretrial.[619] State ethics rules may also guide prosecutorial decisions on evidence disclosure. The American Bar Association's *Model Rules of*

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608 GREEN, B.: "Federal Criminal Discovery Reform: A Legislative Approach," *Mercer Law Review*, n. 64, 2013, p. 644.

609 *Id.* at 645 (citing *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006), https://www.loc.gov/item/usrep547867/ (evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.").

610 *Kyles v. Whitley, Warden*, 514 U.S. 419, 434 (1995), https://www.loc.gov/item/usrep514419/ ("A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'").

611 *Wood v. Bartholomew*, 516 U.S. 1, 8 (1995), https://www.loc.gov/item/usrep516001/.

612 *United States v. Clark*, 928 F.2d 733 (6th Cir. 1991).

613 Fed. R. Crim. P. 16, https://www.uscourts.gov/sites/default/files/federal_rules_of_criminal_procedure_-_december_2020_0.pdf#page=48.

614 MCCONKIE, *supra* note 597, at 67.

615 *United States v. Agurs*, 427 U.S. 97, 106-07 (1976), https://www.loc.gov/item/usrep427097/) (a general request for "anything exculpatory" is insufficient and "gives the prosecutor no better notice than if no request was made.").

616 GREEN, *supra* note 608, at 644.

617 *Id.* at 644 n. 26.

618 *Id.* at 641 n. 14.

619 *Id.* at 644 n. 28.

Professional Conduct, which many state jurisdictions have adopted in their rules governing attorney ethics, mandate the *Brady* rule as a matter of ethics, requiring that prosecutors "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . ."[620]

Although discovery practices in criminal proceedings have progressed significantly over the past century, many advocates have posited that the government's duty to disclose evidence should be expanded further. Many of these arguments have focused on a lack of early discovery, before plea-bargaining,[621] as well as the lack of oversight that courts have over prosecutorial practices,[622] and de minimus consequences for discovery violations by prosecutors.[623]

III.2.2. Exclusionary Rule

The Fourth Amendment declares the right of individuals to be free from unreasonable searches and seizures. A number of remedies have been used by courts and other agencies to remedy constitutionally defective and unlawful searches, but the most commonly used legal device to cure these issues in criminal prosecutions is the exclusionary rule. Under this rule, the trial court will exclude the unconstitutionally seized evidence from a criminal trial, typically during a pretrial hearing. This sometimes results in the prosecution dismissing the charges against the defendant because the government lacks sufficient evidence to prove beyond a reasonable doubt that the defendant committed a crime. The following paragraphs provide a brief background on this practice in American courts, and summarize recent court decisions and legal developments on this topic. Examples of alternative remedies to the exclusionary rule also are provided.

FRAME 21

U.S. Const., amend. IV

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

Scholars have traced the exclusionary rule's origins in American jurisprudence to *Boyd v. United States*,[624] an 1886 Supreme Court decision discussing the relationship between the Fourth Amendment's search and seizure limitations and the Fifth Amendment's prohibition against compelling an individual to be a witness against him/herself in a criminal proceeding. In *Boyd*, the Supreme Court reviewed an 1874 customs revenue statute that required defendants to produce private books, invoices, and papers in certain cases; failure to do so was deemed under the statute to be an admission of guilt or statutory violation.[625] The Supreme Court held that the compulsory production of records to establish guilt is equivalent to a Fourth

[620] MODEL RULES OF PROF'L CONDUCT r. 3.8(d): https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor/.

[621] MCCONKIE, D.: "Structuring Pre-Plea Criminal Discovery," *The Journal of Criminal Law and Criminology*, n. 107, 2017, pp. 1-61.

[622] MCCONKIE, *supra* note 597, at 65-74.

[623] GREEN, *supra* note 608, at 639-682.

[624] *Boyd v. United States*, 116 U.S. 616 (1886), https://www.loc.gov/item/usrep116616/.

[625] Ch. 391, § 5, 18 Stat. 186.

Amendment search.[626] After analyzing the relationship between the Fourth Amendment and the Fifth Amendment's provision against self-incrimination, the Court excluded the evidence "*because the defendant had been compelled to incriminate himself by producing it.*"[627] Although this decision was limited to the facts and statute before the Court, *Boyd* laid the groundwork for the exclusionary rule.

In 1914, the Supreme Court decided *Weeks v. United States*,[628] addressing the use of evidence at trial that was seized in two warrantless searches of the defendant's home. Writing for a unanimous court, Justice Day wrote an opinion concluding that the trial court should have excluded this evidence, emphasizing the duty imposed upon courts and law enforcement officers by the Constitution:

> *The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful searches and enforced confessions . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.*[629]

The Court said that if unlawfully seized evidence was admissible in court, this would effectively nullify the Fourth and Fifth Amendments:

> *If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. The United States Marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information and describing with reasonable particularity the thing for which the search was to be made. Instead, he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the Government, and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action.*[630]

While the exclusionary rule became the standard for federal criminal cases after *Weeks*, the Court only applied it in rare circumstances over the ensuing decades, usually in cases where

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626 *Boyd,* 116 U.S. at 622 (1886).

627 Cong. Rsch. Serv., *Adoption of Exclusionary Rule*, CONSTITUTION ANNOTATED: https://constitution.congress.gov/browse/essay/amdt4-7-2/ALDE_00000806/ (last visited May 17, 2023) (citing *Boyd* 116 U.S. at 633).

628 *Weeks v. United States*, 232 U.S. 383 (1914), https://www.loc.gov/item/usrep232383/.

629 *Id.* at 392.

630 *Id*. at 393.

the search tactic employed by the police "shock[ed] the conscience."[631] The Court eventually applied the exclusionary rule to states in *Mapp v. Ohio*.[632] Using a similar rationale as the Court set out in *Weeks*, it held that the exclusionary rule was "*an essential part of the right to privacy*" under the Fourth Amendment, and to fail to exclude unlawfully seized evidence would equate to "*grant[ing] the right but in reality . . . withhold[ing] its privilege and enjoyment*." [633] The Court further held that the same standards for reviewing the legality of searches should apply in both federal and state courts.[634]

The exclusionary rule has faced criticism since its adoption. Many arguments against it focus on the fact that a person who committed a crime will go free due to police error.[635] Others have stated that the exclusionary rule has a limited deterrant effect that interferes with effective law enforcement and public safety.[636] These concerns have been noted by the Supreme Court, which has limited the rule considerably since *Mapp*.

Under contemporary Supreme Court precedent, the exclusionary rule is not applied in cases where officers had a "good faith" belief that their actions met constitutional muster. In *United States v. Leon*, the Court reviewed a case in which evidence was obtained based on the "*officers' objective, good-faith reliance on a warrant, later found to be defective, issued by a detached and neutral magistrate*."[637] The Court concluded that the rule had no application in a situation like this, because the rule was intended was to deter police misconduct, rather than punish the errors of magistrates.[638] The Court noted that this decision did not apply to all defective warrants; rather, warrants must still be written with particularity under the Fourth Amendment.[639] Other contexts in which the exclusionary rule is inapplicable include parole

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631 *Rochin v. California*, 342 U.S. 165, 172 (1952), https://www.loc.gov/item/usrep342165/ (evidence of drugs should have been excluded when the police acquired the evidence by forcing the defendant to take an emetic, which the Court characterized as "conduct that shocks the conscience"); *see also Wolf v. Colorado*, 338 U.S. 25, 31 (1949), https://www.loc.gov/item/usrep338025/ (freedom from unreasonable searches is guaranteed by the Fourth and Fourteenth Amendments, but states may apply corrective measures other than the exclusionary rule, if these practices are consistently enforced); *Irvine v. California*, 347 U.S. 128 (1954), https://www.loc.gov/item/usrep347128/ (holding that the *Wolf* decision compels the exclusionary rule in limited circumstances involving brutality, and not in a case where officers use some unlawful means to obtain evidence).

632 *Mapp v. Ohio*, 367 U.S. 643 (1961), https://www.loc.gov/item/usrep367643/.

633 *Id*. at 656.

634 *Ker v. California*, 374 U.S. 23 (1963), https://www.loc.gov/item/usrep374023/.

635 *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926): https://cite.case.law/ny/242/13/?full_case=true&format=html (the criminal will go free "because the constable has blundered");

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 416 (1971): https://www.loc.gov/item/usrep403388/ (Burger, C.J., dissenting).

A more robust set of arguments against the exclusionary rule can be found in LAFAVE, W.: *Search and Seizure: A Treatise on the Fourth Amendment*, Thomson Reuters, 2020 (6th ed.), §§ 1.2-1.6; *see also* GAROUPA, N. & MUNGAN, M.: "The Exclusionary Rule Revisited," *Journal of Legal Studies*, n. 51, 2022, p. 209 (applying a law and economics review of the exclusionary rule's impact).

636 *United States v. Janis*, 428 U.S. 433, 448-54 (1976), https://www.loc.gov/item/usrep428433/.

637 Cong. Rsch. Serv., *Adoption of Exclusionary Rule*, CONSTITUTION ANNOTATED: https://constitution.congress.gov/browse/essay/amdt4-7-2/ALDE_00000806/ (last visited May 17, 2023).

638 *United States v. Leon*, 468 U.S. 897, 916-17 (1984), https://www.loc.gov/item/usrep468897/.

639 Other cases applying a "good faith" or "objectively reasonable" exception to the exclusionary rule include: *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), https://www.loc.gov/item/usrep468981/; *Illinois v. Krull*, 480 U.S. 340 (1987), https://www.loc.gov/item/usrep480340/; *Davis v. United States*, 564 U.S. 229 (2011), https://www.loc.gov/item/usrep564229/.

revocation hearings;[640] searches conducted in violation of the "knock-and-announce" rule;[641] and when an arrest or search was valid at the time of execution, but the underlying statute was later invalidated.[642]

The Supreme Court's most recent decision addressing the admissibility of evidence obtained during an unconstitutional search was *Collins v. Virginia*.[643] In *Collins*, the Court concluded that officers violated the Fourth Amendment when searching for a motorcycle that had twice unlawfully eluded police officers. Without a warrant, the officers visited the defendant's home, entered the driveway, and lifted a tarp to find a distinct motorcycle matching the description provided by witnesses. The Court held that officers are prohibited under the Fourth Amendment from performing warrantless searches of an individual's home or "curtilage," including an adjacent driveway.[644] In a concurring opinion, Justice Thomas agreed with the Court's conclusion, but wrote separately to express "*serious doubts about this Court's authority to impose [the exclusionary rule] on the States*."[645] With the altered make-up of the Court since *Collins*, it remains to be seen whether the other Justices will someday adopt Justice Thomas' approach, thereby at least partially overturning *Mapp v. Ohio* and its related cases.

III.3. Pending Questions on Congressional Oversight and Supreme Court Ethics

As discussed supra in sections II.1.2.1 and II.2.1, Article III judges have life tenure "*during good behavior*." During the course of this study's drafting, news reports began covering previously undisclosed financial relationships between a Supreme Court Justice and a wealthy individual. In response to these reports, Members of Congress drafted a letter to the Chief Justice, requesting an ethics investigation into this matter.[646] The Chief Justice, who serves as the Secretary of the Judicial Conference of the United States, referred the matter to the Judicial Conference Committee on Financial Disclosure.[647]

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640 *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357 (1998), https://www.loc.gov/item/usrep524357/.

641 18 U.S.C. § 3109: https://uscode.house.gov/view.xhtml?req=(title:18%20section:3109%20edition:prelim)%20OR%20(granuleid:USC-prelim-title18-section3109)&f=treesort&num=0&edition=prelim ("The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant"); *Hudson v. Michigan*, 547 U.S. 586 (2006), https://www.loc.gov/item/usrep547586/.

642 *Michigan v. DeFillippo*, 443 U.S. 31 (1979), https://www.loc.gov/item/usrep443031/.

643 *Collins v. Virginia*, No. 16-1027, slip op. (2018) https://www.supremecourt.gov/opinions/17pdf/16-1027_7lio.pdf. Although the Supreme Court outlined the justification for excluding the evidence, it never used the term "exclusionary rule." That term, however, is used repeatedly by the concurrence.

644 *Id*. at 14.

645 *Id*. at 1 (Thomas, J. concurring).

646 Letter from Sheldon Whitehouse, et al., U.S. Senator, to John Roberts, Chief Justice, United States Supreme Court (Apr. 7, 2023): https://www.whitehouse.senate.gov/imo/media/doc/Letter%20to%20Chief%20Justice%20Roberts%20re%20Justice%20Thomas%20and%20Ethics.pdf.

647 Letter from Roslynn Mauskopf, Secretary, Judicial Conference of the United States to Sheldon Whitehouse, et al., Senator, United States Senate (Apr. 21, 2023): https://www.whitehouse.senate.gov/imo/media/doc/RRM%20response%20to%20Senators%207%20Apr%202023%20letter%20(Final)1.pdf.

The Senate Judiciary Committee contemporaneously invited Justice Roberts to testify before the committee at a hearing on judicial ethics,[648] which Justice Roberts declined, noting that the appearance of a Supreme Court Justice at a congressional committee hearing was "rare" due to "*separation of powers concerns and the importance of preserving judicial independence.*"[649] Chief Justice Roberts' letter appended a statement on ethics principles and practices "*to which all of the current Members of the Supreme Court subscribe*."[650] The Senate Judiciary Committee hearing on Supreme Court ethics reform proceeded as planned on May 2, 2023.[651] Relatedly, several bills have been introduced in Congress to create more precise ethical standards for the U.S. Supreme Court, although their scope and substance varies by bill.[652]

This study offers no opinion on the pending investigations or legislation related to Supreme Court ethics reform. Rather, these events are described only to note that rule of law questions and issues related to separation-of-powers principles continue to be debated across the federal government branches. For more information about congressional oversight of the federal courts, see sec. II.2, *supra*.

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[648] Letter from Dick Durbin, Senator, U.S. Senate to John Roberts, Chief Justice, United States Supreme Court (Apr. 20, 2023): https://www.judiciary.senate.gov/imo/media/doc/chair_durbin_invitation_to_chief_justice_roberts_to_testify_before_sjc.pdf.

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[650] Id.

[651] *Supreme Court Ethics Reform*, U.S. SENATE JUDICIARY COMMITTEE: https://www.judiciary.senate.gov/committee-activity/hearings/supreme-court-ethics-reform (last reviewed May 17, 2023).

[652] *Search for* Supreme Court Ethics Act, CONGRESS.GOV: https://www.congress.gov/search?q=%7B%22congress%22%3A%5B%22118%22%5D%2C%22source%22%3A%22all%22%2C%22search%22%3A%22Supreme%20Court%20Ethics%20Act%22%7D (last reviewed May 17, 2023).

IV. The Rule of Law and Its Challenges

The organization, scope, and contents in this bibliography is provided only to provide additional resources on American rule of law topics. A more complete bibliography by alphabetical order of the authors can be found in the annex.

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V. Conclusions

In the United States federal government, rule of law principles are embodied in the separation of functions across the three government branches. The Constitution mandates the roles that each branch performs and creates mechanisms for ensuring that government power is restrained.

Lawmaking by the three federal government branches is not siloed. Instead, the branches work together to constrain or "check" the activities of the other coordinate branches. Congress enacts legislation and may delegate authority to federal agencies to issue laws on a certain policy, or dictate the make-up and appellate jurisdiction of the federal courts. Despite these broad legislative powers, the courts may overturn unconstitutional laws, and federal agencies have significant leeway in drafting rules and regulations when Congress is silent or ambiguous on specific issues. Exective agencies enact specific and sweeping regulations that impact nearly every impact on American life, but Congress is permitted to review and overturn these rules through legislation or under the Congressional Review Act. Likewise, federal courts are tasked with ensuring that agencies act within the bounds of their statutory authority and serve as the final arbiter on these issues. Finally, while the courts have broad authority under the doctrine of judicial review, the limited jurisdiction of federal courts and procedural hurdles such as Article III standing significantly limit the courts' authority to overturn legislation and regulations.

The Founders created this system, with separate government functions and checks and balances, to ensure that no government branch successfully usurped the power of the other branches, and to promote stability across the government while it adapts to society's changing needs.

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VI. Right to health

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VII. Rule of Law

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This study forms part of a larger comparative law project which seeks to present the rule of law in a broad range of legal orders around the world.

The subject of this study is the United States federal legal system. It presents the main relevant sources regarding the rule of law (legislation in force, case law and literature) in the US.

America's rule of law principles have origins in selected philosophies, legal histories, and lived experiences. With this background, America's Founders created a system, with separate government functions and checks and balances, to ensure that no government branch successfully usurped the power of the other branches, and to promote stability across the government while it adapts to society's changing needs.

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