CHAPTER 2

Judicial Structure in the United States

21. GENERAL STATEMENT

The United States of America constitutes a State in the international sense with internal and external sovereignty. The states which comprise the Union are not nations in the international sense but are, except for the Union, independent of each other. They are political communities, occupying separate territories, and possessing powers of self-government in respect to almost all matters of local concern. Each has its own constitution and laws and its own government.

The American system of government had its roots in the early life of the colonists who brought with them a common English heritage. They developed town and county governments based on the needs of a frontier people. With the passage of time, differences arose between the colonies and the mother country. Seeking unified action, the colonists convened the First Continental Congress in 1774. This constituted the first step toward union. This was followed by the Declaration of Independence, which was signed on July 4, 1776, and the Thirteen Colonies became the Thirteen Original States. Each state thus became completely sovereign. The need for concerted action during the Revolutionary War led to the adoption of the Articles of Confederation and Perpetual Union and these were submitted to the states for ratification in 1777, the last ratification taking place in 1781. Thus was formed the "United States of America." This provided a semblance of national government, but as thus constituted was dependent on the states. There were inherent weaknesses in this arrangement, the most serious of which were the absence of a national executive branch and a national judiciary. Failure to delegate to the Confederation the power to regulate interstate and foreign commerce led to economic wars among the various states,[1] and made a national commercial policy impos-

1. The controversy between Virginia and Maryland over fishing and navigation rights in the Potomac River culminated in the Compact of 1785, by which Maryland, who owned the river, gave Virginia certain fishing rights in return for free passage of Maryland ships through the lower Chesapeake Bay (*see* 342).

sible. It therefore became necessary to "form a more perfect Union" by establishing a constitution which would provide the central authority with adequate powers, and which would clarify the relationship between it and the component states. Such a document was devised by the constitutional convention which met in 1787. On September 28, 1787, Congress submitted the Constitution to the states for ratification, and on March 4, 1789, the Constitution became legally operative [2] and was ordained and established by the people of the United States as the "Constitution for the United States of America."

211. The American Constitutional System

One of the most striking features of the American constitutional system is its federal character. This federalism, as it is sometimes called, is defined as the division of political power between a central government, with authority over the entire territory of a nation, and the states, or local governments, which individually include only limited portions of the country, but which collectively cover the entire area. This dual sovereignty between the states and the Federal Government—each within its own sphere of operation—is the basis, as will be seen, for the existing diversity of legal doctrines in the area of waterfront boundaries and related matters. To better understand these doctrines and their impact on the subject matter of this publication, certain background material will be presented touching on the relationship of these two sovereignties in the judicial and legislative fields.

2111. *Federal–State Relationship*

Federalism entails a balancing of powers between the national and state governments. To accomplish this the framers of the Constitution devised a plan by which the powers of the National Government were enumerated in rather precise fashion leaving it to be inferred that all remaining powers were reserved to the states.[3] This is the fundamental principle governing the division of powers between the Federal Government and the states. Under this doctrine, the Federal Government is often referred to as one of limited, delegated, and

2. *Owings* v. *Speed,* 5 Wheat. 420 (18 U.S., 1820).

3. This, however, was not long left to inference, for almost immediately the 10th amendment was added to the Constitution, which expressly provides that "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." The first 10 amendments, known as the Bill of Rights, were all proposed by Congress on Sept. 25, 1789. They were ratified and adoption certified on Dec. 15, 1791.

enumerated powers, including all those powers that may reasonably be implied from those expressly stated.[4]

A case in point is the power of Congress to control navigation. Actually, the Constitution is silent with respect to navigation as such. But Article I, section 8, clause 3 (known as the commerce clause), gives Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This was interpreted by the Supreme Court of the United States, in the case of *Gibbons* v. *Ogden,* 9 Wheat. 1 (22 U.S., 1824), to apply to the control and protection of navigation on navigable interstate rivers and other bodies of water as a necessary incident of the power to regulate commerce. (*See* 43.) [5]

There is one important exception to the basic principle that the Federal Government is one of enumerated powers only, and that is in the field of foreign relations. The Supreme Court has held that in conducting its foreign relations the United States is a sovereign nation and must be held to possess with respect to those relations all the powers that other sovereign nations enjoy, and these powers are not limited to those which are delegated to it by the Constitution. The Court has distinguished those powers of the Federal Government in respect of domestic or internal affairs from those in respect of foreign or external affairs, and has said: "In that field [internal affairs], the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states . . . . That this doctrine applies only to powers which the states had, is self evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source." [6]

Governmental powers, in the American federal system, may be classified generally as (1) exclusively national, (2) exclusively state, and (3) concurrent.

4. The classic statement on the scope of the implied powers of Congress is contained in one of the early landmark cases in which the Supreme Court said: " . . . the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch* v. *Maryland,* 4 Wheat. 316, 421 (17 U.S. 1819).

5. The Act of Feb. 10, 1807 (2 Stat. 413), which authorized a survey of the coast and set in motion the machinery for the establishment of a federal agency (later to be known as the Coast and Geodetic Survey) to conduct such survey was also an exercise of an implied power growing out of the enumerated power to regulate commerce.

6. *United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304, 316 (1936). This doctrine of national external sovereignty was advanced by the Supreme Court as one of the reasons for upholding federal paramount rights in the submerged lands of the marginal belt. *United States* v. *California,* 332 U.S. 19 (1947) (*see* Volume One, Part 1, 112).

The first two fall within the delegated and reserve powers, respectively. The third is an outgrowth of the first—the exclusively national powers. A few matters are exclusively national, not because conferred in terms of exclusion, but because their character is such that they may be exercised by only one authority—for example, in the fields of foreign relations and naturalization. Other matters are exclusively national because granted to the United States and expressly forbidden to the states—for example, the power to declare war. But there are still other national powers that are exercisable by the states in the absence of federal action, or with congressional consent. This is the area of concurrent powers.[7]

What powers of the National Government are of such a nature as to fall within the category of concurrent powers is not always easy of determination. The principle which has been applied is that there is a difference between those powers the exercise of which by the states would be, under any circumstances, inconsistent with the general theory of the Constitution, and those that are not of such a character—the first are outside the area of concurrent jurisdiction, the second are within. The question as to the extent to which national action precludes state action in a particular field is largely one of fact.

Among the more important subjects which have been held to be subject to state control, in the absence of federal legislation, because they lend themselves to local regulation, are pilotage (*see* 43), ferries, bridges, harbor regulations.[8]

2112. *Tripartite Systems*

A fundamental principle of the American system, accepted alike in the federal and state governments, is that the exercise of legislative, executive, and judicial powers be vested in separate and independent branches. This tripartite version of government has as its central theme the idea that the same persons or body should not make the laws, enforce them, and pass judgment on persons accused of their violation.

The principle of the separation of powers is not formally set forth or de-

7. Such powers are not concurrent in the sense of equal power with the Nation; they are subordinate to the superior authority and are superseded whenever the power of Congress is exercised. *Southern Ry. Co.* v. *Reid,* 222 U.S. 424 (1912).

8. In *Covington Bridge Co.* v. *Kentucky,* 154 U.S. 204 (1894), the cases are reviewed and summarized. The inspection and regulation of vessels has been held as a permissible field of state action in *Kelly* v. *Washington,* 302 U.S. 1 (1937). And in *Hagan* v. *City of Richmond,* 52 S.E. 385 (1905) (Va.), it was held that the Act of Mar. 3, 1899 (30 Stat. 1121, 1154), relating to removal of obstructions from navigable waters of the United States, did not invest the Secretary of War with exclusive jurisdiction for such removal but with discretionary power only which he might exert or leave to the enforcement of local authorities, citing the Supreme Court of the United States in *County of Mobile* v. *Kimball,* 12 Otto 691 (102 U.S., 1881), which sustained a law of Alabama providing for the improvement of the river, bay, and harbor of Mobile.

fined at any one place in the Constitution. But its equivalent is found in the clauses which provide that "All legislative Powers shall be vested in a Congress of the United States" (Art. I), that "The executive Power shall be vested in a President of the United States of America" (Art. II), and 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" (Art. III).[9]

Strictly speaking, there is no complete separation of powers because the system of checks and balances that has been worked into the Constitution enables each branch to exercise a certain restraint on the other two. The veto power of the President and the power of Congress to override a veto, and the power of the Supreme Court to hold unconstitutional acts of Congress and acts of the President are examples of how this system works in practice.[10]

In the United States, it is the role of the legislature to establish policy in general terms; it is the role of the court to apply that policy to specific situations. A unique characteristic of the American judiciary is the existence side by side of two entirely separate court systems—the federal judiciary and the state judiciaries. This results from the federal system which provides that both national and state governments make and enforce the law. Thus, it is the primary function of the state courts to enforce state law and of the Federal courts to enforce federal law. This multiple sovereignty in the legislative and judicial fields accounts for the lack of uniformity in the laws relating to riparian rights and related matters.[11] This is what makes it difficult to say what the rule is in the United States and why a certain rule is often spoken of as a majority rule, and why it is necessary to distinguish between the rule in the Federal courts and the rule in state courts.

A second characteristic of the judicial structure in the United States, federal and state, is its hierarchical arrangement. At the base are found the trial courts or courts of original jurisdiction with general authority to hear and decide the

9. There is nothing in the Constitution that requires the states to organize their governments along such lines, but all have voluntarily observed this principle.

10. In recent years, in order to meet modern problems in the technological and other fields without sacrificing the fundamental structure, a so-called fourth branch of government has made its appearance—the *administrative* branch. Administrative agencies perform varied activities which often represent a fusion of legislation, execution, administration, and adjudication. They are usually staffed with experts in the respective fields. Under the Administrative Procedure Act of June 11, 1946 (60 Stat. 237 (Part 1)), procedural protections surrounding the administrative process are established as well as the standards of judicial review. RODEE, ANDERSON, AND CHRISTOL, INTRODUCTION TO POLITICAL SCIENCE 486–489 (1957).

11. In *Iowa* v. *Carr,* 191 Fed. 257, 261 (1911), it was stated: "The settled decisions of the courts of a state and its laws . . . determine the title to the beds of navigable streams and the extent of the rights of riparian owners . . . in that state." And in *Barney* v. *Keokuk,* 4 Otto 324, 338 (94 U.S., 1877), the Supreme Court, even more significantly, said: "If they [the states] choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections."

great mass of cases which arise. These courts hear evidence, ascertain facts, and apply the law.

Above these trial courts are the courts of appeals. These are generally intermediate appellate and final appellate. The theory behind appellate courts is that there should be a uniform interpretation of the law. By providing for an appeal of those cases in which the meaning of law is involved, an authoritative ruling as to the doubtful legal issue can be obtained and thereafter followed by all of the lower courts. Appellate courts function without juries and no new evidence is presented.

22. THE FEDERAL JUDICIARY

The federal system of courts has its origin in the Constitution of the United States, which provides, in Article III, section 1, 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." Like the National Government generally, the federal judicial branch has only delegated and enumerated powers. The Federal courts decide only the types of cases assigned to them by the Constitution. These include cases arising under the Constitution, laws, and treaties of the National Government; admiralty and maritime cases; cases affecting ambassadors, ministers, and consuls; controversies between two or more states; cases in which the United States is a party; controversies between citizens of different states; controversies between a state, or the citizens thereof, and foreign states, citizens, or subjects; controversies between a state and citizens of another state; and controversies between citizens of the same state claiming lands under grants of different states (Art. III, sec. 2, cl. 1). All others remain the responsibility of the state courts. But the Constitution does not require that all of the classes of cases listed be tried exclusively by Federal courts, and Congress may designate types of cases which can be tried either in Federal or state courts or can assign some to the state courts on a concurrent or even exclusive basis.[12]

The provision which gives Federal courts jurisdiction over controversies "between a State and Citizens of another State" was interpreted by the Supreme Court, in the very early case of *Chisholm* v. *Georgia,* 2 Dall. 419 (2 U.S., 1793), to permit states to be sued on the basis that a dispute between a state and an

12. CARR, MORRISON, BERNSTEIN, SNYDER, AMERICAN DEMOCRACY IN THEORY AND PRACTICE 413–414 (1951). Congress has designated exclusive federal jurisdiction over the following cases: all admiralty, maritime, patent, copyright, and bankruptcy cases; all cases of crimes under federal statutes; all civil actions wherein the United States or a state is a party (except cases between a state and its own citizens); and all cases affecting foreign diplomats and consuls.

individual is also a dispute between an individual and a state. But this doctrine was soon overruled by the 11th amendment to the Constitution which provides that "The Judicial power of the United States shall not be construed to extend to any suit . . . against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." [13]

221. District Courts

At the bottom level of the federal judicial hierarchy is the district court. These courts were established by the original Judiciary Act of 1789 (1 Stat. 73). At least one district court is located in each state but some states have more than one. No district crosses state boundaries. The District of Columbia has one district court. Cases ordinarily are first heard in the district courts, which are the trial courts in the national system. These are the only Federal courts where juries are used. They have no appellate jurisdiction. The great majority of district court judgments, if they are reviewed at all, are reviewed by a court of appeals (*see* 222) and go no higher. Certain cases, however, may be appealed directly to the Supreme Court (*see* 223). District courts have original jurisdiction of civil cases at common law, in equity, in admiralty, in the enforcement of acts of Congress, and of all prosecutions for crime cognizable under the authority of the United States (*see also* note 30 *infra*).[14]

222. United States Courts of Appeals

The middle layer of the national judicial pyramid is made up of the United States courts of appeals. There is one such court in each of the ten judicial circuits into which the country is divided. The District of Columbia also has an appellate court known as the United States Court of Appeals for the District of Columbia.[15] The new states of Alaska and Hawaii are included within

13. The 11th amendment was proposed to the legislatures of the several states by the Third Congress on Mar. 5, 1794, and was declared by the President on Jan. 8, 1798, to have been ratified by three-fourths of the states. Although not specifically prohibited, the amendment has been construed to prevent a state being sued without its consent by its own citizens (*Hans* v. *Louisiana*, 134 U.S. 1 (1890)), or by a foreign State (*Monaco* v. *Mississippi*, 292 U.S. 313 (1934)).

14. Smith, Handbook of Elementary Law 378 (1939). Cases decided in the district courts of the United States which have sufficient general interest to merit publication are recorded in volumes designated as "Federal Supplement" (cited "F. Supp."). The series began in 1932, and as of Sept. 1963 there were 219 volumes issued. From 1880 to 1932, selected district court decisions were reported in the "Federal Reporter" (*see* note 17 *infra*). A complete citation to a case in the Federal Supplement would be "*United States* v. *5.324 Acres of Land*, 79 F. Supp. 748 (1948)," meaning that it is recorded in volume 79 at page 748 and was decided in 1948.

15. This court has a unique position in the judicial structure. It is equal in all respects to the 10 other courts of appeals, but at the same time it is, in many respects, the same as the highest court

the ninth circuit which also includes the seven westernmost states. The jurisdiction of these courts, as the name suggests, is exclusively appellate; they have no original jurisdiction. They hear cases (civil and criminal) from the district and other Federal courts that operate in each particular circuit. They were created by Congress in 1891 (26 Stat. 826), as amended by 45 Stat. 1346 (1929), to lighten the work of the Supreme Court, and serve to screen cases so that only the most important ones go to the highest tribunal. The courts of appeals have no jurisdiction to review the decisions of the state courts and cases from the highest state courts go directly to the Supreme Court of the United States (*see* 223). It is also an accepted principle that where the solution of novel and serious constitutional questions depends on the interpretation to be given a state statute, not yet construed by the state courts, the Federal courts should abstain from interpreting the state statute.[16] In cases where a court of appeals has held a state statute invalid on the ground of repugnancy to the Constitution or a law or treaty of the United States, an appeal may be taken to the Supreme Court; in all other cases its decisions are final except as they may be reviewed by the Supreme Court at the latter's discretion.[17]

223. Supreme Court

At the top of the federal judiciary is the Supreme Court of the United States, and is the only Federal court specifically provided for in the Constitution. It is the final arbiter of the American constitutional system. Its opinions on the nature and scope of federal and state power, on the functions of the various departments of government, and on the meaning of the written language of the Constitution have built up a great body of constitutional law. It not only stands at the apex of the federal judicial pyramid, but it is actually the highest court of the land. As such it may accept cases for review directly from the state courts in some situations, as, for example, those in which the validity of a state or federal statute under the Federal Constitution is in question. Its opinions are definitive statements of the law which the lower courts must follow

in each of the 50 states. This dual role, plus the jurisdiction which it exercises over decisions of the administrative agencies of the Federal Government by virtue of its location, gives it an added importance.

16. This principle of abstention was followed in *Williams* v. *Hot Shoppes,* 293 F. 2d 835, 840 (1961), where the question before the United States Court of Appeals for the District of Columbia was the meaning of a Virginia statute whose constitutionality had not yet been passed on by the state court.

17. Smith (1939), *op. cit. supra* note 14, at 379. Cases decided in the courts of appeals are recorded in volumes designated as "Federal Reporter" (cited "Fed."). In Oct. 1963, there were two series of this reporter, the second being designated as "Federal Reporter 2d Series" (cited "F. 2d"). The first series covers volumes 1 to 300 and includes cases decided between 1880 and 1924. The second series covers at present volumes 1 to 319 and includes cases decided between 1924 and 1963. A complete citation for a case in the second series of the Federal Reporter would be "*Hinman* v. *Pacific Air Transport,* 84 F. 2d (1936)" (*see* note 14 *supra*).

in all cases. Its appellate jurisdiction can, however, be curtailed by Congress, the only irrevocable jurisdiction being original, that is, in those cases in which the Court takes jurisdiction in the first instance. These reach only to cases affecting ambassadors, public ministers, and consuls, or cases in which a state is a party.[18] But this original jurisdiction is not exclusive, and Congress has in fact, in a number of instances, granted such jurisdiction to the lower Federal courts.[19]

The Supreme Court cannot take most cases until at least one and generally two courts have heard and decided them. Also, as an appellate court, it properly can act only on the state of facts revealed by the record made in the court below, supplemented sometimes by general information of which it may take judicial notice. With few exceptions, Congress has found it necessary to make review in the Supreme Court not a matter of right but within the discretion of the Court. The grant of review is not intended to give the litigant another chance, nor does it depend on the amount of money involved, but upon the importance of the case to a uniform and just system of federal law.[20]

There are four avenues by which cases flow to the Supreme Court. The first is from the state courts.[21] These comprise cases in which the validity of a state or federal statute under the Federal Constitution is in question. The second is from the Federal district courts in cases where the court holds against the constitutionality of a federal statute and the United States is a party. The Government may under such circumstances appeal directly to the Supreme Court. The third avenue is from the courts of appeals. This category comprises cases where the decisions of different courts are conflicting on the same point of law, and cases where the Supreme Court thinks a court of appeals may

18. Where the Supreme Court has original jurisdiction it does not function exactly as a Federal trial court. Through briefs submitted by the litigants it passes on questions of law, leaving the ascertainment of facts, which may require the taking of evidence, to a Special Master or Referee whose recommendations they accept, reject, or modify. This was the procedure followed in the case of *United States* v. *California,* 332 U.S. 19 (1947). After the Supreme Court rendered its decision and decree establishing a rule of law to be applied, it named a Special Master to ascertain with greater particularity how the law was to be applied to the federal-state boundary along certain portions of the California coast (*see* Volume One, Part 1, 2111).

19. WILLOUGHBY, PRINCIPLES OF THE CONSTITUTIONAL LAW OF THE UNITED STATES 400 (1922). In the *California* case, *supra* note 18, the original action was begun in a Federal district court and was later removed to the Supreme Court.

20. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 12–14 (1955).

21. In *Cohens* v. *Virginia,* 6 Wheat. 264 (19 U.S., 1821), the Supreme Court, under authority of the Judiciary Act of 1789 (Sec. 25), sustained its right to review decisions of state courts involving constitutional rights in suits brought by a state against an individual. The 11th amendment (*see* 22), it held, did not prevent such appeal by the individual.

have misconstrued or misapplied an earlier Supreme Court decision. The last avenue is from the Court of Claims (*see* 224), the Customs Court, and the Court of Customs and Patent Appeals.[22]

The appellate jurisdiction of the Supreme Court may be contrasted with the jurisdiction of the intermediate Federal appellate courts with the observation that the Supreme Court's work is now confined in good part to cases which present constitutional issues or questions of statutory interpretation in which the people as a whole, as well as the litigants, have a major interest, whereas the Federal courts of appeals have become in large measure the final courts for deciding cases important primarily to the litigants.[23]

The uniqueness of the Supreme Court as a judicial body lies in its power to hold unconstitutional and judicially unenforceable an act of the President, of Congress, or of a constituent state of the Union. "That power is not expressly granted in the Constitution, but rests on logical implication. It is an incident of jurisdiction to determine what is the law governing a particular case or controversy. In the hierarchy of legal values, if the higher law of the Constitution prohibits what the lower law of the legislature attempts, the

22. These courts, although technically outside the national judicial system, are tied in with it through procedures for review of their findings either in courts of appeals or by the Supreme Court. They are often designated as "legislative courts,"—in contradistinction to the courts discussed above, which are termed "constitutional courts"—because they are not authorized by Art. III of the Constitution but are established under authority implied from constitutional provisions other than Art. III; for example, by the 18th grant of power in Art. I, sec. 8, which permits Congress "To make all Laws which shall be necessary and proper" for carrying out any of its expressly granted powers. Constitutional courts share in the exercise of the judicial power defined in Art. III of the Constitution (*see* 22), and their judges are appointed for life or good behavior and can only by removed by the impeachment process. The functions of legislative courts, on the other hand, are always directed toward the execution of one or more of such powers as are prescribed by Congress, independently of Art. III, and their judges hold for such term as Congress may prescribe, whether it be a fixed term of years or during good behavior. *Ex parte Bakelite Corp.*, 279 U.S. 438, 449 (1929). In 1953, Congress declared the Court of Claims to be a court established under Art. III of the Constitution (67 Stat. 226), and in 1958 the same designation was accorded the Court of Customs and Patent Appeals (72 Stat. 848). For a comprehensive statement on the constitutional character of these two courts prior to the 1953 and 1958 declarations, *see The Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962), in which the Supreme Court upheld the validity of judges from these courts sitting as regular Federal judges in the courts of appeals and in the district courts.

23. CARR, etc. (1951), *op. cit. supra* note 12, at 418. In *Landman* v. *Miedzinski*, 358 U.S. 644 (1959), the Supreme Court declined to review a Maryland Court of Appeals decision, upholding a Maryland statute which prohibited the operation of gaming machines in the Potomac River, unless such machines could be reached from Maryland soil by foot, on the ground that it presented no substantial federal question. Yet the Court took jurisdiction of a case, involving a double-indemnity insurance policy, where the question was whether the death of a North Dakota farmer of gun wounds was suicide or accidental. *Dick* v. *New York Life Insurance Co.*, 359 U.S. 437 (1959). *But see* the vigorous dissent by Mr. Justice Frankfurter on the basis that the case involved no question of state or federal law and laid down no broad rules of application for the guidance of lawyers. *Id.* at 447.

latter is a nullity." [24] But there is a reluctance on the part of the Supreme Court to hold acts of Congress invalid because of the doctrine of separation of powers, and if a case can be disposed of without reaching the constitutional question, the Court will invariably do so.

Another facet of the Court's functions, is to maintain the system of checks and balances upon which the American Government is based, namely, between the Executive and Congress, between the National Government and the states, and between state and state. In the last category, Congress was by the Constitution made a supervisor of their compacts and agreements (Art. I, sec. 10) (*see* 342) and the Supreme Court was made the arbiter of their controversies (Art. III, sec. 2) (*see* 3421). Under this head, the Court has settled many disputes over river boundaries.[25]

2231. *Supreme Court Reports*

Cases decided by the Supreme Court are recorded in volumes designated as "United States Reports" and cited as "U.S." These are the official reports of the decisions and are printed by the Government.[26] As of October 1963, there was but one series of these reports covering volumes 1 to 372. Prior to 1882, the volumes of the United States Reports were designated by the name of the official reporter and a number—for example, 1 Dallas, 16 Peters, 3 Howard,

24. JACKSON (1955), *op. cit. supra* note 20, at 22. This doctrine of the supremacy of the Constitution, when in conflict with an act of Congress, was firmly enunciated in the early case of *Marbury* v. *Madison*, 1 Cr. 137 (5 U.S., 1803). Although the case dealt with the relatively unimportant situation of the issuance of a commission by an outgoing President to a justice of the peace, which the new Secretary of State refused to deliver, the constitutional question at issue was whether under the provision of the Judiciary Act of 1789 (Sec. 13) the Supreme Court could issue writs of mandamus to public officers. The Court answered this in the negative on the principle that the Constitution prescribed specifically the cases in which the Supreme Court was to have original jurisdiction and that Congress had no power to alter such jurisdiction. This established, by judicial interpretation, the great constitutional doctrine of the power of the Supreme Court to declare an act of Congress invalid, if it is repugnant to the Constitution.

25. Among these are *Maryland* v. *West Virginia*, 217 U.S. 1 (1910) (Potomac River); *Indiana* v. *Kentucky*, 136 U.S. 479 (1890) (Ohio River); *New Jersey* v. *Delaware*, 291 U.S. 361 (1934) (Delaware River); *Alabama* v. *Georgia*, 23 How. 505 (64 U.S., 1860) (Chattahoochee River); *Arkansas* v. *Tennessee*, 269 U.S. 152 (1925) (Mississippi River). For other river boundary disputes settled by the Supreme Court, *see* 1422, 1423, and 1424.

26. In addition, there are two unofficial series—the "Lawyer's Edition of the Supreme Court Reports" and the "Supreme Court Reporter." The first covers the entire set of the United States Reports. Although the text is identical with that of the official edition, editorially it is quite different. Each case is summarized, the headnotes are rewritten in somewhat expanded form, and briefs of counsel are summarized. A distinctive feature of this series is the annotations for many cases; that is, points of law decided are written up, with citations to authorities. Reference to this series is made thus: "62 L. Ed. 968 (1918)" (*see* note 14 *supra*). The second series is a unit of the National Reporter System (*see* 2312). Coverage is from the Oct. 1882 term or 16 Otto (106 U.S.) to date. Reference to this series is made thus: "38 Sup. Ct. 473 (1918)." Parallel citations of a case are often given in this form: *United States* v. *United Shoe Machinery Co.*, 247 U.S. 32, 38 Sup. Ct. 473, 62 L. Ed. 968 (1918). In this publication, citations are given only to the official series.

etc. Later, a serial number was added which carries through to the present time. In this publication, cases in the early series are cited by giving both the original reference and the serial reference, thus: 16 Pet. 367 (41 U.S., 1842), meaning volume 16 of the Peters reports at page 367, which is serial volume 41, decided in 1842.[27] A complete citation to a case in the United States Reports would be *"United States* v. *United Shoe Machinery Co.,* 247 U.S. 32 (1918)" (*see* note 14 *supra*).

224. United States Court of Claims

Of the courts referred to in note 22 *supra* and accompanying text, the Court of Claims is one of the most important because of its broad field of operation. It was originally created in 1855 (10 Stat. 612) as a special tribunal to investigate claims against the Government and report its findings to Congress. Subsequent acts of Congress have given it the status of a court of special jurisdiction with power to hear and determine (with some few exceptions) all claims against the United States founded on any act of Congress, on any regulation of an executive department, on any contract with the Government, or for damages, in cases not in the nature of tort actions, in respect to which the party would be entitled to redress if the United States were suable; claims of government disbursing officers for relief from responsibility for loss while in the line of duty; and questions of fact or law submitted by heads of departments for their guidance or to obtain an adjudication.[28]

23. STATE JUDICIARIES

It has already been noted (*see* 2112) that in our dual system of government two judicial systems function side by side—the federal and the state. The state system follows a pattern similar to the federal with the trial courts at the base, the intermediate appellate courts at the middle, and the final appellate courts

27. In order of issue, there were 4 reports by Dallas (Dall.) (serial Nos. 1 to 4) for the years 1790 to 1800; 9 by Cranch (Cr.) (serial Nos. 5 to 13) for 1801 to 1815; 12 by Wheaton (Wheat.) (serial Nos. 14 to 25) for 1816 to 1827; 16 by Peters (Pet.) (serial Nos. 26 to 41) for 1828 to 1842; 24 by Howard (How.) (serial Nos. 42 to 65) for 1843 to 1860; 2 by Black (Bl.) (serial Nos. 66 and 67) for 1861 and 1862; 23 by Wallace (Wall.) (serial Nos. 68 to 90) for 1863 to 1874; and 17 by Otto (Otto) (serial Nos. 91 to 107) for 1875 to 1882.

28. Smith (1939), *op. cit. supra* note 14, at 380. For present status of the court as a constitutional court, *see* note 22 *supra*. Decisions of this court are reported in two series of official reports entitled "Court of Claims Reports" (cited "Ct. Cl."), the first, unnumbered, from 1855 to 1862; and the second (current), beginning with 1863. There are at present (in Oct. 1963) 151 bound volumes of these reports. Tax claims decisions of this court are also reported in the Federal Reporter through 60 F. 2d (*see* note 17 *supra*) in 1932, and in the Federal Supplement (*see* note 14 *supra*) from 1 F. Supp. in 1932 through 181 F. Supp. in 1960, then in the Federal Reporter from 276 F. 2d in 1960 to date.

at the top. The names given to the state courts at the different levels may vary from state to state.[29]

Essentially, state courts, as opposed to Federal courts, concern themselves with suits arising under the state constitutions and with laws enacted by the state legislatures. But it is not always easy to draw the line between the case that may be heard in the state courts and the case that may be heard in the Federal courts. For one thing the subject matter of a case may involve both federal and state laws. Secondly, Congress has by law left part of the area of federal jurisdiction as set forth in the Constitution to be exercised by state courts, either concurrently with Federal courts or even exclusively.[30] This, however, is not a jurisdiction conferred on them by federal statute, but one which they possess under state law. And it has been held that Congress is without power to confer jurisdiction upon any courts which it does not create.[31]

The Judiciary Act of 1789 (1 Stat. 73) infringed on the function of state courts in two respects: It provided for a review by the Supreme Court of final judgments of the highest state courts in which federal questions are involved, and it also established a system of Federal trial courts throughout the United States and vested them with jurisdiction of controversies in cases of diversity of citizenship, regardless of whether a federal law was involved or not. And the Supreme Court has held that except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied by the Federal courts is the law of the state, and decisions of the highest state courts are a part of that law.[32]

231. State Court Reports

Decisions of the state courts are usually published in two forms—official and unofficial reports. Official reports are published under statutory direction,

29. A frequent designation in the ascending order is County Court, Superior Court, and Supreme Court. This is the nomenclature followed in the New Jersey system. In the Maryland system, the highest court is called the Court of Appeals. Courts of special probate jurisdiction are usually styled "probate courts," but in Pennsylvania such a court is called the "orphans court," and in New York the "surrogate court." Small-cause courts are known as "justice of the peace courts," "police courts," or "municipal courts."

30. Congress has provided that Federal district courts may take jurisdiction over civil suits between citizens of different states, or arising under federal statutes, only if the amount involved exceeds $3,000, but the parties may still elect to take their dispute to a state court. Under the Act of June 25, 1948 (62 Stat. 931), the $3,000 limitation does not apply and district courts have jurisdiction of any civil action arising under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. *See,* for example, *United Air Lines, Inc.* v. *Public Utilities Commission of California,* 109 F. Supp. 13 (1952), where a district court took jurisdiction under this act in a controversy involving the question of state or federal authority over air line rates.

31. *Houston* v. *Moore,* 5 Wheat. 1 (18 U.S., 1820).

32. *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 80 (1938).

while unofficial reports usually are not. But both use identical texts as far as the opinions and judgments are concerned, and these are supplied by the courts. Both are citable in court.[33] The most widely used of the unofficial state reports are those in the National Reporter System (*see* 2312). Because of their greater availability citations in this publication, wherever possible, are to this system rather than to the official state reports (*see* 2311).

2311. *Official State Reports*

It is not always clear as to what makes a report official. Those prepared and published under statutory authorization are definitely official. Prior to about the middle of the 19th century it was customary for the official reporter to publish reports at his own expense or profit and the reports carried his name—for example, *Shivers* v. *Wilson,* 5 Harr. & John. 130 (Md. App. 1820). These reports, whether considered official or not in the current sense, are nevertheless acceptably cited in any legal writing.[34]

2312. *The National Reporter System*

The decisions of state courts—appellate courts and some courts of first instance—are reported in a series of unofficial reports known as the National Reporter System. Begun in 1879 with the "North Western Reporter," it now covers the entire country including a special series for the courts of record of New York (the New York Supplement).[35] The text of the opinions in this system follows the official state reports. A typical citation to the National Reporter System would be the following: *Lively* v. *Mundy,* 40 S.E. 2d 62 (1946) (Ga.). This is the form used in this publication.[36]

33. PRICE AND BITNER, EFFECTIVE LEGAL RESEARCH 94, 114 (1953).

34. *Id.* at 116. Current official reports are cited by a title frequently with a parallel citation to the National Reporter System (*see* 2312)—for example, *Wynn* v. *Sullivan,* 294 Mass. 562, 3 N.E. 2d 236 (1936).

35. In this system, the country is divided into seven regional areas, each with its own designation, as follows: *Atlantic Reporter* (cited "Atl." and "A. 2d") includes Maine, New Hampshire, Vermont, Rhode Island, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, and the District of Columbia; *North Eastern Reporter* (cited "N.E." and "N.E. 2d") includes Massachusetts, New York, Ohio, Indiana, and Illinois; *South Eastern Reporter* (cited "S.E." and "S.E. 2d") includes Virginia, West Virginia, North Carolina, South Carolina, and Georgia; *Southern Reporter* (cited "So." and "So. 2d") includes Florida, Alabama, Mississippi, and Louisiana; *South Western Reporter* (cited "S.W." and "S.W. 2d") includes Kentucky, Tennessee, Missouri, Arkansas, and Texas; *Pacific Reporter* (cited "Pac." and "P. 2d") includes Oklahoma, Kansas, New Mexico, Colorado, Wyoming, Montana, Idaho, Utah, Arizona, Nevada, California, Oregon, Washington, Alaska, and Hawaii; and *North Western Reporter* (cited "N.W." and "N.W. 2d") includes Michigan, Wisconsin, Iowa, Minnesota, North Dakota, South Dakota, and Nebraska.

36. The National Reporter System also includes the Supreme Court Reporter (*see* note 26 *supra*), the Federal Reporter (*see* note 17 *supra*), and the Federal Supplement (*see* note 14 *supra*).

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24. THE JUDICIAL PROCESS

Through the enactment of statutes, the legislature fixes standards of conduct which govern human affairs; through the rendering of decisions, courts apply these standards to specific cases. Such is the theory of the legislative function and the judicial function. The judicial process is the set of principles that courts have developed to govern their decisions. In its broadest concept, it involves more than the mere weighing and counting of precedents on either side of a controversy; it includes as well the whole field of judicial backgrounds, experiences, and philosophies by which judges interpret the law and determine its meaning when new problems and situations arise.

241. Case or Controversy

It is a cardinal rule in the Federal courts that there must be a bona fide dispute between opposing parties with a true conflict of interests before the court will accept the dispute for adjudication. If these elements do not exist, then the matter is beyond the jurisdiction of the Federal courts.[37] This stems from the provision in Article III, section 2, of the Constitution, which limits the scope of the judicial power of the United States to "cases" and "controversies" (*see* 22).[38]

It follows, therefore, that a "moot" or "advisory" case is not the proper subject of judicial action, in the absence of a specific constitutional provision sanctioning such a proceeding, for the reason that such an action violates the basic requirement that judicial proceedings be both adversary and effective. And it has been held that the judicial power of the United States does not extend to the furnishing of opinions as to the constitutionality of an act of Congress in advance of a justiciable controversy involving the statute. And even where litigants are actually involved, if the net result of the litigation is merely to furnish advice as to rights, it is held to be beyond the judicial function.[39]

37. In *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 423 (1940), the Supreme Court said: "The courts deal with concrete legal issues, presented in actual cases, not in abstractions" (citing *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 75 (30 U.S., 1831), and *New Jersey* v. *Sargent*, 269 U.S. 328 (1926)).

38. "Cases" have been held to be broader in scope than "controversies" and to apply to suits of both a civil and criminal nature, whereas controversies are confined to civil suits only. In common usage, however, the two are not distinguishable, and the term "cases and controversies" implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication.

39. *Muskrat* v. *United States*, 219 U.S. 346 (1911). In several of the states, advisory opinions at the request of the Governor or legislature are authorized by their constitutions. Dodd, Cases on Constitutional Law 156 (1949). Complicated factual situations may sometimes present themselves as to whether there is a justiciable case or controversy. This very question arose in *United States* v. *California*, 332 U.S. 19 (1947) (the so-called "tidelands" case). (*See* Volume One, Part 1, 11, 112.)

242. The Doctrine of Stare Decisis

One of the most important developments in the judicial process was the appearance of the rule of *stare decisis* ("adhere to the decision"), or the doctrine of precedent. This was a logical outgrowth of the common-law system of jurisprudence, which is based on case law, as distinguished from the civil-law system, which is based on established codes (*see* 251). The theory of Anglo-American law is that the principle underlying the decision in one case will be deemed to control decisions in like cases in the same court or in lower courts within the same jurisdiction. The underlying reason for the emergence of this doctrine was the need for securing continuity and certainty in the law, especially as the great body of decisional law expanded. The rationale of the doctrine was stated by Chancellor Kent as follows: "A solemn decision upon a point of law arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case." [40]

Were this otherwise there would be a perpetual uncertainty as to the law and no safe advice could be given in any set of circumstances. The doctrine of precedent is of course subject to qualifications. The determination of what is a "like case" that makes it imperative for a court to follow is what gives flexibility to the doctrine.

In dealing with a case at common law, three avenues of approach are open to the court: It can follow precedents established in previous decisions; it can overrule such precedents (unless it is a lower court and hence compelled to follow decisions of the higher court); or it can "distinguish" those cases that stand in the way of the decision at which it wishes to arrive.[41]

Where a rule has been judicially declared and private rights created thereunder, the courts will not depart from the doctrine except under the greatest of compulsions and in the clearest cases of error. But when public interests are involved, and especially where the question is one of constitutional construc-

40. Kent, 1 Commentaries on American Law 476 (1896).

41. To "distinguish" a case means pointing out how and why the former case does not apply to the instant case, and, therefore, why it does not constitute a precedent which the court is obliged to follow. In *Glidden* v. *Zdanok*, *supra* note 22, at 584, the Supreme Court, in holding that the Court of Claims and the Court of Customs and Patent Appeals were constitutional courts, "distinguished" this case from two previous cases—*Ex parte Bakelite Corp.*, *supra* note 22, and *Williams* v. *United States*, 289 U.S. 553 (1933)—which held these courts to be legislative courts, on the ground that the factors considered in the *Glidden* case were not considered in the former cases. While in a sense the Court distinguished these cases, in effect it overruled the former. However, in the particular case the question of overruling had become academic, inasmuch as Congress had, subsequent to the former cases, provided by statute what amounted to an overruling (*see* note 22 *supra*).

tion, the approach is more liberal, in view of the fact that a constitution, and particularly the Federal Constitution, may be changed only with great difficulty. On the justification of departure from the doctrine, it was stated by Mr. Justice Brandeis, in dissenting from the decision that Congress may not by statute bring injuries in maritime work under the state workmen's compensation laws: "The doctrine of *stare decisis* should not deter us from overruling that case and those which follow it. The decisions are recent ones. They have not been acquiesced in. They have not created a rule of property around which vested interests have clustered. They affect solely the matters of a transitory nature. On the other hand, they affect seriously the lives of men, women and children, and the general welfare. *Stare decisis* is ordinarily a wise rule of action. But it is not a universal, inexorable command. The instances in which the court has disregarded its admonition are many." [42]

2421. *Rule of Property*

The doctrine of stare decisis finds particular force in decisions relating to real property. Stability is especially requisite in this area of judicial determination. Such decisions become *rules of property*, and many titles may be injuriously affected by their change. In an early case, the Supreme Court said on this matter: "Legislatures may alter or change their laws, without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change." [43]

A "rule of property" has been defined as a settled legal principle governing ownership and devolution of property. To constitute such a rule, a judicial

42. *Washington* v. *W. C. Dawson & Co.*, 264 U.S. 219, 235, 238 (1924). For a list of cases overruled by the Supreme Court, *see* dissent by Mr. Justice Brandeis in *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932). A more recent list of overruled cases appears in the opinion of the Court in *Smith* v. *Allwright*, 321 U.S. 649 (1944). One of the noteworthy cases in which the Supreme Court expressly overruled its former decisions was *The Genesee Chief* v. *Fitzhugh*, 12 How. 443 (53 U.S., 1851). By this action, the Court, in defining the scope of the admiralty jurisdiction in this country, overturned the tidal test for navigability and adopted the principle that the test was the actual navigable capacity of a waterway and not the extent of tidal influence. The Court thereby overruled *The Thomas Jefferson*, 10 Wheat. 428 (23 U.S., 1825), which it had decided 26 years before. On the justification for not adhering to the rule of stare decisis, the Court said: "The case of the *Thomas Jefferson* did not decide any question of property, or lay down any rule by which the right of property should be determined. If it had, we should have felt ourselves bound to follow it. . . . But the decision referred to has no relation to rights of property. It was a question of jurisdiction only." *Id.* at 458.

43. *Minnesota Co.* v. *National Co.*, 3 Wall. 332 (70 U.S., 1866). The existence of the doctrine of the rule of property is one of the reasons why early court decisions are often cited as authority in modern cases involving land ownerships.

declaration must be fixed, long-continued, and relied on by persons acquiring property, so that its repudiation would amount to a denial of due process.[44] The rule remains even when the decision is erroneous, unless it appears that the evils resulting from the principle established is more mischievous than can possibly ensue from disregarding the previous adjudications upon the subject.[45] The theory on which adherence to the rule is based is that if any change in the law is necessary it should be made by the legislature.[46]

Decisions of executive departments of government have been held not to be covered by the rule except in the clearest cases of long and continued promulgation and reliance.[47]

2422. *Obiter Dictum*

There is one situation where the rule of stare decisis is held not to apply. It is where the court in rationalizing its decision uses language broader than is needed for the disposition of the point at issue. Such language is known as *obiter dictum* ("that which is said in passing"), and dicta are not regarded as precedents within the rule. The reason is obvious. Not being at issue before the court, they have not been given the investigation and consideration that the question before it has. The test seems to be whether or not the court's statement is required in the determination of the issues presented; if it is merely illustrative or background material, then it is not and it then falls within the category of dictum.[48]

44. *United States* v. *Standard Oil Co. of Cal.*, 20 F. Supp. 427, 458 (1937).

45. *Brekke* v. *Crew*, 178 N.W. 146, 154 (1920) (S.D.). The court here held that even if the previous decision (a single decision) established a rule of property, under the existing facts it would not invoke the maxim of stare decisis. *Ibid.*

46. *Stewart* v. *Stewart*, 249 Pac. 197, 207 (1926) (Calif.). On the question of the retroactive effect of overruled decisions, the Supreme Court has taken the position that "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions" or it may hold "the reconsidered declaration as law from the beginning." *Great Northern Railway* v. *Sunburst Co.*, 287 U.S. 358, 364, 365 (1932).

47. *United States* v. *Standard Oil Co. of Cal.*, *supra* note 44, at 458.

48. In *Myers* v. *United States*, 272 U.S. 52 (1926), the Court upheld the right of the President to remove a postmaster from office without restraint by Congress. Although this was the narrow point decided, the opinions consisted of 243 pages. In the majority opinion, language was used to the effect that the power of removal extended to the members of the independent regulatory commissions. But when in a later case, *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), the Government invoked the language in the *Myers* case and sought to apply it to a member of such a commission (the Federal Trade Commission), the Court held such language as dicta and therefore not controlling in the disposition of the later case.

243. The Role of Authority in the Judicial System

In the judicial process, as has been noted, the doctrine of stare decisis is a form of authority which courts generally follow in order to give continuity and stability to the law. But strictly speaking the process is one of precedent rather than authority. "Authority" in the judicial set-up deals more with the weight to be accorded court decisions, statutes, and textbooks and other writings on the law. It is generally of two kinds—*mandatory* and *persuasive*. The first, also called imperative authority, is binding on courts; the second is not, but may or may not be followed.

The dual sovereignty systems in the United States include courts of different jurisdiction and rank, and the relative authority and force of their decisions in the courts vary accordingly. Thus, decisions of the United States Supreme Court, the highest court in the land, are mandatory on all inferior Federal courts, and on all state courts in cases involving federal questions, such as those arising under the Constitution, statutes, and treaties of the United States. But its decisions are only persuasive in state courts on all other matters. A court of one rank is not bound to follow a decision of another court of the same rank. So that decisions of the intermediate Federal appellate courts (*see* 222), while binding on all lower Federal courts within its circuit, are only persuasive in other Federal appellate courts and in the lower Federal courts outside its circuit.

On the state level, the decisions of the highest court of a state are binding on the intermediate appellate courts and the trial courts of the state, and the decisions of the intermediate appellate courts are binding on the trial courts below them within their respective districts; but the decision of any inferior court is not binding on another court of the same rank, although it may be followed for the sake of uniformity, nor is the decision binding on any state court of higher rank with appellate jurisdiction over it. The decisions of a court of one state applying common-law principles or construing a state statute may be persuasive authority to the courts of other states in cases involving analogous problems and enactments, but they are not binding authority. And the decisions of the highest court of a state are conclusive in regard to the meaning of state statutes and their validity under the state constitution. The precedents established by the highest court of a state are binding on the Federal courts in all cases originating in the state, except as to questions arising under the Constitution, statutes, or treaties of the United States.

Dicta, strictly speaking, have not, even persuasive authority, because the subject matter by definition was not necessarily raised and considered in the decision in which the dicta were uttered (*see* 2422). But in actual practice,

well-considered dicta may be entitled to respect, some to such an extent that their original status is overlooked or forgotten, and they are cited as authority.

There is another form of authority, sometimes called *secondary* authority, in contradistinction to the types of authority discussed above and generally considered *primary*. Secondary authority is not really authority, but comprises instead indexes to authority, such as digests and legal encyclopedias, and text books, law review articles, and other treatises. These can be highly persuasive and are frequently cited in judicial decisions.[49]

25. LEGAL SYSTEMS IN THE UNITED STATES

There are many definitions for the law, but in its ordinary sense it consists of the legal prescriptions enacted by duly constituted bodies and promulgated for the purpose of governing human conduct. The prescriptions, once made, are subject to interpretation by a court which may consider their constitutionality as well as their application to particular factual situations. So, in its broader aspects, law comprises both the legislative enactments and the decisional law evolved by the courts.

Two of the world's great legal systems, applicable in the United States and its possessions, are the *common law,* or that derived from the English law, and the *civil law,* or that having its antecedents in the Roman law. The common-law system was accepted in the English speaking countries of the world and their possessions, while the civil-law system was accepted in continental European countries, especially those having a Latin origin.[50] There are some significant differences under the two systems in the areas of riparian property law and the law of navigable waters. To cite one example: According to the common law, the inshore boundary of tidelands is ordinary or mean high-water mark,[51] whereas under the civil law it has been variously defined as "the line of highest advance of water," "the line reached by the highest waves in winter," "the highest tide of the year," and "the line of highest tide." [52] Other differences will be noted in the subsequent consideration of the specialized legal areas. To better understand these differences, a brief account will be given of the two systems.

49. PRICE AND BITNER (1953), *op. cit. supra* note 33, at 3.

50. GAVIT, INTRODUCTION TO THE STUDY OF LAW 44 (1951).

51. *Borax Consolidated, Ltd.* v. *Los Angeles,* 296 U.S. 10 (1935).

52. Diamond, *The Effect of Common and Civil Law on Tidal Boundaries,* 9 BAYLOR L. REV. 40 (1957). Recently, the Supreme Court of Texas defined "shore" as the line of mean-higher-high tide. *Luttes* v. *State,* 324 S.W. 2d 167 (1958) (*see* Appendix D).

251. The Common Law

The common law, as understood in this country, had its origins in the legal precepts adopted, developed, and formulated by the decisions of the courts of England following the Norman Conquest in 1066. These decisions were based in part upon customary usages and in part upon their own common sense. There was thus developed a body of judicial rulings, said to be derived from the "common custom of the realm," which later became known as *common law*. Common law is thus judge-made law, or case law. It is unwritten law as opposed to statute, or written, law. Under the common-law system, cases decided by judges are regarded as a valid, major source of law, and therefore the doctrine of stare decisis, or precedent, has an important role in this system (*see* 242). The common-law system is nevertheless a flexible system and one of its merits is its adaptability to a shifting environment.[53]

The English common law forms the foundation for the system of law in this country. It was brought to the American colonies at an early date and was continued by the Original Thirteen States and has been accepted by the other states upon their admission to the Union, except in the case of Louisiana (*see* 252). This original inheritance of English law has been modified by legislation or judicial decisions. Thus, as cases arose in each state for which there was no precedent in that state, the courts had to declare what the common-law rule was. It was in these decisions that the English common law was departed from in order to make them responsive to the local environment. There are, therefore, many systems of common law in the states, all manifesting a general likeness because of their common origin and extensive borrowing from each other, yet diverting from English law and from one another in many particulars. On many matters there have developed two rules—a majority and a minority rule. This means that numerically the number of states accepting one rule outnumber those which accept a contrary or modified rule. Sometimes different rules are described by the source of their origin, or principal exponent. Thus, reference is sometimes made in decisions to a *New York* rule, as distinguished from a *Massachusetts* rule, each followed in a varying number of states.

The common law of the states is applied in the Federal courts under a federal statute which provides that "The laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require

53. Thus, in *The Genesee Chief* v. *Fitzhugh, supra* note 42, the Supreme Court, in reexamining the federal admiralty jurisdiction, departed from the common-law doctrine of the tidal test of navigability and substituted the actual navigable capacity of a waterway as the test, on the basis that the former reflected an English environment, where the limit of the tide was also the limit of practical navigation, and was inapplicable in this country because of the broad difference between the topography of the British island and the American Continent.

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." [54] In construing this statute, the Supreme Court has said: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." [55]

2511. *Statutory Law*

The common law in the United States has been modified by statute from time to time. This is known as *statutory law*. In its broad sense, statutory law is used to refer to the enacted law, including such enactments as written constitutions or treaties. The most numerous illustrations of enacted law in the United States and in the states are the statutes enacted by the legislative departments of government, namely, the Congress and the state legislatures, respectively.[56]

In relation to the common law, statutes may declare or supplement, or they may supersede. A statute is declaratory of the common law when it merely affirms existing principles, while it is supplementary only when it does not displace the common law any more than is clearly necessary. But a statute supersedes when it is inconsistent with the common law.

There is one limitation on statutory law, whether legislatively created or the result of an administrative regulation, that overrides everything else—it must be in conformity with the Constitution of the United States. If it is not, then the Constitution must prevail.[57]

54. Judiciary Act of 1789 (1 Stat. 73, 92).

55. *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 78 (1938).

56. Insofar as is pertinent to the subject matter of this publication, statutory law may be subdivided into the following categories: (1) federal and state constitutions; (2) federal and state statutes; (3) federal treaties; (4) executive orders and proclamations of the President and of the state governors; and (5) administrative regulations of heads of departments, boards, and commissions, when authorized by statutes.

57. This is because Art. VI, cl. 2 of the Constitution makes it the supreme law of the land. This doctrine of supremacy and of the power of the courts to pass on the constitutionality of legislation was finally fixed by the Supreme Court in the case of *Marbury* v. *Madison, supra* note 24. The court did not claim a general power to nullify acts of Congress; the review of legislation arises incidentally in the decisions of cases. The theory on which the Court operates is that the Constitution is the final source of power and if a rule of lesser authority is in conflict with the basic law, the judiciary will act as though the lesser rule did not exist. GAVIT (1951), *op. cit. supra* note 50, at 49. It is pertinent in this regard to note here that in passing on the constitutionality of legislation the duty of the court is to determine the intention of the people from whom the constitution emanated. In this process of construction, no rules or principles have yet been formulated that reduces it to a purely mechanical one. A rule may be employed in one instance and rejected in another. The most important single factor in construing and interpreting the Constitution is the language in which it is expressed. Words are to be taken in their natural sense, except legal and technical terms which are given their technical meaning. Where ambiguities in

In the construction of statutes by the courts, the underlying object is to ascertain the meaning and will of the enacting body. This meaning is sought first in the language of the statute itself. If the language is clear and unambiguous, the statute will be interpreted according to the plain meaning of the words used. But where the language is ambiguous and is susceptible of two or more interpretations the intended meaning must be sought by the aid of all pertinent and admissible considerations. One of these sources is the legislative history of the statute, including committee reports and congressional debates.

252. The Civil Law

The civil law is characterized by emphasis upon statutes and also upon codes of law. Much of this system is traceable to the code prepared for the Roman Emperor Justinian and known as the Justinian Code of 533 A.D. One of the more famous civil codes, also founded on the Roman law, is that of France, prepared for Napoleon in 1804, and known as the Code Napoleon.[58] Acceptance of this system in a country means that basically the entire law is stated in a written code. It is legislation, sometimes in a most general form. On many important subjects the written statement is quite brief. The function of the court under such a system is to apply a pertinent statutory rule or principle to the facts in hand, rather than to a prior decision under the rule of stare decisis, as in the common-law system.

Because of its Spanish and French background, Louisiana adopted the civil-law system and much of its law is based on the Code Napoleon, but statute and judicial practice have resulted in many departures from the basic civil code and have brought the law a long way towards conformity to the common law.[59]

2521. *Application in Common-Law States*

In states where the common law now prevails, grants of land made by foreign governments before the land became part of the United States are held

language exist, they are resolved by resort to extraneous aids for discovering the intent of the framers. These may include a consideration of the history of the times when the provision was adopted and of the purposes aimed at in its adoption, the debates of constitutional conventions, contemporaneous construction, and practical construction by legislative and executive departments. Rottschaefer, Constitutional Law 18, 19 (1939) (citing cases in support of these rules).

58. Rodee, etc. (1957), *op. cit. supra* note 10, at 65.

59. By act of Congress, the situation in Puerto Rico is similar to that in Louisiana. This was originally true as to Hawaii, but only a limited amount of its civil law background is now in effect. Alaska is a common-law jurisdiction. Gavit (1951), *op. cit. supra* note 50, at 44. In Texas, the civil law was in force up to 1840, when its congress adopted the common law. Act of congress of Jan. 20, 1840, Laws 1840, sec. 2, p. 1.

to be governed by the law in force at the time of the grant. Thus, it was held undisputed that land in San Pablo Bay, Calif., which was originally granted by Mexico to one Castro, was governed by the Mexican law [the civil law] and that, under that law, the title of an owner of land bordering on navigable waters ran to the line of the highest high tide.[60]

26. LAWS AND THEIR RANK

Laws in the United States rank in authority in the following order: (1) the Constitution of the United States; (2) the statutes and treaties of the United States; (3) the constitutions of the states; (4) the statutes of the states; and (5) the common law.[61]

It has already been noted in 2511 that the Constitution is the supreme law of the land, consequently if one of its provisions is applicable in a controversy no other law need be looked to. The statutes and treaties of the United States are of coordinate rank, a later treaty superseding a prior, inconsistent statute, and a later statute superseding a prior, inconsistent treaty.[62] While the constitution and statutes of a state must give way to the Constitution, statutes, and treaties of the United States, where only the law of a particular state is involved the constitution of the state is supreme. Finally, where a conflict exists between the common law and enacted precepts, the latter prevail.

Under the separation of powers principle of American government (*see* 2112), the general rule is that Congress (or the state legislatures) cannot delegate the power to make laws. But having enacted statutes and laid down the general rules of action, it may invest executive officers or boards or commissions with authority to make rules and regulations for the practical administration of such statutes in matters of detail and to enforce the same, and also to determine the facts on which application of the law depends.[63]

60. *Stewart* v. *United States,* 316 U. S. 354, 359 (1942). In New York, the titles to considerable bodies of land are based on grants by the Dutch Government, and therefore the courts interpret such grants according to the law which the Dutch accepted and practiced at the time of the grant. Thus, in *Grace* v. *Town of North Hempstead,* 152 N. Y. Supp. 122 (1915), where the question at issue was the title to the waters and bed of Manhasset Bay in Long Island Sound, under a grant made in 1644 by the Dutch Governor to the Town of Hempstead, it was held that under the Roman-Dutch law (the civil law) of that date rivers and their beds were alienable and subject to proprietary rights. Therefore, the grant of ports and havens to the Town of Hempstead was valid and it in turn had authority to alienate. (There was indication that the *early* Roman-Dutch law recognized such water rights as common to all and not subject to private appropriation.)

61. SMITH (1939), *op. cit. supra* note 14, at 79.

62. *Foster* v. *Neilson,* 2 Pet. 253 (27 U.S., 1829).

63. *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U.S. 194, 214 (1912).

Similarly, the President has authority to issue Executive orders and his subordinates have authority to promulgate rules for the regulation of the internal affairs and procedure of the executive departments and its subdivisions, but such rules and orders are not statutes in any sense, and in a proper case courts may inquire into the validity of the regulation.[64] Principles analogous to these apply in general to the similar regulations issued by state executive officers, boards, and commissions.

64. In *Boyle* v. *United States,* 309 F. 2d 399 (1962), the United States Court of Claims reversed the action of the Civil Service Commission (concurred in by the Comptroller General) in deducting from the amounts payable to plaintiff, who was employed by the Government on a contractual basis after retirement, portions of his retirement annuity as was allocable to the period of the services rendered. But in *Baehr* v. *United States,* the Court of Claims, in a court order of May 18, 1962 (no written opinion), denied to federal employees the right to appeal Civil Service Commission's job classification standards which determine their salaries. On appeal, the Supreme Court, in an unwritten opinion, refused to hear arguments from the employees involved, thereby upholding the Commission's position that its job classification standards are not subject to further review or appeal. *Baehr* v. *United States,* 371 U.S. 888 (1962).