1 Introduction to the Law and the American Legal System

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A clear understanding of law, the sources from which law emanates, and the structure of the court systems in the United States is central to developing a conceptual framework for the study of higher education law. This chapter briefly introduces the sources of law, the legal process, and the structure of the courts in order to provide such a framework. Principal sources of law are delineated, and the relationship between law and the legal process at both federal and state levels is explored, with particular emphasis on higher education.

Sources of Law

Sources of American law abound, and one fundamental error to avoid is assuming that the law is a static or monolithic concept. Multiple sources of law exist, and the dynamic nature of the legal process means that one single process may have to examine several legal sources to determine how the law applies to any specific situation—you need to learn to distinguish between the *text* of the law and the *interpretation* of the law. Legal professionals use numerous sources to mount their arguments, and the correct interpretation depends on the context. Generally, the law is any set of rules enacted by public officials in a legitimate manner that has the authority of the government. There is no one source of law, and the legal framework, its rules, regulations, and interpretations are almost always in flux. Laws can be in conflict with one another or interpreted differently by various parties, and it is these conflicts that increase the importance of understanding the sources and subsequent interpretation of the law by all the political actors involved in shaping the law—including elected branches of the government (specifically the legislative and executive branches), the courts, and administrative agencies.

In Anglo-American jurisprudence, developments in the law prior to the nineteenth century were founded primarily on common law—courts'

interpretation of prior judicial decisions on a case-by-case basis. Lawyers and judges combed over prior court decisions to determine the legal precedent of previous cases in order to ascertain how a conflict should be decided. Judges were the primary source of interpretation—they not only created the law, but they were also instrumental in shaping and modifying it as they issued their decisions in cases that came before them over the years. By the late nineteenth century, this reliance on common law began to change dramatically as democratic legislatures initiated changes to codify rules into statutes.

The codification of law expanded greatly during the New Deal Period in the United States due to the larger role government played in society. Rather than relying on judges to make case-by-case interpretation of the law, state legislatures began putting more and more common-law legal concepts into statutory form. For example, the common-law concept of sovereign immunity, which prohibited lawsuits against governmental agencies, gradually gave way to tort claim laws, whereby state legislatures spelled out in statutes the circumstances in which a governmental agency could be sued.

Formalizing law through passage of legislation helps decrease uncertainties about legal rights and obligations. Nevertheless, it is still judges who must interpret the laws adopted by legislatures and clarify the meaning of various statutes and regulations. For example, when Congress passed the Equal Access Act in 1984, it intended to give student religious groups equal access to school facilities as other non-curriculum-related student groups. Unfortunately, Congress did not define the phrase "non-curriculum- related student group," and the Supreme Court was called upon to define the term in *Board of Education of Westside Community Schools v. Mergens*.[1] In a decision written by Justice O'Connor, the Court defined the phrase to mean "any student group that does not *directly* relate to the body of courses offered by the school."[2]

Sources of Codified Law

The principle sources of codified law include constitutions, statutes, case law, administrative regulations, and procedural rules. It is to these various forms of codified law that we now turn.

Constitutional Law

In the hierarchy of legal structure, constitutional law can be thought of as "where the buck stops." Constitutions are authoritative texts that have legal force and prescribe principles of government. The root of the word "constitution" comes from various sources that date from Roman and Medieval times. "*Constitutio"* or "*constitutiones*" meant "enactments, decrees or regulations by the sovereign." The word "constitution" also derives from the

[1] Board of Educ. of the Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990).

[2] *Id*. at 239.

Latin word "*constituere,*" which means "to cause to stand" or "to fix, wet, or make" a thing or document.[3]

Constitutions are generally rather broad, and designed to be overarching frameworks to be interpreted by politicians and judges. The United States Constitution is rather concise, having approximately 4400 words and twenty-seven amendments; yet, it has survived over two centuries of political turmoil and stands as the oldest democratic constitution in the world. While roughly half of the world's constitutions (those from nations around the globe) were put in place after 1974, the U.S. Constitution is seen as the ideal model for articulating constitutional principles, even though many consider the nation's Constitution to be a flawed document. A sovereign country need not be a democracy to have a constitution, nor does having a constitution guarantee democratic principles. The Democratic People's Republic of North Korea has a constitution; indeed, Article 67 of that country's constitution guarantees freedom of the press and speech. Yet, any student of international affairs knows that the country is not democratic and does not permit freedom of speech or freedom of the press. While most countries of the world have written constitutions, and several countries have had multiple constitutions over time (e.g., France has had fifteen since 1789), England's "Constitution" is really a series of decisions handed down by English courts, as well as Acts of Parliament that have been promulgated over time.

Some state constitutions can either be very detailed or remain limited and abstract. For example, the Texas State Constitution comprises 109 pages with more than 82,800 words and more than 430 amendments regulating everything from freedom of speech to requirements that the constitution must be amended every time a county office is abolished! In contrast, Vermont's constitution, at about 8300 words, is about one-tenth the size of the Texas document and remains relatively short, because the amendment process for that state's constitution is cumbersome.

The nation's Federal Constitution operates in conjunction with the fifty states. When a state or federal law interferes with the U.S. Constitution, the courts determine whether the law is unconstitutional, that is, whether the law violates principles set forward in the authoritative text. In some instances, a court may determine that a particular law is *unconstitutional on its face* and, therefore, invalid in all its applications. In other instances, a court may determine that a law is *unconstitutional as applied*—i.e., that the law was applied by public officials in an unconstitutional manner.

Statutory Law

Statutes are laws enacted by federal or state legislatures that are codified for judges to interpret and apply. Whenever a law is passed by Congress, it is assigned a Public Law number, which indicates the Congressional term and chronological placement of the bill during that legislative session. In addition, all federal statutes are contained in the United States Codes (U.S.C.) or the

[3] *Encyclopædia Britannica Online*. Encyclopædia Britannica, 2014. Wed. 16 Mar. 2015.

United States Code Annotated (U.S.C.A.). State laws passed by the various legislatures are also given numerical code designations. The manner of codifying state laws differs from state to state and may not follow the same structure as the U.S. Code. All fifty states have online access to their state codes.

Judges may examine both the legislative history and legislative debates surrounding the enactment of a particular statute to determine what the legislature intended when it passed the law. Judges and their law clerks examine this legislative intent to ascertain how a statute should be properly construed. Occasionally, Congress or a state legislature may adopt a law in direct response to a court decision (see Figure 1). When a legislative body passes a law to counteract a judicial decision, it is said to have engaged in statutory reversal of the decision. Of course, these new laws may also be overturned by the courts in subsequent cases.

For example, the *Grove City College v. Bell* (1984) case involved gender discrimination under Title IX of the Education Amendments of 1972 and a question about withholding federal funds if discrimination had occurred. The Supreme Court held that only the program, not the institution could be sanctioned. So, because discrimination at Grove City College was confined to student financial aid, only federal financial aid monies could be withheld—all other federal monies could be disbursed to the college. After the Supreme Court's decision, Congress disagreed and eventually enacted a law which had the effect of statutorily reversing the *Grove City* decision so that the institution would lose all money coming from the federal government even if it had only been the financial aid office that had been discriminating.

Figure 1 – Statutory Reversals

Chief Justice Era	Years	# of Federal Laws Struck	Annual Federal Average	# of State & Local Laws Struck	Annual State & Local Average
Early Court	1789-1863	2	0.03	39	0.51
Chase Court	1864-1873	8	0.89	33	3.67
Waite Court	1874-1888	7	0.5	65	4.64
Fuller Court	1888-1910	14	0.64	89	4.05
White Court	1910-1921	12	1.2	124	12.4
Taft Court	1921-1930	11	1.22	129	14.33
Hughes Court, pre-"switch in time"	1930-1936	14	2	65	9.29
Roosevelt Court	1937-1953	3	0.18	108	6.35
Early Warren Court	1954-1962	7	0.78	73	8.11
Late Warren Court	1963-1969	16	2.29	113	16.14
Burger Court	1969-1986	32	1.88	309	18.18

Early Rehnquist Court	1986-1994	7	0.78	85	10.63
Late Rehnquist Court	1995-2005	35	3.18	52	4.73
Roberts Court to date	2005-2013	15	1.88	31	3.88

Case Law

Case law, or judge-made law, is the judicial interpretation of laws, including constitutions, statutes, administrative regulations, or court cases that were previously decided. Case law is essentially common law decided by judges, and it is relied upon whenever some other source of law is not available or needs interpretation. It is from these opinions that we have the notion of precedent, or stare decisis, a Latin phrase that means "let the decision stand**.**" Precedent mandates that judges follow legal principles laid down in prior cases and apply those principles to current disputes before the court when making a decision. Judges establish this law on a case-by-case basis through issuing opinions. No two cases look exactly alike; therefore, judges take different facets from prior cases to arrive at the appropriate rule of law. Nor is the law static—just because prior precedent exists does not mean that the courts do not reverse themselves. For example, as Figure 2 shows, between 1790 and 2001, the U.S. Supreme Court reversed itself at least 223 times (approximately 1.04 times per term). The Rehnquist court (1986-2005) reversed precedent forty-five times (2.4 times per term), while the Roberts court reversed precedent about eight times (1.6 times per term) during the first five years of Chief Justice Roberts's tenure.[4]

Figure 2 – Supreme Court Reversals

	Reversing the Court's Own Precedents		
Chief Justice	Terms	% Cases Overruled Precedents	% Overrulings Went in Liberal Direction
Fred M. Vinson	1946-53	0.8%	17%
Earl Warren	1953-69	2.4	91
Warren E. Burger	1969-86	2.0	53
William H. Rehnquist	1986-2005	2.4	40
John G. Roberts Jr.	2005-13	1.7	30

At the trial court level, usually only one judge decides a case. Cases may or may not involve a jury depending on the substance of the litigation, whether a jury trial is available under the law at issue, or whether a party asks for a jury trial. Judges make a number of decisions every day, but these do not always involve a written opinion. Indeed in the vast majority of trial-court decisions, judges rule without formal opinion in what are called bench rulings. Thus, there is no record of the decision for lawyers to examine, although a record of a bench ruling is usually preserved in a transcript of the court's proceedings. A party may

[4] *Ebb & Flow on the Supreme Court*, Oct. 12, 2013. Last visited February 13, 2014.

appeal a trial judge's bench ruling in appellate proceedings if the party believes the judge's ruling was erroneous, but only if the appealing party objected to the ruling in a timely manner during the trial court proceedings. Otherwise, the objecting party will have waived the right to challenge the ruling in an appellate court.

At the appellate level, the federal system and most state court systems have intermediate appellate courts that rule on appeals to trial-court decisions. Typically, an intermediate appellate court sits in a three-judge panel to decide a case, with one judge taking the lead in authoring the opinion. Other judges on the panel can either support the lead judge's opinion or issue a dissenting opinion relating to the case. If one of the appealing parties believes the three-judge panel incorrectly decided the case, the federal courts (and some state courts) permit a party to seek *en banc* review of the case. If *en banc* review is granted, all the judges of the appellate court review the case and issue a new opinion; and the three-judge panel's earlier decision is voided. Because the Ninth Circuit is so large (with over twenty-six judges), it uses a limited *en banc* review, meaning that the Chief Judge and ten judges randomly chosen are selected to re-hear the case. Generally, *en banc* review of a three-judge panel's decision occurs under special circumstances in which the issue under review is of broad public importance.

Administrative Regulations and Law

Administrative law is sometimes difficult to grasp, but it is critical to understanding the body of law in the U.S. legal system today and is frequently a factor in disputes that involve higher education institutions. In essence, administrative law is a subsidiary of statutory law and has the same authority as other laws, even though it is quasi-legislative or quasi-judicial in nature. Federal regulations developed substantially in the 1930s and continued to grow with the passage of the Administrative Procedures Act in 1946. Today, more than fifty-five different federal agencies operate under federal regulations.

When a legislature passes a law, it may not have well-defined ideas about how the law should be applied in practice. Nor may it know how best to implement the goals set down in the legislative enactment. In such a case, the legislature may delegate rule-making authority to the administrative agency that is responsible for implementing and enforcing the law. The administrative agency then adopts rules and regulations to further clarify the law that the legislature passed. These administrative rules and regulations have the force of law, although they were not passed by the legislature.

In the case of federal legislation, federal administrative agencies announce in the *Federal Register* that they are considering a new regulation and give interested individuals and groups a designated time period in which to provide comments about the proposed regulation. The agency may or may not hold public hearings, depending on the substantive nature of the rule. After the regulation has been established, it is "final" and must be published in the *Federal Register* and the *Code of Federal Regulations*. Many state agencies follow a similar process when promulgating administrative regulations.

Similarly, a legislature may believe it is important to have some legal control over a substantive area that is regulated by an administrative agency, but because of the number of issues associated with a particular regulation, it may recognize a need to keep conflicts about the rule out of the courts. For example, the U.S. Congress sometimes delegates dispute-resolution authority to administrative agencies. In such instances, Congress gives quasi-judicial authority to an administrative agency to hear particular kinds of disputes and legal challenges and render a decision. This quasi-judicial power has the force of law, even though the case is not heard by a federal or state judge. All agency actions can be appealed to the courts. Generally, the judicial standard for reviewing an administrative agency's decision is whether the agency's actions were "arbitrary and capricious," with the courts tending to defer to the findings of the administrative law judge.

Procedural Rules

Both federal and state courts have procedural rules that govern the administration of the courts in hearing cases. These rules have the force of law, and authority for them is generally codified in statutes promulgated by the legislature. Essentially, these procedural rules provide guidelines that must be followed when filing lawsuits, instituting criminal actions, or deciding cases based on procedural restrictions. These are rules that judges and attorneys use in their proceedings before the courts. The U.S. Supreme Court has an extensive list of rules that are amended and updated almost every year. For example, Rule 38 of the Supreme Court Rules specifies that there is a $300 filing fee for docketing and hearing a case pursuant to a writ of certiorari or an appeal. The Supreme Court's authority to set these fees is provided for in 28 U. S. C. Section 1911.

State and federal courts (both trial courts and appellate courts) have their own procedural rules to follow with regard to filing motions, briefs, and other legal documents. While most of these rules are similar across jurisdictions, there are variations ranging from the procedures for judges to follow while on the bench to ethical standards that attorneys must follow when appearing before the courts.

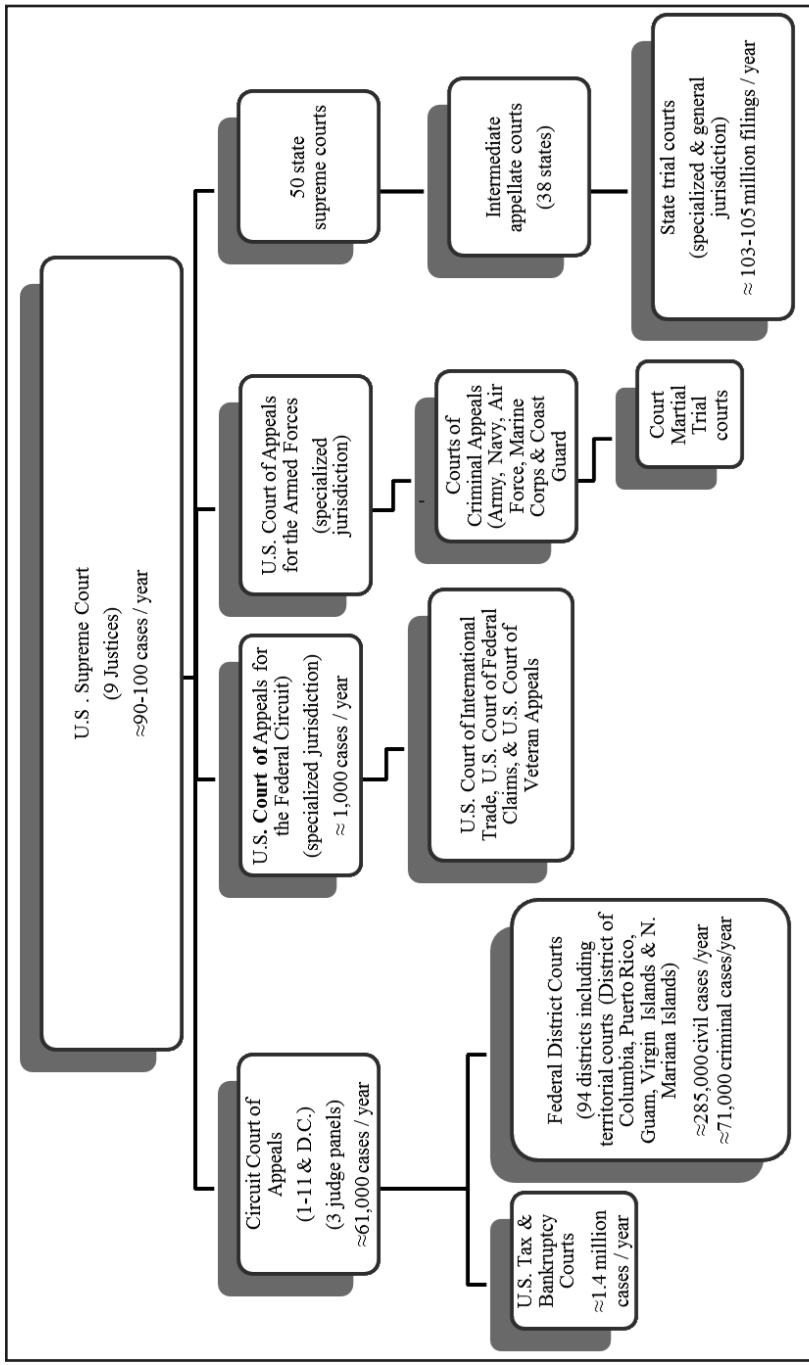
Legal Structure and Processes

Court Systems

The American legal system relies on a dual court structure with judicial authority divided between the federal and state courts. Although the structures and procedures of the state and federal courts have many similarities, each system has a distinctive structure and jurisdiction. It is consistent with the vision of federalism espoused by Alexander Hamilton in *Federalist No. 82* that there are two distinctive sets of courts with exclusive jurisdiction over certain subject matters, concurrent jurisdiction over key areas, and a right of direct appeal from the states' highest courts to the U.S. Supreme Court. As a result, there are as many different types of state court systems as there are states. The

federal courts generally address issues regarding federal governance, while the state courts are responsible for the vast majority of litigation (see Figure 3).

Figure 3 – State & Federal Dual Court Structure



The federal and state courts are structured in a similar hierarchal manner whereby higher courts have the power to review lower court decisions. Courts of first instances (trial courts) hear the initial phase of a legal dispute, make determinations about questions of fact, and rule for or against various parties to the litigation. In most states, a party that is dissatisfied with a trial court's decision may appeal the trial court's decision to an intermediate appellate court. The intermediate appellate court reviews questions of law to determine whether there are errors by the trial court and issues its opinion. The case can then be appealed to a court of last resort, usually called the supreme court, which has final authority over the case. This appeal structure is followed for most state court systems, although some states have more than one level of intermediate appellate review, and a few states have separate courts of last resort for civil and criminal cases. Likewise, in the federal court system, parties dissatisfied with a federal trial court opinion can appeal the trial court's decision to a federal appellate court.

State Judicial Systems

Structure

Every state (and the District of Columbia and the Commonwealth of Puerto Rico) has its own independent court system consisting of trial courts and appellate courts, although the structure of the various court systems varies somewhat from state to state. At the bottom of the hierarchy is the trial court (sometimes called a superior court or district court) presided over by a single judge. In the United States, the state trial courts are where the vast majority of litigation occurs. More than 100 million cases are filed in state trial courts each year—far outpacing the number of cases heard in the federal courts—making state trial courts the workhorses of our legal system. All states have courts of general jurisdiction and most states have specialized courts to handle small claims, traffic laws, divorce and family disputes, and probate matters. In addition, individual municipalities, cities, counties, towns, or villages may have court systems presided over by local magistrates and judges serving in both courts of general and specialized jurisdiction. The larger and more populous states generally have the greatest degree of specialization at lower court levels.

Typically, rulings from the trial court level (whether by a court of general or specialized jurisdiction) are subject to review by at least one state court of general jurisdiction, and in most states there is a court of last resort which hears appeals prior to review by the U.S. Supreme Court. Every state has different rules about whether a case goes to an intermediate appellate court or the state's court of last resort. Whether review is granted depends upon the subject matter jurisdiction of the dispute, as well as the jurisdiction granted under state law. In Texas, for example, death penalty cases do not go to an intermediate court of appeal as most death penalty cases do in other states; instead, they go directly to the Texas Court of Criminal Appeals, bypassing an additional level of review by an intermediate appellate court. After final appeal, and depending on the basis of the state appellate ruling, the state court cases can be appealed to the U.S. Supreme Court for one final round of appellate review. Approximately 35% of the cases the U.S. Supreme Court hears in any given year arise from the state court systems.

Judicial Selection and Removal

States vary in the way judges are selected. Basically, there are five different ways for appointing judges to their positions: partisan election, nonpartisan election, merit selection, gubernatorial appointment, and appointment by the legislature.[5] Most states have mandatory retirement plans requiring judges to retire at a certain age, typically between the ages of sixty-five and seventy-five. Judges who are corrupt, incompetent, or unethical can be removed through impeachment and conviction, recall elections, and concurrent resolutions by the state legislature. In recent years, states have established special commissions, often comprised of judges themselves, to review charges of incompetence or corruption against judges.

Federal Judicial System

Structure

The role of the federal courts—especially the U.S. Supreme Court—is important for understanding higher education law, even though the vast majority of litigation in the U.S. judicial system is carried out in the state and local courts across the country. In part, this is because of the unique nature of American colleges and universities subject to federal jurisdiction under certain civil rights and federal funding laws. In addition, public colleges and universities may be sued in the federal courts if they violate an individual's federal constitutional rights, such as the right to freedom of speech under the First Amendment or the right to equal protection under the law guaranteed by the Fourteenth Amendment. The U.S. Congress establishes and controls the jurisdiction of the federal courts, and under the nation's distinctive federal system, there are two types of courts: Article III courts (having both general and special jurisdiction) as well as the legislative (Article I) courts, which are more limited in their powers and jurisdictional authority.

When most people think of the "federal courts", they are thinking of the Article III courts under the U.S. Constitution, which have general jurisdiction over a wide variety of legal claims. These courts include: 1) the U.S. District Courts (trial); 2) the twelve U.S. Circuit Courts of Appeals (intermediate appellate courts for Circuits 1–11, plus the D.C. Circuit Court of Appeals) and the Court of Appeals for the Federal Circuit; and 3) the U.S. Supreme Court, which is the nation's highest appellate court (see Figure 5, Map of Federal Courts Jurisdiction). The federal judicial system also includes courts with specialized jurisdiction over a narrow range of substantive legal issues, such as the U.S. Court of Claims, the U.S. Court of International Trade, and the courts relating to the U.S. armed forces. The sum total of all the cases filed in the federal system is but a small percentage of the cases that are filed each year in the United States, as Figure 4 illustrates.

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[5] To review the different methods for each state see http://www.judicialselection.us/. Last accessed at April 1, 2015.

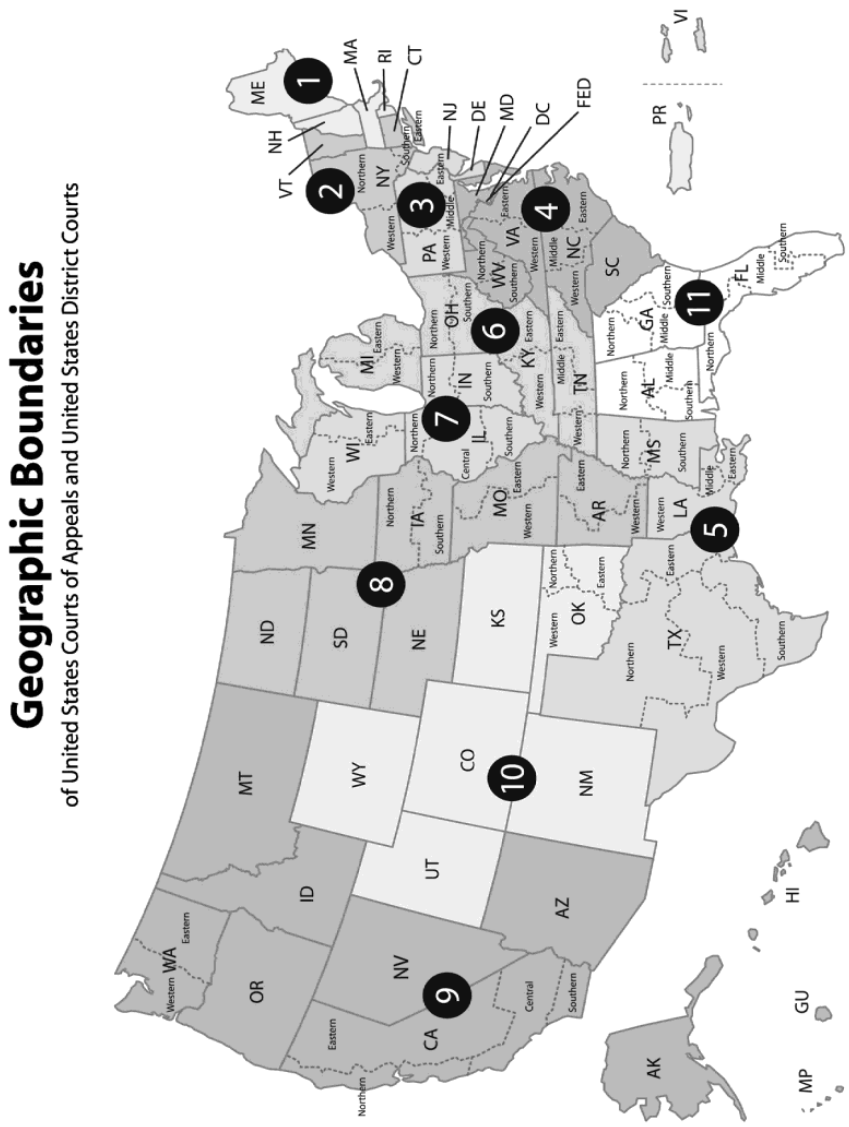
Figure 4 – Federal Judicial Caseload 2010

Judicial Caseload	2005	2010	2013	2014	% Change Since 2005	% Change Since 2010	% Change Since 2013
U.S. Courts of Appeals*							
Cases Filed	65,418	56,790	56,453	55,623	-15.0	-2.1	-1.5
Cases Terminated	57,486	60,316	58,459	56,354	-2.0	-6.6	-3.6
Cases Pending	54,908	47,420	42,319	41,588	-24.5	-12.3	-1.7
U.S. District Courts - Civil							
Cases Filed	287,712	282,307	271,950	303,820	9.0	7.6	11.7
Cases Terminated	260,980	285,603	254,619	260,840	-0.1	-8.7	2.4
Cases Pending	281,172	299,512	$280,575_2$	323,555	15.1	8.0	15.3
U.S. District Court - Criminal							
Cases Filed	70,364	77,287	69,449	66,193	-5.9	-14.4	-4.7
Defendants Filed	92,672	98,798	91,964	86,705	-6.4	-12.2	-5.7
Cases Terminated	64,430	77,180	70,600	67,611	4.9	-12.4	-4.2
Cases Pending	67,867	76,748	$75,578_2$	74,101	9.2	-3.5	-2.0
U.S. Bankruptcy Courts							
Cases Filed	1,590,975	1,531,997	$1,170,324_2$	1,038,280	-34.7	-32.2	-11.3
Cases Terminated	1,612,145	1,353,528	$1,241,836_2$	1,149,282	-28.7	-15.1	-7.5
Cases Pending	1,654,018	1,596,994	$1,571,091_2$	1,460,363	-11.7	-8.6	-7.0

*Excludes the U.S. Court of Appeals for the Federal Circuit

At the intermediate appellate level of the federal judicial system, there are thirteen circuit courts of appeals, but the Court of Appeals for the Federal Circuit is unique because it has federal jurisdiction in a variety of specialized subject areas, including international trade, government contracts, patents, trademarks, certain money claims against the U.S. government, federal personnel, veterans' benefits, and public safety officers' benefits claims.

Figure 5 – Map of Federal Circuit Courts' Jurisdiction



As noted earlier, when most people think of the "federal courts"—including the U.S. Supreme Court—they are typically thinking about the judiciary system created under Article III of the U.S. Constitution. However, there are also legislative courts established by Congress under the legislative powers granted to Congress in Article I of the U.S. Constitution. These legislative courts include 1) magistrate courts, 2) bankruptcy courts, 3) the U.S. Court of Military Appeals, 4) the U.S. Tax Court, and 5) the U.S. Court of Veterans' Appeals. The judges of these courts are appointed by the President with the advice and consent of the Senate, but they do not have a lifetime appointment as Article III judges do (discussed below). Article I judges hold office for a limited number of years. The magistrate and bankruptcy courts are attached to the U.S. district courts. The courts of specialized jurisdiction hear cases specifically designated to their topic area.

Federal District Courts

The U.S. district courts are established by U.S. Congress, and the contours of each district are defined by state boundary lines and structured according to geographic jurisdiction. The current structure has ninety-four federal trial courts of general subject matter jurisdiction (eighty-nine located within the fifty states and five within the federal and territorial jurisdiction—Washington, D.C.; Puerto Rico; Guam; the Virgin Islands; Northern Mariana Islands; and Guam). Each state has at least one district court (trial court), and some states have up to four (e.g., California, New York, and Texas).Districts are drawn along geographic boundaries and structured according to location (Northern, Southern, Eastern, Western, Central, or Middle).

Circuit Courts of Appeal

Like the federal district courts, the intermediate courts of appeal are not contemplated under Article III of the U.S. Constitution. Congress first configured the federal judicial system under the Judiciary Act of 1789. The three-tier system left to the federal legislature to configure ultimately resulted in the Court of Appeals Act (1891), along with the Judges Bill (1925),which both provide the basic structures in existence today and which outline the relationship between the intermediate appellate courts in the federal system and appeals to the U.S. Supreme Court. The twelve courts of general jurisdiction in the numbered circuits (First through Eleventh), as well as the D.C. Circuit Court of Appeals, hear cases concerning a variety of legal matters, including cases on appeal from the federal administrative agencies, which are specified by federal law. The circuit courts of appeal deal exclusively with appellate jurisdiction.

U.S. Supreme Court

The final arbiter of conflicts between federal and state courts is the U.S. Supreme Court, provided for explicitly under Article III of the U.S. Constitution, which outlines the Court's original and appellate jurisdiction authority. In recent years, the U.S. Supreme Court has heard approximately 100-110 cases annually out of approximately 7000–8000 requests for a hearing per term. While the High

Court takes cases from both the federal and state lower-level courts, it is more likely to hear cases that come from the lower federal courts, where about 65% of its docket originates. Although most cases come before the U.S. Supreme Court through its discretionary jurisdiction (meaning that the Justices are not required to give a reason for refusing to hear a case), a small percentage (between one to five cases in any given term) come to the court under its mandatory jurisdiction authority. These "mandatory appeals" (also called "appeals by right") require that the case be heard from lower federal court decisions or from the states' highest appellate courts. Mandatory jurisdiction cases are set by federal statute and such cases require that certain factors be present. Since 1988, however, changes to federal law have sharply limited the number of these mandatory appeal cases that are heard. Moreover, while we typically think of the U.S. Supreme Court as being an appellate court, in less than five cases per year the Court takes cases pursuant to its original jurisdiction power. This jurisdictional authority covers lawsuits between states and actions against ambassadors and gives the Supreme Court original jurisdiction over these cases under Article III of the U.S. Constitution. Perhaps the most famous example of original jurisdiction was the decision in *Marbury v. Madison*,[6] in which the Supreme Court established the power of judicial review, or the ability to review acts of the other branches of government to determine whether the Constitution has been violated.

Selection and Removal

The number of federal judges at both the trial and appellate levels, as well as the size of the U.S. Supreme Court, is set by the U.S. Congress. Today, the number of Justices is nine, but initially the High Court had six Justices (five Associate Justices and one Chief Justice). The number of Justices dropped to a low of five in 1801, and rose to a high of ten in 1863, before stabilizing at nine in 1869. The last attempt to alter the number of Justices on the court came with President Franklin D. Roosevelt's court-packing plan during the New Deal era.

All Article III judges are nominated by the President and confirmed with the advice and consent of the Senate, meaning a majority of Senators vote to confirm after hearings in the Senate Judiciary Committee regarding the nominees' judicial qualifications. Under Article III, these judges hold office during "good behavior" unless they are removed or resign.

Every president signals the qualities that the administration is looking for in nominees, including partisanship and ideology, with some executives emphasizing certain characteristics more than others. Some presidents have specific policy agendas they would like to pursue. For example, President Nixon was known for appointing tough "law and order" judges, while President Reagan indicated that judicial attitudes regarding abortion were important to him. Still other presidents indicate they have a different set of priorities they are hoping to accomplish. Presidents Clinton and Carter were intent on creating a more ethni-

[6] 5 U.S. 137 (1803).

cally and racially diverse bench, while President Truman preferred to appoint those who had served him faithfully and President Ford sought to be more bipartisan in appointments.[7] Presidents are not required to appoint persons who are from the same party and may cross party lines when appointing judicial candidates. Because Supreme Court Justices have lifetime appointments, a president's Supreme Court appointment can shape the character of the Court for decades.

When Elena Kagan was appointed to the Supreme Court in 2010, she became the fourth woman in history to be appointed to the Supreme Court. In addition, Justice Kagan's appointment marks the first time that three women are serving on the Court concurrently. Her appointment also meant that for the first time in U.S. history, every Justice on the Court was either Catholic or Jewish, and that every member had an Ivy League law school education. While typically, presidents care about sociodemographic factors (age, religion, legal training), they are also concerned about the candidate's judicial temperament, ideology, and the candidate's partisanship support in the U.S. Senate.

What is "the Law"?

Subject Matter Jurisdiction

Higher education institutions are subject to a broad range of state and federal laws. Colleges and universities deal with everything from property and contract law to administrative regulations, state and federal constitutional rights, and even criminal law. Because the higher education environment is such that an array of federal and state legal issues involved in any given issue may implicate a number of laws, questions may arise about which laws apply and which courts have jurisdiction to hear disputes. Understanding jurisdiction is typically left to in-house legal counsel at most academic institutions, and discussions about specific substantive areas of study are discussed in more detail within other chapters; but a basic understanding of jurisdiction is important to help better comprehend how to find the law and how to carry out legal research in the substantive legal areas being examined.

Laws are structured according to the subject matter jurisdiction, which governs whether a case is heard in federal or state courts. Indeed, the vast majority of disputes are governed by state and local laws so most litigation is carried out by the fifty state court systems (see Figure 6). As James Madison explained in *Federalist No. 45,* the powers given to the federal government are "few and defined," while the powers that "remain in the State governments are numerous and indefinite."[8] Thus, the nation's distinctive judicial system means federal jurisdiction extends

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[7] For an excellent summary looking at federal judicial appointments, see Micheal W. Giles, Virginia A. Hettinger and Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54(3), Pol. Res. Q. 623-641 (2001).

[8] The Federalist No. 45 (James Madison), available at http://www.constitution.org/fed/federa45.htm (last accessed April 3, 2011).

"to certain enumerated objects only," while the Constitution "leaves to the several States a residuary and inviolable sovereignty over all other objects." [9]

Figure 6 – State and Federal Subject Matter Jurisdiction

State Courts	Federal Courts	State or Federal Courts
Crimes defined by state legislation	Crimes defined under federal law where there is interstate jurisdiction (e.g. kidnapping, carjacking, if it crosses state lines)	Crimes punishable by both federal and state law
State constitutional issues and cases involving state laws or regulations	Cases involving interstate and international commerce, including airline and railroad regulation	Certain civil rights claims
Family law issues	Cases involving rights under treaties, foreign states, and foreign nationals	Certain disputes involving federal law where concurrent jurisdiction is retained
Education law issues	International trade law issues	Environmental regulations
Internal governance of business associations (e.g. partnerships and corporations)	State law disputes when "diversity of citizenship" exists (citizens from 2 or more states with at least $75,000+ in damages requested)	"Class action" cases
Regulation of trades and professions (e.g. lawyers, carpenters, teachers)	Admiralty cases	Federal constitutional issues
Most personal injury lawsuits (except those where there is "diversity of citizenship")	Patent, copyright, and intellectual property issues	
Most private contract disputes (except bankruptcy law)	Habeas corpus actions	
Most professional malpractice issues	Bankruptcy matters	
Most traffic violations and motor vehicle issues	Disputes between states	
Most workers' injury claims	Cases involving securities and commodities regulation, including public corporations	

[9] The Federalist No. 39 (James Madison), available at http://www.constitution.org/fed/federa39.htm (last accessed April 3, 2011).

Probate and inheritance matters	Most cases involving federal laws or regulations (e.g., tax, Social Security, broadcasting, civil rights)	
Most real property and contract issues	Traffic violations or other misdemeanors on federal property	

While the question of which system should hear a particular case is seemingly straightforward, there are several important points to keep in mind. When both federal and state laws are at issue, the courts have resolved jurisdictional issues by providing rules regarding when the state or federal system can, should, or must, take jurisdiction. A federal court can hear a claim that would typically arise under a state court's jurisdiction if it is related to a federal claim already before that court. This supplementary jurisdiction (sometimes called "ancillary" or "pendent jurisdiction") is a common-law mechanism that allows a court to resolve all claims between the parties in one forum rather than require that different claims be heard by different courts. Unlike other forms of jurisdiction, supplementary jurisdiction is discretionary, so a federal court can choose whether to exercise it in a given case.

For example, if a public university faculty member believes she has been wrongfully terminated, this would typically be a case for a state court because laws regarding employment are generally covered under state statutes and contract law. If, however, the employee believes she was fired due to some discrimination in violation of Title VII of the 1964 Civil Rights Act and its amendments, or in violation of her constitutional right to equal protection under the Fourteenth Amendment, then her lawsuit involves federal statutory and constitutional issues that are subject to federal jurisdiction. A federal court can take jurisdiction to resolve the dispute more efficiently, rather than requiring the employee to bring separate legal actions (one in federal and one in state court).

Additionally, even if a case is subject to state laws, it may still be filed in federal court if the two parties are from different states and the amount of money involved in the lawsuit is more than $75,000. Such cases are known as diversity of citizenship cases, and Article III, section 2 of the Constitution gives federal courts concurrent jurisdiction over these cases. Thus, in diversity cases, plaintiffs can choose in which court they wish to file suit. For example, suppose that the university faculty member terminated above taught an online course from another state and had an annual salary contract for $75,001 that the university considered null and void after she was fired in violation of the Title VII of the 1964 Civil Rights Act. Imagine further that when she went to the campus to meet with administration officials that her car was damaged by the university when it was towed because it did not have a proper parking sticker. Normally, this latter claim would not come under the jurisdiction of a federal court. However, a federal court could opt to exercise its "supplemental jurisdiction" and hear this claim along with the Title VII claim.

When it comes to whether the U.S. Supreme Court will hear a case, there is a gray area in which the High Court can maneuver. A state court decision about a federal statute will not be reviewed by the U.S. Supreme Court if the decision of the state court lies upon "independent and adequate" state law grounds. Such decisions of state courts can be upheld if 1) the non-federal ground is independent of the federal ground and is adequate to support the judgment, and 2) the opinion of the state court expressly states that the state ground is an alternative reason for the holding. Thus, requests to review state court decisions are typically dismissed by the U.S. Supreme Court.

This dismissal, however, will not necessarily bar the High Court from hearing a case if the state supreme court indicates that its decision was based on federal grounds. In such cases, the U.S. Supreme Court *can* take jurisdiction. Alternatively, the U.S. Supreme Court can refuse to take jurisdiction if the adequate state ground is "debatable," meaning that there is disagreement about the adequacy of the state grounds as the basis for the decision.

Suppose that the faculty member described above is fired in violation of Title VII and she sues in state court because that state's employment discrimination laws are particularly favorable to persons alleging discrimination. If that state has an equal protection provision in its state constitution, the U.S. Supreme Court will most likely find that independent and adequate state grounds exist and allow the state court to resolve the issue. Figure 7 briefly summarizes the key points to remember about federal and state jurisdiction.

Figure 7 – Federal and State Jurisdictional Authority

Possible Basis for Jurisdiction	Federal Question	Diversity	Supplemental
Source of jurisdiction	Constitution	Federal Law	Common Law
Minimum amount in controversy	None	$75,000	None
Does the court have the discretion to deny jurisdiction, if proper?	No	No	Yes

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Citations

Citations for Figure 3

U.S. Courts of Appeals for the Armed Forces 2013 Annual Report http://www.armfor.uscourts.gov/newcaaf/ann_reports.htm

Federal Judicial Caseload 2014 Statistics http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx

Citation for Figure 5

Federal Judicial Caseload Statistics http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx