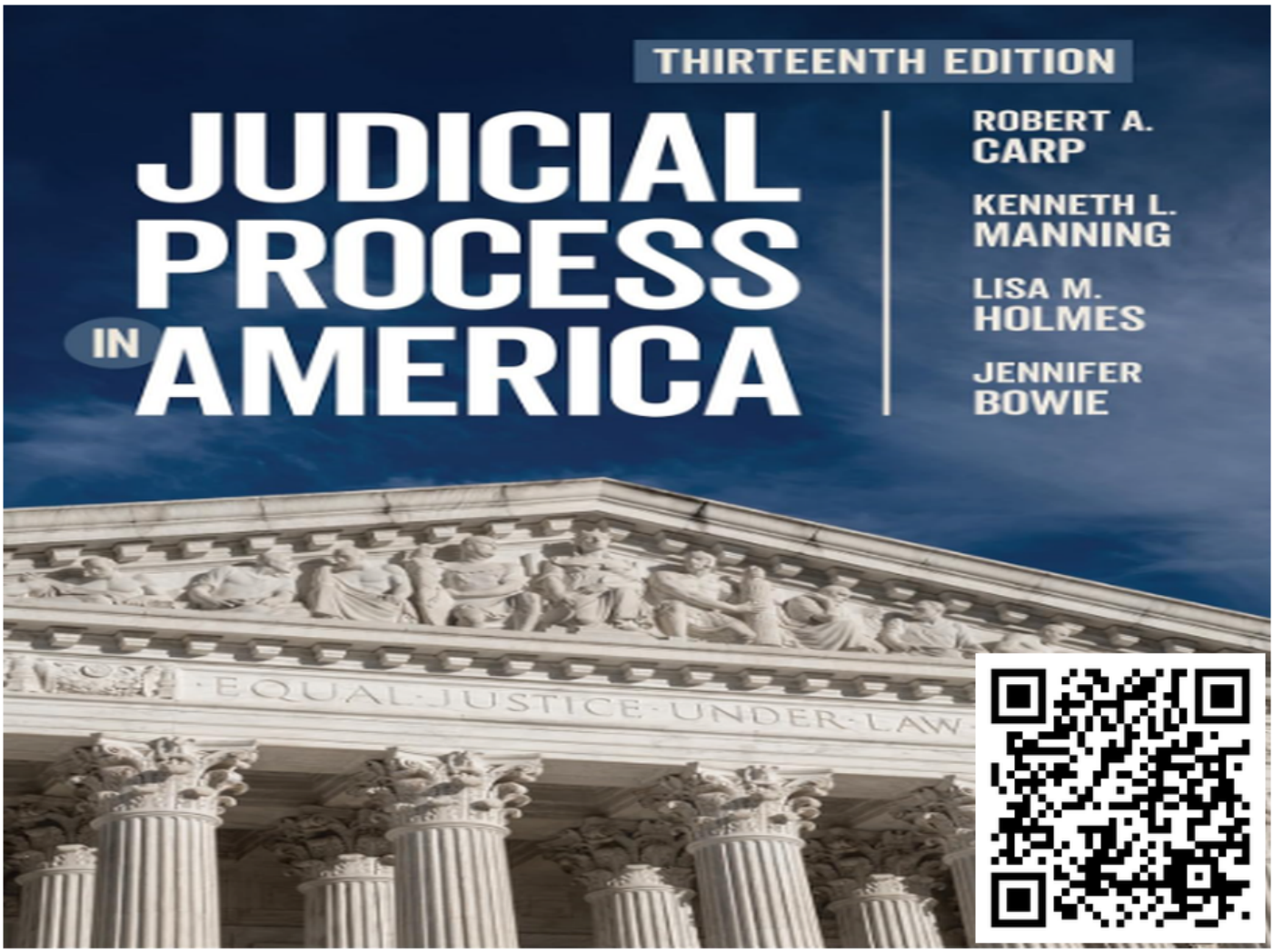

THIRTEENTH EDITION

JUDICIAL PROCESS IN AMERICA

ROBERT A. CARP

KENNETH L. MANNING

LISA M. HOLMES

JENNIFER BOWIE

Judicial Process in America

Thirteenth Edition

To the memory of Brian Rainer and his surviving wife Gloria, greatly valued and much-cherished friends for over fifty years.

—R. A. C.

To Marcia, Katie, and Kenny.

—K. L. M.

To Meghan, Lee, Jessica, Lizzy, and Sydney.

—L. M. H.

To my husband, Gavin Bowie, and my family.

—J.B.

Judicial Process in America

Thirteenth Edition

Robert A. Carp

University of Houston

Kenneth L. Manning

University of Massachusetts Dartmouth

Lisa M. Holmes

University of Vermont

Jennifer Bowie

University of Richmond

Sage | CQPRESS

FOR INFORMATION:

2455 Teller Road
Thousand Oaks, California 91320
E-mail: order@sagepub.com

1 Oliver's Yard
55 City Road
London, EC1Y 1SP
United Kingdom

Unit No. 323-333, Third Floor, F-Block
International Trade Tower
Nehru Place, New Delhi – 110 019
India

18 Cross Street #10-10/11/12
China Square Central
Singapore 048423

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Names: Carp, Robert A., 1943-, author. | Manning, Kenneth L. (Kenneth Luis) author. | Holmes, Lisa M., 1969- author. | Bowie, Jennifer Barnes, author.

Title: Judicial process in america / Robert A. Carp, University of Houston; Kenneth L. Manning, University of Massachusetts Dartmouth; Lisa M. Holmes, University of Vermont; Jennifer Bowie, University of Richmond.

Description: Thirteenth. | Thousand Oaks : CQ Press, 2025. | Previous edition 2023. | Includes bibliographical references and index.

Identifiers: LCCN 2024059344 (print) | LCCN 2024059345 (ebook) | ISBN 9781071934425 (paperback) | ISBN 9781071934432 (epub)

Subjects: LCSH: Justice, Administration of—United States. | Courts—United States. | Judicial process—United States.

Classification: LCC KF8700 .C37 2025 (print) | LCC KF8700 (ebook) | DDC 347.73—dc23/eng/20241212

LC record available at https://lccn.loc.gov/2024059344

LC ebook record available at https://lccn.loc.gov/2024059345

This book is printed on acid-free paper.

26 27 28 29 30 10 9 8 7 6 5 4 3 2 1

Acquisitions Editor: Anna Villarruel

Content Development Editor: Bailey Witterholt

Production Editor: Astha Jaiswal

Copy Editor: Talia Greenberg

Typesetter: diacriTech

Designer: Scott Van Atta

Marketing Manager: Jennifer Haldeman

BRIEF CONTENTS

DETAILED CONTENTS

PREFACE

Since the publication of the twelfth edition of *Judicial Process in America* in 2023, the United States has seen a great deal of uncertainty and discord, and the courts have certainly not been cut off from this turmoil. Some of the most prevalent issues surrounding the federal courts in recent years have concerned increased partisan polarization of the judiciary, the implications of President Donald Trump's success in appointing conservative judges across the federal courts, declining support for the Supreme Court by the public, and President Joe Biden's successful efforts at diversifying the federal judiciary.

Partisan polarization has been increasing in the United States, including among the public and among our elected officials. Recent scholarship points to a Supreme Court that has also seen a dramatic increase in partisan polarization in recent years, "perhaps more so than ever in its history."[1] This increased polarization has affected Supreme Court decision-making across many policy areas, including voting rights and campaign finance, religious liberty, and cases involving business. In other words, there is more disagreement today than there used to be in resolving campaign finance or religious liberty cases between justices appointed by Democratic versus Republican presidents.[2]

We are now a few years into the 6-3 conservative supermajority brought about by the hardball tactics utilized in appointing two of President Trump's three appointees to the Court (as we address in Chapter 6). Justice Ketanji Brown Jackson's selection in 2022 as President Biden's sole appointee to the nation's highest court, while unprecedented from the perspective of representation, did little to alter the ideological composition of the Court, given that she replaced liberal Justice Stephen Breyer. Decades of work by conservative interests and Republican political leaders are in the process of coming to fruition in expanding gun rights, empowering individual religious liberty claims over antidiscrimination policies, ending race-based affirmative action in college admissions, and limiting the power of administrative agencies, among other areas. Indeed, at the close of the 2023-2024 term, one longtime Court observer noted that the justices had "taken on a stunning array of major disputes and [assumed] a commanding role in shaping American society and democracy."[3]

Two such major disputes from the Court's 2023 term directly involved President Donald Trump. In a 6-3 decision mirroring the Court's partisan composition, the majority ruled that a president is entitled to full immunity for actions within his core constitutional authority and at least presumptive immunity from criminal prosecution for all of his official acts.[4] This ruling calls into question some of the ongoing criminal

trials involving Trump, as we address in Chapter 10. In the other case, the Court ruled in a unanimous per curiam opinion that Section 3 of the Fourteenth Amendment did not empower the state of Colorado to exclude Trump from the primary ballot, even with a trial court determination that he had "engaged in insurrection" by intentionally inciting the breach of the US Capitol on January 6, 2021.[5] The ballot access case demonstrates that even in this era of increased polarization on the Court, the resolution of some high-profile cases does not always reflect our expectation of the justices' ideological leanings.

Most high profile among recent Court rulings, however, has been the overturning of decades of abortion law in *Dobbs v. Jackson Women's Health Organization*,[6] in a 6-3 decision along ideological lines. The ramifications of the *Dobbs* decision have been seismic, in multiple ways. Newly empowered to chart their own course on abortion law, many states across the country passed restrictive abortion laws. According to the Guttmacher Institute, forty-three clinics in eleven states had stopped providing abortion care within thirty days of the *Dobbs* decision in June 2022.[7] The number of states with lesser or no access to abortion care have increased since then. The success achieved by pro-life advocates in the *Dobbs* decision has also encouraged further efforts at bringing additional cases to the courts regarding abortion care, although not all of these cases have achieved the goals sought by the conservative plaintiffs. In Chapter 4, for example, we discuss the as yet unsuccessful efforts at overturning the Food and Drug Administration's approval and regulation of mifepristone, a drug used in medication abortions in the United States.

Beyond the ramifications of *Dobbs* on abortion law and policy around the country, the decision influenced electoral politics in the United States. In the 2022 midterm elections, Democrats were expected to suffer the wrath of voters upset about inflation and economic concerns. Instead, voters' views on abortion were more critical than were views on the economy to shifting votes from one party to the other in the 2022 midterms.[8] Since a larger number of voting Americans supported rather than opposed legal abortions, the Democratic Party exceeded expectations by barely losing control of the House and gaining a seat to their slim majority in the Senate in the midterms that year.

The legacy of the *Dobbs* decision continued into the 2024 presidential election. In her time as vice president, Democratic presidential candidate Kamala Harris served as "the White House's voice of unflinching support for reproductive health rights," and this experience in discussing abortion followed her on the presidential campaign trail.[9] For his part, Donald Trump was challenged in reconciling his role in appointing justices who voted to overturn *Roe* with the electoral blowback for Republicans that has come in the wake of *Dobbs*. Ultimately, early exit poll analyses of the 2024 election indicated that those who voted to support reproductive rights in the states that had abortion-related measures on the ballot did not break for Harris to the extent that her campaign needed to defeat Trump, especially in battleground states like Arizona and Nevada.[10]

The implications of party polarization and appointment politics on the judiciary extend beyond the US Supreme Court. In Chapter 4, we consider how the ideological composition of lower federal courts has contributed to litigants filing cases strategically in the hopes of drawing judges particularly sympathetic to the litigants' arguments. This intense form of "forum shopping" on the part of litigants has drawn pushback from other actors in the political system, including the Judicial Conference of the United States.

At the state level, discord between the political branches and the judiciary remains prevalent in some states. As we discuss in more detail in Chapter 5, for instance, Republican legislators in Wisconsin threatened to impeach a newly elected state supreme court justice if she did not recuse herself from an important redistricting case.

Given these events, it is perhaps not surprising that we are currently seeing historically low levels of approval of the US Supreme Court expressed by the public, with the Court's approval dropping a full 23 percentage points between 2020 and 2024.[11] As would likely be expected, given our polarized society, the decrease in support for the Supreme Court has a partisan hue, with support among Democrats dropping especially sharply.[12] In addition, the steady stream of ethics scandals following some of the justices has also been a likely contributor to the decrease in support. These widely reported scandals, and the Court's tepid response to them, have spurred a call for increased judicial ethics reform, as we discuss in Chapter 6. In that chapter, we also give attention to President Biden's judicial reform plan, including his proposal for term limits and judicial ethics provisions specifically targeting the justices of the nation's highest court.

Alongside noticeable trends toward increased partisan polarization and decreased public support for the Supreme Court, another obvious trend has been the dramatic increase in diversity in judicial appointments during the Biden presidency. From the perspective of racial, ethnic, and gender diversity, President Biden has had a tremendous impact on the courts. Justice Ketanji Brown Jackson is the first Black woman, the second woman of color, and only the sixth woman appointed in the Court's history. Justice Jackson's previous experience as a public defender also reflects Biden's approach to diversifying the professional backgrounds of his judicial appointees. With more opportunity to shape the composition of the lower federal judiciary, Biden's record on diversifying the district and circuit courts is unprecedented. In Chapter 6, we provide updated data on the demographic, educational, and professional backgrounds of Biden's appointees to the circuit and district courts.

In this current edition, we also include updated original data on the voting patterns of US trial court judges. We provide additional analysis of the decisions made by the judges appointed by President Trump, and also give a full assessment of the voting behavior of Biden's trial court cohort in Chapter 7. Given the particularly diverse identities and professional backgrounds of the Biden judges, the decision-making behavior of his judicial appointees will be important to track in the coming years.

The results of the 2024 elections will, of course, have a significant influence over the direction of US law and policy moving forward. Although the confirmation process has settled into a post-nuclear option reality, where a filibuster is no longer able to deny confirmation, partisan control of the presidency and the Senate are critical to who is appointed to all levels of the judiciary. President Trump will benefit from unified government in the 119th Congress, with a Senate controlled 53 to 47 by Republicans, clearing the path toward confirmation for a new cohort of Trump judges without the need for bipartisan support.

The implications of the 2024 presidential election will also be seen in the leadership and priorities of the US Department of Justice (DOJ). With a newly elected president, we expect new appointees to serve in key positions within the DOJ. As we discuss in Chapter 8, these new appointees will influence the direction of law and policy in the United States for the near future, at least. At the state level, the increasing amount of money spent on certain judicial elections has shown little sign of abating in recent election cycles, as we address in Chapter 5. In that chapter, we also discuss how the elected branches have attempted to influence the judiciary in some states through hardball political tactics, often in response to electoral victories or defeats.

State court systems have also recently demonstrated why states are often seen as "laboratories of democracy." The COVID-19 pandemic caused monumental obstacles for access to court systems across the country, and state judiciaries responded as they often do, through innovations designed to allow courts to continue hearing cases as the pandemic raged. As the nation has moved forward from the most disruptive days of the crisis, many states have retained innovations deemed useful in providing greater access to these courts, although these reforms have come with their own drawbacks and problems, as we address in Chapter 3.

In considering all of these topics, and many others throughout the book, we have taken care to prepare a text that is highly readable for both academic and general audiences. The primary emphasis is on full coverage of the federal courts, state judicial systems, the role of the lawyer in American society, the nature of criminal and civil law, and public policy concerns that color the entire judicial fabric. The book is designed as a primary text for courses in judicial process and behavior; it is also useful as a supplement in political science classes in constitutional law, American government, and law and society. Likewise, it may serve as interesting reading in law-related courses in sociology, history, psychology, and criminology.

We also provide a variety of comparative references and examples throughout the book, continuing to highlight relevant aspects of the US judicial system that are uniquely American and that may be compared with the judicial practices of other nations. In providing some comparative insight, we have endeavored to include a wide variety of countries as the sources of our comparisons—not just Canada and the United Kingdom, whose judiciaries are mostly like the US system.

Throughout the text, we have endeavored to use minimal jargon and theoretical vocabulary of political science and the law without condescending to the reader. We believe it is possible to provide a keen and fundamental understanding of the court systems and their impact on Americans' daily lives without assuming that all readers are budding political scientists or lawyers. At times, it is necessary and useful to employ technical terms and evoke theoretical concepts. Still, we address the basic questions on a level that is meaningful to an educated layperson.

We have also avoided stressing any theoretical framework for the study of courts and legal questions, such as a systems model approach or a judicial realist perspective. Instructors partial to the tenets of modern behaviorism will find much here to appreciate, but we have also included some of the insights that more traditional scholarship has provided over the years. The book reflects the contributions not only of political scientists and legal scholars but also of historians, psychologists, court administrators, think tanks and research groups, and journalists.

For students who may desire more specialized explanations or who wish to explore further some of the issues we discuss, the glossary, notes, and suggested resources contain ample leads. We have added new websites to the suggested resources at the end of each chapter, for those who wish to pursue the subject matter in greater depth. As an additional learning aid, we encourage readers to visit the Cornell University Law School Supreme Court website (https://www.law.cornell.edu/supremecourt/text/home), from which they can obtain, without cost, summaries of Supreme Court decisions immediately after they are handed down by the justices. For those interested in current developments in Supreme Court jurisprudence, we also suggest the free, award-winning website *SCOTUSblog.com*, sponsored by Bloomberg Law. *SCOTUSblog.com* has become a go-to source for many Court watchers.

Throughout the text we are constantly mindful of the interrelation of the courts and public policy. We have worked from the premise that significant portions of citizens' lives—both as individuals and as part of a nation—are affected by what federal and state judges choose to do and what they refrain from doing. We reject the common assumption that only liberals make public policy and only conservatives practice restraint. We believe that to some degree all judges engage in the inevitable activity of making policy. The question, as we see it, is not whether American judges make policy but which directions their policy decisions take. In the chapters that follow, we explain why this has come to be, how it happens, and what the consequences are for the United States today.

We intend for the thirteenth edition of this book to provide the same balance between rigor and readability seen in previous editions. But evolution is inevitable, and we would like to highlight one major change with this current edition. We are delighted to announce that Dr. Jennifer Bowie, associate professor of political science at the University of Richmond, has brought her wealth of expertise with her as this project's newest coauthor. We cannot highlight all of Dr. Bowie's impressive teaching

and scholarly accomplishments here, but her contributions to this latest edition have been vast, and she is a valued and important new member of the *Judicial Process in America* team.

In terms of chapter organization for this text, we set the theoretical stage in Chapter 1, noting Americans' ample respect for the law and also their traditional willingness to violate the law when it is morally, economically, or politically expedient to do so. We also examine sources of jurisprudence in the United States and several of the major philosophies concerning the role and function of law.

In Chapter 2, we examine the organizational structure and workloads of the federal judicial system, and we have updated all the tables to reflect new caseload statistics for all three levels of the federal judiciary. In this thirteenth edition, we provide a deeper discussion of the work at each level of the federal judiciary and devote more attention to the importance of the federal courts of appeals and district courts.

Chapter 3 focuses on the judicial systems in the various states. There is also expanded coverage of courts of limited jurisdiction including juvenile courts, of the increasing use of administrative hearings (in place of litigation), and of the expanding role of state supreme courts in critical areas of policymaking such as same-sex marriage and legislative apportionment. We also discuss the significant impact that post-pandemic innovations have had on state judicial administration. Finally, the statistical tables in this chapter reflect the most recent available data.

In Chapter 4, we outline the jurisdiction of the several levels of US courts and discuss the political and nonjusticiable realms of American life into which judges in principle are not supposed to enter. In this edition, we highlight a number of recent developments of relevance to this chapter. We include a new discussion of "forum shopping," the practice (when available) of filing a case in the court that is expected to be the most sympathetic to the plaintiff's argument. We also address contemporary debates concerning proposals to alter the Supreme Court's appellate jurisdiction and we update some examples by incorporating *FDA v. Alliance for Hippocratic Medicine*[13] and *303 Creative v. Elenis*[14] into the chapter.

Chapter 5 focuses on the role and work of state judges with an emphasis on the selection, retention, and removal of state judges. We emphasize the balance between judicial accountability and judicial independence in this chapter, focusing on tensions between the elective branches and the judiciary. We include new material in this chapter on judicial oversight and in particular judicial misconduct commissions in the states. The statistical information includes the most recent data available.

Focusing on the federal courts in Chapter 6, we use newly collected original data to take a close look at the men and women serving the federal judiciary. What are their backgrounds and qualifications for office? How are they chosen? How are they socialized into their judicial roles, under what circumstances can they be removed from office, and when do they choose to leave their lifetime tenured seats? As noted, President Joe Biden had a profound influence on the composition of all levels of the

federal judiciary, particularly with respect to the unprecedented racial, ethnic, and gender diversity among his appointees. We also expand the discussion of judicial ethics, focusing on recent controversies centering on Justice Clarence Thomas, and give attention to President Biden's actions with respect to judicial reform initiatives. Lastly, we discuss the relevance of the 2024 elections to the judiciary moving forward.

Chapter 7 examines the work and decision-making patterns of federal judges, those appointed by Presidents Franklin Roosevelt through Joe Biden. We find a discernible link among the values of most of the voters in a presidential election, those of the appointing president, and the subsequent policy content of decisions made by the judges nominated by the chief executive. And through original research, using significant amounts of our own new and updated data, we offer an in-depth assessment of recent presidents' impact on the ideological orientation of the federal judiciary. Finally, we provide an updated analysis that compares and contrasts the judicial nomination and appointment strategies of Presidents Trump and Biden.

Chapter 8 discusses the role of lawyers in American society—their training, values, and attitudes, and the public policy goals of their professional associations. We provide an expanded and updated discussion of the issues facing law students and law schools themselves in recent decades. The legal profession has rebounded well but not completely, since the darkest days of the Great Recession. The student debt crisis remains a problem, especially for law students from traditionally marginalized backgrounds. In this chapter, we also provide a discussion of the role of litigants and interest groups in the judicial process, including the rise and success of conservative legal groups in recent years. We have updated statistics and examples throughout the chapter.

In Chapter 9, we focus on the nature of crime and on the various procedures prior to a criminal trial: the arrest, the appearance before a magistrate, the grand jury process, the arraignment, and the possibility of a plea bargain. We provide new crime examples throughout the chapter and we further discuss the adversarial process as it exists in American courtrooms. We also place more attention on plea bargaining, highlighting that plea bargaining is the norm and not the exception in the US system. We provide new statistical information in this chapter.

Chapter 10 explores the criminal trial and its aftermath. We examine the procedural rights of the criminal defendant, the process of selecting a jury, the roles of judge and juries during the trial, the sentencing process, and the possibility of an appeal. To illustrate the various stages of a criminal trial, we rely on Donald Trump's 2024 conviction on charges related to paying off Stormy Daniels in the leadup to the 2016 presidential election. We also provide current statistics throughout the chapter.

Chapter 11 examines the civil court process, beginning with an analysis of the distinct types of civil cases and the options available to the complainant and the respondent. We then proceed through the various methods of alternative dispute resolution, followed by a discussion of pretrial hearings and jury selection. Finally, we discuss the trial and judgment. In addition to updates to statistics and examples, this chapter gives

some added attention to benefits and concerns about alternative dispute resolution procedures. We also incorporate a discussion of *Securities and Exchange Commission v. Jarkesy* (2024)[15] and the decision's influence on the ability of federal administrative agencies to seek penalties from wrongdoers without protecting the right to a trial by jury.

Chapter 12 is the first of two on judicial decision-making. In this chapter, we outline those aspects of the decision-making process that are common to all judges, in the context of the legal subculture (the traditional legal reasoning model for explaining judges' decisions) and the democratic subculture (a few extralegal factors that appear to be associated with judges' policy decisions). This chapter contains updated statistics on a magnitude of partisan differences for a wide variety of case types from 1932 until the current era.

In Chapter 13, we examine the special case of decision-making in collegial appellate courts. We explore the assumptions and contributions of cue theory, small-group analysis, attitude theory, and the rational choice model. These models are then used to explain the high court's decisions in several high-profile cases. We have also provided an updated discussion of Chief Justice John G. Roberts Jr.'s leadership on the Supreme Court and discuss recent developments in this area.

In Chapter 14, we explore the policy impact of decisions made by federal and state courts and analyze the process by which some judicial rulings are implemented, and some are not. We include examples from the most recent terms of the Supreme Court, including the high court's rulings on abortion, affirmative action, and gun rights (*Dobbs v. Jackson Women's Health Organization*,[16] *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*,[17] and *Garland v. Cargill*[18]). We have also included the latest research on the impact of the Court's same-sex marriage (*Obergefell v. Hodges*)[19] decision.

Chapter 15 is a summary chapter with two general goals: to outline the primary factors that impel judges to engage in policymaking and to suggest the variables that determine the ideological direction of such policymaking.

ACKNOWLEDGMENTS

Many people contributed to the writing of this book, and to all of them, we offer sincere thanks. At CQ Press, we would like to thank Anna Villarruel, Bailey Witterholt, Scott Van Atta, and Astha Jaiswal. We also extend our sincere appreciation to Russell Wheeler (nonresident senior fellow at the Brookings Institution) for his thoughtful and helpful feedback on many chapters in this book. We assume responsibility for any errors that remain.

Ken Manning extends many thanks to his department's administrative assistant, Lisa Porto, who is an invaluable colleague and provides so much professional support. He also gives a "shout out" and appreciation to the multiple undergraduate research assistants whose work in his office over the years has been so helpful in compiling and analyzing the district court data.

Lisa Holmes would like to thank Robin Olsen (University of Vermont class of 2026) for her invaluable assistance in collecting and analyzing data on Joe Biden's judicial appointees. She also thanks the Department of Political Science at the University of Vermont for the financial support needed to hire Robin.

Jennifer Bowie would like to thank Fiona McDaid (University of Richmond class of 2026) for her research assistance in collecting data on the state courts. She would especially like to thank her husband, Gavin Bowie, for his support along with her two furry spotted friends, Tuck and Louie Bowie.

Robert A. Carp
Kenneth L. Manning
Lisa M. Holmes
Jennifer Bowie

1 FOUNDATIONS OF LAW IN THE UNITED STATES

CHAPTER GOALS AND OBJECTIVES

In this chapter, readers will learn that . . .

- It is important that we understand what we mean by the word *law*.
- There are a variety of types of law in the United States, and each one has a separate function for society.
- Americans have historically had rather ambivalent attitudes about whether the law should always be obeyed and about whether there are legitimate reasons for ignoring the commands of legal statutes.
- The United States is a very litigious society, and there are reasons why this might be a good thing.

They called themselves the Memphis Seven. Coworkers at a Starbucks location in Memphis, Tennessee, they were all fired in February 2022 after being accused by the coffee giant of violating company safety and security policies. But the baristas believed the *real* reason they lost their jobs was in retaliation for their efforts to unionize their local branch of the national chain. Starbucks management claimed that the employees had violated company rules when they unlocked a door to the store after hours and allowed unauthorized TV media representatives into the building to conduct employee interviews as part of the workers' attempts to publicize their unionization efforts. It was also alleged by the company that the Memphis Seven had not followed the company's COVID-era protocols regarding mask-wearing, imperiling the health and safety of those in the store.[1]

Starbucks Workers United, a union spearheading efforts to unionize the company's workers across the United States, filed a legal challenge on behalf of the fired employees, arguing that the workers were victims of unfair labor practices. The union claimed that "Starbucks chose to selectively enforce policies that have not previously been consistently enforced as a pretext to fire union leaders."[2] The baristas pointed out that some of the supposed violations were common practices at the coffee shop and that employees had not been previously disciplined over them. They noted, for example, that off-duty workers frequently had been admitted

into the closed store to check their schedules, which are posted there.[3] The union also argued that companies are prohibited by federal law—in particular, by the National Labor Relations Act—from retaliating against workers for leading unionization efforts. Companies may not like unions—in fact, news reports noted that the Seattle-based coffee company had a history of being anti-union.[4] But legally, employers cannot harm or otherwise disadvantage workers who push to organize and fight for collective bargaining. The union claimed that that is exactly what Starbucks had done.

"The Memphis Seven" — seven former employees of a Starbucks coffee shop in Memphis, Tennessee, who claimed they were fired in 2022 for their efforts to unionize their store's employees.

Patrick Lantrip/Daily Memphian via AP

So, who was correct in this "David versus Goliath" dispute? Was Starbucks legally allowed to fire the employees for clearly violating company rules? Were the workers right that the rules violation was just an excuse that the company used to illegally dismiss staff who were leading unionization efforts?

The dispute was initially heard by the National Labor Relations Board (NLRB), the government agency that enforces a federal law known as the National Labor Relations Act (NLRA) by investigating allegations of wrongdoing brought by workers, unions, employers, conducting organizing elections, and deciding and resolving cases.[5] After a formal hearing process in which both sides were given the opportunity to present their cases, the NLRB ruled in favor of the baristas. The board concluded that Starbucks unlawfully fired the Memphis employees for supporting the union drive and that the company had done so, at least in part, to send a threatening message to other workers about supporting the union.

But this decision by itself did not end the matter. The NLRB finding in their favor did not automatically give the workers their jobs back. For that to happen, there would have to be an order issued by a federal judge to force the company to rehire the employees. And that's exactly what the NLRB got when it requested such an order from US District Judge Sheryl Lipman, who ruled in favor of the employees and granted an injunction compelling Starbucks to rehire the workers. Consistent with its right under federal law, the coffee chain appealed Judge Lipman's injunction to the US Court of Appeals for the Sixth Circuit, which upheld the judge's ruling.[6]

Starbucks then appealed to the US Supreme Court. But the company made a claim on appeal to the High Court that raised a new and interesting legal question, increasing the likelihood that the justices would agree to hear the case. In particular, Starbucks questioned the standard that judges should use to determine whether to issue such a preliminary injunction. In other words, Starbucks didn't dispute the specific *facts* in the case; rather, the company challenged Judge Lipman's *legal authority* to issue the injunction mandating that the company rehire the baristas. In particular, the company's appeal questioned how hard it should for the NLRB to win an injunction.[7] As it turns out, the NLRA law doesn't say much about this, simply providing that a court can grant "such temporary relief . . . as it deems just and proper." But this imprecise language conflicted with existing precedent, which had a stricter standard for granting an injunction. Starbucks argued that the judge didn't have the legal power to order the company to rehire the workers because the NLRA's vague standard unfairly gave too much leeway to judges.[8] And if the company's argument that Judge Lipman didn't have the legal authority to grant the order was correct, then her injunction was null and void. The workers would not get their jobs back.

On June 13, 2024, the US Supreme Court settled the dispute when it handed down a ruling in favor of Starbucks. In a decision that was said to hinder future efforts to organize workers, the Court ruled that the legal test the district court judge used to make their decision was too broad and inconsistent with precedent.[9] The NLRB ruling in favor of the Memphis Seven was not reversed, but the judge's order forcing the company to rehire the workers was ruled improper and thus overturned.

This was an outcome in which both sides could claim at least some vindication. The workers won a key public relations and moral victory when the NLRB ruled that they had been fired improperly by Starbucks. "It's exciting to know, us baristas in Memphis, Tennessee, in the South, an area where they aren't very pro-union, that we were able to create an atmosphere and really drive forward the labor union," said twenty-five-year-old Memphis Seven member Nabretta Hardin.[10] And some observers have suggested that high-profile litigation over labor organizing efforts has led Starbucks to soften its stance toward unions.[11] But the company prevailed in the dispute about being forced to rehire the dismissed employees — the baristas did not win back their jobs. Starbucks issued a statement that said, in part, "Consistent federal standards are important in ensuring that employees know their rights and consistent labor practices are upheld no matter where in the country they work and live."[12]

This dispute reveals much about the United States and the rule of law, and it suggests themes that we will articulate not only in this chapter but throughout the book. What happens when there are conflicts between two lawful and well-motivated propositions: the desire to engage in union organization and a company's right to enforce its policies consistent with established legal principles? Both desires are legitimate, but sometimes, they may come into conflict with one another. And if distinctions are to be made in our society between conflicting interests, which institutions should be empowered to make these determinations: legislatures, courts, local executives, or election officials?

We begin our discussion of the foundations of law in the United States with a look at the law itself. This is appropriate because without law, there would be no courts and no judges, no political or judicial system through which disputes could be settled and decisions rendered. In this chapter, we examine the sources of law in the United States—that is, the institutions and traditions that establish the rules of the legal game. We discuss the types of law that are used and define some of the basic legal terms. Likewise, we explore the functions of law for society—what it enables citizens to avoid and accomplish as individuals and as a people that would be impossible without the existence of some commonly accepted rules. Finally, we examine America's ambivalent tradition vis-à-vis the law—that is, how a nation founded on an illegal revolution and nurtured with a healthy tradition of civil disobedience can pride itself on being a land where respect for the law is ideally taught at every mother's knee. We also take note of the degree to which American society has become highly litigious and why this is significant for the study of the American judicial system.

DEFINITION OF LAW

A useful definition of American **law** postulates that "law is a social norm the infraction of which is sanctioned in threat or in fact by the application of physical force by a party possessing the socially recognized privilege of so acting."[13] This definition suggests that law comprises three basic elements—force, official authority, and regularity—the combination of which differentiates law from mere custom or morals in society.

In an ideal society, force would never have to be exercised; in an imperfect world, the threat of its use is a foundation of any law-abiding society. Although substitutes for physical force may be used, such as confiscation of property or imposition of fines, the possibility of physical punishment must nevertheless remain to deter a potential lawbreaker. The right to apply this force constitutes the official element of the definition of law. The party that exercises this right of physical coercion represents a valid legal authority. Finally, the term *regularity*, as used in the legal sense, can be likened to its use by scientists. Although the term does not reflect absolute certainty, it does suggest uniformity and consistency. The law calls for a degree of predictability, of regularity, in the way individuals are expected to behave or to be treated by the state. In American

society, this emphasis on regularity is manifested by adherence to prior court decisions and precedents (the **common law** doctrine of **stare decisis**) and by the mandate of the Fourteenth Amendment to the US Constitution, which forbids the state to "deny to any person within its **jurisdiction** the *equal protection* of the law" (emphasis added).[14]

SOURCES OF LAW IN THE UNITED STATES

Where does law come from in the United States? At first, the question seems a bit simpleminded. A typical response might be, "Law comes from legislatures; that's what Congress and the state legislatures do." This answer is not wrong, but it is far from adequate. Law comes from a large variety of sources.

Constitutions

The US Constitution is the primary source of law in the United States, as it claims to be in Article VI: "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Thus, none of the other types of law may stand if they conflict with the Constitution. Similarly, each state has its own separate constitution, and all local laws must yield to its supremacy.

Acts of Legislative Bodies

Laws passed by Congress and by state legislatures constitute a sizable bulk of law in the United States. Statutes requiring the payment of income tax to Uncle Sam and state laws forbidding the robbing of banks are both examples. But many other types of legislative bodies also enact statutes and ordinances that regulate the lives of US residents. County commissioners (also known as county judges or boards of selectmen), for example, act as legislative bodies for the various counties within the states.

Likewise, city councils serve in a legislative capacity when they pass ordinances, set property-tax rates, establish building codes, and so on at the municipal level. Then there are almost fifty thousand "special districts" throughout the country, each of which is headed by an elected or appointed body that acts in a legislative capacity. Examples of these would be school districts, fire prevention districts, water districts, and municipal utility districts.

Decisions of Quasi-Legislative and Quasi-Judicial Bodies

Sprinkled vertically and horizontally throughout the US governmental structure are thousands of boards, agencies, commissions, departments, and so on, whose primary function is not to legislate or to adjudicate but that still may be called on to make rules or to render decisions that are semilegislative or semijudicial in character. The job of the US Postal Service is to deliver the mail, but sometimes it may have to act in

a quasi-judicial capacity. For example, a local postmaster may refuse to deliver a piece of mail because he or she believes it contains hazardous materials. (Congress has mandated that "hazardous materials" may not be sent through the mail.) The postmaster is acting in a semi- or quasi-judicial capacity in determining that a particular item is "hazardous" and hence not subject to being delivered.

The US Securities and Exchange Commission (SEC) is not a lawmaking body, either, but when it determines that a particular company has run afoul of the security laws or when it rules on a firm's qualification to be listed on the New York Stock Exchange, it becomes a source of law in the United States. In effect, the SEC makes rules and decisions that affect a person or a company's behavior and for which penalties are imposed for noncompliance. Although decisions of such agencies may be appealed to or reviewed by the courts, they are binding unless they are overturned by a judicial entity.

A university's board of regents may also be a source of law for the students, faculty, and staff members covered by its jurisdiction. These boards may set rules on matters such as which persons may lawfully enter the campus grounds, procedures to be followed before a staff member may be fired, or definitions of plagiarism. Violations of these rules or procedures carry penalties backed by the full force of the law.

Orders and Rulings of Political Executives

Civics classes teach that legislatures make the law and executives enforce the law. That is essentially true, but political executives also have some lawmaking capacity. This lawmaking occurs when presidents, governors, mayors, or others fill in the details of legislation passed by legislative bodies, and sometimes when they promulgate orders purely in their executive capacity.

When Congress passes reciprocal trade agreement legislation, the goal is to encourage other countries to lower trade and tariff barriers to US-produced goods, in exchange for which the United States will do the same. But there are so many thousands of goods, almost two hundred countries, and countless degrees of setting up or lowering trade barriers. What to do? The customary practice is for Congress not only to set basic guidelines for the reciprocal lowering of trade barriers but also to allow the president to decide how much to regulate a given tariff on any given commodity for a particular country. These executive orders of the president are published regularly in the *Federal Register* and carry the full force of law. In fact, at the national level, more than 80,000 pages of new rules are churned out each year.[15] At the present time, the *Code of Federal Regulations*, dealing mainly with economic activity and published in the *Federal Registrar*, now runs over 200,000 pages.[16]

In his first several months in office, President Joe Biden made extensive use of his power to issue executive orders. For instance, on January 20, 2021, he revoked President Donald Trump's plan to exclude noncitizens from the census; on January 25, he declared that transgender persons could serve in the military; and on January 27, he ordered that climate change be elevated as a **national security** concern.[17]

Likewise, at the state level, when a legislature delegates to the governor the right to "fill in the details of legislation," the state executive uses his or her **ordinance-making power**, which also is a type of lawmaking capacity. Political executives may promulgate orders that, within certain narrow but important realms, constitute the law of the land. For example, during the height of the COVID-19 pandemic in 2020, many governors and mayors issued orders limiting or prohibiting certain kinds of public gatherings of individuals in order to prevent the spread of the virus. The governor of the state of Kentucky issued an order limiting religious gatherings to ten people.[18] In California, that state's governor issued a similar order requiring that people in houses of worship maintain a six-foot distance from one another. Violators were subject to a fine of up to $1,000 or up to ninety days imprisonment.[19] Although limited and usually temporary, such orders are law, and violations invoke penalties.

Judicial Decisions

Civics classes also teach that judges interpret the law. So, they do, but judges make law as they interpret it. And judicial decisions themselves constitute a body of law in the United States. All the thousands of court decisions that have been handed down by federal and state judges for the past two-and-a-half centuries are part of the **corpus juris**—the body of law—of the United States.

Judicial decisions may be grounded in or surround a variety of entities: any of the abovementioned sources of law, past decisions of other judges, or legal principles that have evolved over the centuries. (For example, one cannot bring a lawsuit on behalf of another person unless that person is one's minor child or ward.) Judicial decisions may also be grounded in the common law—that is, those written (and sometimes unwritten) legal traditions and principles that have served as the basis of court decisions and accepted human behavior for many centuries. For instance, if a couple lives together as husband and wife for a specified period of years, the common law may be invoked to have their union recognized as a legal marriage.

TYPES OF LAW

After examining the wellsprings of American law, it is appropriate to take a brief look at the vessels wherein such laws are contained—that is, to define or explain the formal types of categories of law. (Note that types of law are not necessarily mutually exclusive.)

Codified (or Code) Law

Unlike the United States, most countries (including most of Europe and Latin America) refer to themselves as code law countries. A code is merely a body of laws, but it is one that consists of statutes enacted by a national parliament. These laws address virtually

all aspects of the body politic; are often detailed; and are arranged in an orderly, systematic, and comprehensive manner. The US legal system is often seen from abroad as a hodgepodge of legislative acts, judicial decisions, unwritten legal traditions, and so on.

Statutory Law and Common Law

Statutory law is the type of law enacted by a legislative body such as Congress, a state legislature, or a city council, although it could also include the written orders of various quasi-legislative bodies. The key is that the enactments be in written form and be addressed to the needs of society. Examples of statutory law would be a congressional act increasing Social Security payments or a statute passed by a state legislature authorizing the death penalty for first-degree murder. Statutory law is often contrasted with the common law, which is a less orderly compilation of traditions, principles, and legal practices that have been handed down from one generation of lawyers and judges to the next. Because much of the common law is not systematically codified and delineated, as is statutory law, it is sometimes referred to as the unwritten law. However, this is not entirely accurate. Much of the common law exists in the form of court decisions and legal precedents that are in written form. The common law is known for its flexibility and capacity to change as it evolves in response to the changing needs and values of society.

Civil Law and Criminal Law

Civil law deals with disagreements between individuals—for example, a dispute over ownership of private property. It also pertains to corporations, admiralty matters, and contracts. **Criminal law** concerns offenses against the state itself—actions that may be directed against a person but that are deemed to be offensive to society. **Crimes** such as drunken driving, armed robbery, and so on are punishable by fines or imprisonment.

Equity

Equity is best understood when contrasted with law; the primary difference between the two terms is in the remedy involved. In law, the only remedy is financial compensation; in equity, a judge is free to issue a remedy that will either prevent or cure the wrong that is about to happen. Because in many circumstances monetary settlements are inappropriate or inadequate, equity allows judges a degree of flexibility that they would not otherwise have. For example, say you were the owner of an old cabin located in the center of town and that this structure was the first built in the community. You wish to preserve it because of its historic value, but the city decides to expand the adjacent street and thereby destroy the cabin. Your remedy at law is to ask the city for monetary compensation, but to you, this is inadequate. The cabin has little intrinsic value, although as a historic object, it is priceless. Thus, you may wish to ask a judge to issue a writ in equity that might order the city to move the cabin to another site or to reconsider its plan to widen the street.

Private Law

Private law deals with the rights and obligations that private individuals and institutions have when they relate to one another. Much civil law is in this category because it covers subjects such as contracts between private persons and corporations and statutes pertaining to marriage and divorce.

Public Law

Public law addresses the relationship that individuals and institutions have with the state as a sovereign entity. The government makes laws in its capacity as the primary political unit to which all owe allegiance; in turn, the government is obliged to preserve and protect the citizens who live within its jurisdiction. Public law also deals with obligations that citizens have to the government, such as paying taxes or serving in the armed forces, or it may pertain to services or obligations that the state owes to its citizenry, such as laws providing for unemployment compensation or statutes protecting property rights. Criminal law also falls into this broad category, as do laws that deal with such diverse subjects as defense, welfare, and taxation. Two subheadings in this category are administrative law and constitutional law.

Administrative Law

The decisions and regulations set forth by the various administrative agencies of the government are the substance of administrative law. Agencies, such as the SEC or a city health department, are empowered to oversee implementation or carry out specific mandates established by a legislative body. When one of these agencies promulgates rules or guidelines about how it intends to carry out its regulatory functions, the rules become part of administrative law.

Constitutional Law

Basically, constitutional law is the compilation of all court rulings on the meaning of the various words, phrases, and clauses in the US Constitution. Although all courts have the authority to perform this function, the US Supreme Court has the final say about questions of constitutional law. For example, in 1952, during the Korean War, the United States was faced with a strike by the unions against the nation's steel producers. President Harry S. Truman believed that a steel strike would impair the production of armaments needed for the war. He decided to seize and run the steel mills in the name of the United States. He claimed that he had "inherent powers" under Article II of the Constitution to do this—for example, his power as "Commander in Chief of the Army and Navy" and the fact that "the executive power shall be vested in [the] president." The Supreme Court disagreed with Truman and ruled that the chief executive did not have inherent authority to seize and operate the steel mills—even in times of emergency—without specific congressional authorization.[20]

State Law and Federal Law

Laws passed by one of the fifty state legislatures, ordinances promulgated by a state governor, and decisions handed down by a state court all constitute the corpus juris of a single state. They are compelling only for the citizens of that state and for outsiders who reside or do business there. State laws must not conflict with either federal law or anything in the US Constitution. Examples of state law are Illinois' income tax for those who reside within its boundaries and Utah's law that approves the use of firing squads for executions "when no lethal-injection drugs are available."[21] Federal law is made up of acts of Congress, presidential orders, US court decisions, and so on. This body of law applies throughout the United States and usually pertains to topics that are relevant to persons in more than just one state. Examples include a congressional act forbidding the transportation of a stolen car across state lines and a US Supreme Court decision outlawing prayer in the public schools. As with state law, federal law must be in harmony with the strictures of the US Constitution.

FUNCTIONS OF LAW

What is the function of law in the United States (or in any country, given that the function of law is universal)? What would the negative consequences be if there were no law? Or conversely, what positive things could be done through law that would be impossible without it? Few would deny that, in today's world, law is essential for ensuring that people live together amicably. As populations expand and modern transportation and communication link people together even more, every action that everyone takes affects others, either directly or indirectly, possibly causing harm. When conflict results, it must be resolved peaceably, using a rule of law. Otherwise, disorder, death, and chaos reign. Some common set of rules must exist that all agree to live by—in other words, a rule of law and order.

But what kind of law and order? Anarchists (those who are opposed to laws in general) argue that laws restrict personal freedom, and certainly in many cases that is so. If there are too many rules, laws, and restrictions, totalitarianism results. This result may be just about as bad as a state of anarchy. The trick is to strike a balance so that the positive things that law can do are not strangulated by the tyranny of the law and order offered by the totalitarian state.

Assuming, then, that both anarchy and totalitarianism are rejected, what are the positive functions of law when it exists to a reasonable degree? Legal theorists denote several benefits.

Providing Order and Predictability in Society

The world is often chaotic and uncertain. People win lotteries while the price of oil fluctuates dramatically; more and more people are living to the age of one hundred,

while millions around the world died of COVID; the availability of agricultural commodities ebbs and flows based upon fickle weather patterns, geopolitical concerns, industrial accidents, and supply chain disruptions. Laws can neither avert most natural disasters nor prevent random episodes of misfortune, but they can create an environment in which people can work, invest, and pursue happiness with a reasonable expectation that their activity is worth the effort. Without an orderly environment based on and backed by law, the normal activities of life would be lacerated with chaos.

For example, rules must be established that determine which side of the road to drive on, how fast cars can safely go, and when to slow down and stop. Without rules of the road, horrible traffic jams and terrible accidents would result because no driver would know what to expect from the others. Without a climate of law and order, no parent would have the incentive to save for a child's college education. The knowledge that the bank will not close and that one's savings account will not be arbitrarily confiscated by the government or by some powerful party gives the parent an environment in which to save. Law and the predictability it provides cannot guarantee a totally safe and predictable world, but they can create a climate in which people believe it is worthwhile to produce, to venture forth, and to live for the morrow.

Resolving Disputes

No matter how benign and loving people can be at times, altercations and disagreements are inevitable. How disputes are resolved between quarreling individuals, corporations, or governmental entities reveals much about the level and quality of the rule of law in a society. Without an orderly, peaceful process for dispute resolution, there is either chaos or a climate in which the largest gang of thugs or those with the strongest fists prevail.

Suppose a new fraternity house is built next to the home of Mr. Joe Six-Pack, a man who likes his peace and quiet. After Joe's sleep has been disrupted for the umpteenth time by loud music coming from the fraternity house, Joe decides to get even. About sunrise one Sunday, after another sleepless night, Joe angrily runs over to his neighbors' driveway and systematically begins to let air out of the tires of the students' cars—"just to teach those damn kids a lesson." He is caught in the act by several well-soused fraternity boys marking the end of a raucous night. Angry words are exchanged; "manhood" and "right-and-wrong" are at stake. A brawl ensues, resulting in bloodshed and injury all around. How much better the outcome would have been if Joe had turned this grievance over to the police, the courts, or campus authorities—all empowered by the law to peacefully resolve such matters.

Protecting Individuals and Property

Even libertarians, who take a narrow view of the role of government, will readily acknowledge that the state must protect citizens from the outlaw who would inflict bodily harm or steal or destroy their worldly goods. Because of the importance of the safety of persons and their property, many laws on the books deal with protection and

security. Not only are laws in the criminal code intended to punish those who steal and do bodily harm, but civil statutes also permit many crime victims to sue for monetary **damages**. The law has created police and sheriffs' departments, district attorneys' offices, courts, jails, and death chambers to deter and punish the criminal and to help people feel secure. This is not to say that there is no crime; everyone knows otherwise. But without a system of laws, crime would be much more prevalent and the fear of it would be much more paralyzing. Unless everyone could afford to hire his or her own bodyguards and security teams, people would be in constant anxiety about the potential loss of life, limb, and property. However imperfect the system of law, prevention, and enforcement may be, it is certainly better than none.

Providing for the General Welfare

Laws and the institutions and programs they establish enable a society to do corporately what would be impossible, or at least prohibitive, for individuals to do. Providing for the common defense, educating young people, putting out forest fires, controlling pollution, and caring for the sick and aged are all examples of activities that could be done only feebly, if at all, by an individual acting alone but that can be done efficiently and effectively as a society. Citizens may disagree about which endeavors should be undertaken through the government by law. Some may believe, for example, that the aged should be cared for by family members or by private charity; others see such care as a corporate responsibility. Although citizens can disagree about the precise activities that the law should require of government, few would deny that many significant and beneficial results are achieved through corporate endeavors. After all, the foundation of the American legal system, the Constitution, was ordained to "establish Justice, ensure domestic tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to us and our Posterity."

Protecting Individual Liberties

Law should protect the individual's personal and civil rights against those forces that would curtail or restrict them. These basic freedoms might include those provided for in the Bill of Rights, such as freedom of speech, of religion, and of the press; the right to a fair trial; and freedom from cruel and unusual punishment. They might also include some that are not stated in the Bill of Rights but are implied, such as the right to personal privacy, or they might be rights that Congress has provided through legislation, such as the right to be free from job discrimination based on gender or ethnic origin. Potential violators of these freedoms might be the government itself (for example, a law denying American citizens accused of terrorist acts the right to a civilian trial) or one's fellow citizens (for example, a conspiracy among private individuals to discourage certain persons from voting). Although disagreement may arise about which freedoms are basic or about how extensively they should be provided for, it is fair to say that unless

the law protects certain basic immutable rights, the nation's citizens are no more than cogs in a machine. It is the meaningful provision for these basic liberties that ensures the dignity and richness of the life of the individual.

THE UNITED STATES AND THE RULE OF LAW

Americans pride themselves on being a law-abiding people, and to the casual observer, they are. Few would question Abraham Lincoln's admonition that respect for the law should be taught to every child at his or her mother's knee, and most are glad to proclaim that the United States has a government of law, not of individuals. The United States has one of the highest incarceration rates in the world—the US prison population was 1,230,100 in 2022.[22] Indeed, the United States locks up around 20 percent of the Earth's prisoners, even though it is home to less than 5 percent of the world's inhabitants. But this is seen by many not as evidence that society is lawless but as proof that in the United States respect for the law is paramount and disobedience of the law is punished.[23] A careful analysis of US history and traditions reveals, however, that this view of the law has in reality been ambivalent. A few examples will illustrate Americans' love–hate relationship with the rule of law.

The Revolutionary War

An appropriate place to begin is the Revolutionary War. Few Americans can look back on that seven-year struggle and feel anything but pride when certain images come to mind: the bold act of defiance of the Boston Tea Party; the shot fired at Concord, Massachusetts, that was "heard 'round the world"; and George Washington's daring attack on the Hessian troops at Trenton, New Jersey. Despite the goose bumps raised in this patriotic reverie, one bothersome fact is lost: the Revolution was illegal. The wanton destruction of private property wrought by the Boston Tea Party and the killing of British troops sent to America for the colonists' protection were illegal in every sense of the word. The founders were so keenly aware of this fact that they prepared a Declaration of Independence to justify to the rest of the world why a bloody and illegal revolt against the lawful government is sometimes permissible:

> When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another-. . ., a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation . . . [W]hen a long train of abuses and usurpations . . . evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

The irony of America's birth is often overlooked. This citadel of law and order was born under the star of illegality and revolution.

John Brown at Harpers Ferry

Another example is John Brown's famous raid on the US arsenal at Harpers Ferry, West Virginia, in the fall of 1859. With thirteen White men and five Black men, this militant opponent of slavery launched his plan to lead a mass insurrection among the slaves and to create an abolitionist republic on the ruins of the South and its plantation economy. After a small but bloody battle that lasted several days, Brown was captured, given a public trial, and duly hanged for murder and other assorted crimes. But were Brown's flagrantly violent and illegal actions justifiable, given the nobility of his vision? Many in the North believed so. Its moral and cultural elite took the line that Brown might have been insane, but his acts and intentions should be excused on the grounds that the compelling motive was divine. Horace Greeley wrote that the Harpers Ferry raid was "the work of a madman," but he had not "one reproachful word." Ralph Waldo Emerson described Brown as a "saint." Henry David Thoreau, Theodore Parker, Henry Wadsworth Longfellow, William Cullen Bryant, and James Lowell—the whole Northern pantheon—took the position that Brown was an "angel of light," and that it was not Brown but the society that hanged him that was mad. It was also reported that "on the day Brown died, church bells tolled from New England to Chicago; Albany fired off one hundred guns in salute, and a governor of a large Northern state wrote in his diary that men were ready to march to Virginia."[24] Again, the ambivalence is evident. One ought always to obey the law—unless one hears a divine call that transcends the law.

The Civil Rights Movement

The civil rights movement beginning in the 1950s conflicted many Americans between their natural desire to obey the law of the land and their call to change the system. As the Reverend Martin Luther King Jr. sat in a Birmingham, Alabama, jail, he wrote a now famous letter to supporters who were disturbed by his having disobeyed the law during his civil rights protests:

> You express a great deal of anxiety over our willingness to break laws. This is certainly a legitimate concern. Since we would diligently urge people to obey the Supreme Court's decision in 1954 outlawing segregation in the public schools, at first glance it may seem rather paradoxical for us consciously to break laws. One may well ask: "How can you advocate breaking some laws and obeying others?" The answer lies in the fact that there are two types of laws: just and unjust. I would be first to advocate obeying just laws. One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. Thus, it is that I can urge men to obey the 1954 decision of the Supreme Court [*Brown v. Board of Education*, 347 U.S. 483 (1954)], for it is morally right; and I can urge them to disobey segregation ordinances, for they are morally wrong.[25]

com/question/index?qid (accessed March 17, 2015).

39. "Tort Costs in America: An Empirical Analysis of Costs and Compensation of the U.S. Tort System," a report by the US Chamber of Commerce Institute for Legal Reform. Accessed November 22, 2022, https://institutefforlegalreform.com/research/tort-costs-in-america-an-empirical-analysis-of-costs-and-compensation-of-the-u-s-tort-system/
40. American Bar Association, Profile of the Legal Profession. Accessed July 12, 2024, https://www.abalegalprofile.com/demographics.html
41. Ibid.
42. Jethro K. Lieberman, *The Litigious Society* (New York, NY: Basic Books, 1983), viii.
43. "Global Litigation Rates: The U.S. Is Not the Leader," *doeLegal Journal*, March 29, 2011, http://doelegal.blogspot.com/2011/03/global-litigation-rates-us-is-not.html (accessed April 9, 2012).
44. Stuart Taylor Jr. and Evan Thomas, "Civil Wars," *Newsweek*, December 15, 2003, 45.
45. Stephen Wermiel, "High Court Agrees to Hear Case on Segregation at State Colleges," *Wall Street Journal,* April 16, 1991.
46. *Chambers v. U.S. Department of the Army*, 499 U.S. 645 (1991); and *Kunstler v. Britt*, 499 U.S. 969 (1991).
47. The combined cases are: *EPIC Systems Corp. v. Lewis*, No. 16-285 (2018); *Ernst & Young v. Morris*, No. 16-300 (2018); and *NLRB v. Murphy Oil*, No. 16-307 (2018).
48. Robert Barnes, "Supreme Court Rules That Companies Can Require Workers to Accept Individual Arbitration," *Washington Post*, May 22, 2018, https://www.lmtonline.com/news/article/Supreme-Court-rules-that-companies-can-require-12931130.php (accessed May 29, 2018).
49. For example, see the website of the American Tort Reform Association and its state-by-state analysis of tort reform.
50. The American Tort Reform Association, http://www.atra.org/about/ (accessed March 7, 2018).
51. Alexis de Tocqueville, *Democracy in America*, ed. J. P. Mayer and Max Lerner, trans. George Lawrence (New York, NY: Harper & Row, 1966), 248.
52. Lieberman, *The Litigious Society*, 13.
53. Teresa Griffin, Eldin Hasic, Adrienne Busby, Patrick Reilly, and Stephanie A Koltookian, "Class Action Filings on the Rise in Europe," American Bar Association Litigation Newsletter, November 7, 2022, https://www.americanbar.org/groups/litigation/resources/newsletters/mass-torts/class-action-filings-rise-europe/
54. Sameer Yasir, "A Lifelong Nightmare': Seeking Justice in India's Overwhelmed Courts," *New York Times*, January 13, 2024, https://www.nytimes.com/2024/01/13/world/asia/india-judicial-backlog.html
55. Edward Wong, "Quake in China Prompts Lawsuit," *Houston Chronicle*, December 23, 2008, A12.
56. Statement of National Public Radio by Anthony Kuhn, December 23, 2008, https://www.npr.org/templates/story/story.php?storyId598657422 (accessed July 15, 2012).

CHAPTER 2

1. See https://www.fjc.gov/sites/default/files/2012/Creat3ed.pdf.
2. Charles Evans Hughes, *The Supreme Court of the United States* (New York, NY: Columbia University Press, 1966), 1.

mp-classified-documents/index.html (accessed August 17, 2024).

65. Ibid.

66. See Steven Levitsky and Daniel Ziblatt, *Tyranny of the Minority: Why American Democracy Reached the Breaking Point* (New York: Crown Publishing Group, 2023), 216-17.

67. For a good discussion of the impeachment process, including information on what the founders had in mind regarding the terms "High Crimes and Misdemeanors," see "Impeaching Federal Judges: Where Are We and Where Are We Going?" *Judicature* 72 (1989): 359–65. (The article is an edited version of a panel discussion.) See also Mary L. Volcansek, *Judicial Impeachment* (Urbana, IL: University of Illinois Press, 1993).

68. See https://www.fjc.gov/node/7496 (accessed August 16, 2021).

69. Jada F. Smith, "Federal Judge to Quit Post; He Faced Abuse Charges," *New York Times*, May 29, 2015, https://www.nytimes.com/2015/05/30/us/politics/alabama-federal-judge-mark-fuller-to-quit-post-he-faced-abuse-charge.html (accessed August 16, 2024).

70. Diana Reese, "From Ray Rice to a Federal Judge, Is the System Too Lenient in Domestic Violence Cases?" *Washington Post*, September 10, 2014.

71. For a good discussion of this subject, see Collins T. Fitzpatrick, "Misconduct and Disability of Federal Judges: The Unreported Informal Responses," *Judicature* 71 (1988): 282–83.

72. Data on judicial conduct complaints were collected from the Administrative Office of the US Courts at https://www.uscourts.gov/statistics-reports/complaints-against-judges-judicial-business-2023 (accessed August 17, 2024).

73. See the "Judicial Conduct and Disability Complaint Number 22-90121" issued on behalf of the Judicial Council of the Ninth Circuit at https://cdn.ca9.uscourts.gov/datastore/ce9/2024/22-90121%20News%20Release%20&%20Order%20and%20Certification.pdf (accessed August 17, 2024).

74. Judge Henderson's full statement is available at https://www.cadc.uscourts.gov/internet/home.nsf/650f3eec0dfb990fca25692100069854/e19f9990bda5cd2d8525831e00477e3f/$FILE/PressRelease20181006.pdf (accessed August 16, 2024).

75. Steve Denning, "Chief Justice Roberts Requests Tenth Circuit to Investigate Kavanaugh Ethics Questions," *Forbes*, October 11, 2018, https://www.forbes.com/sites/stevedenning/2018/10/11/chief-justice-roberts-requests-tenth-circuit-to-investigate-kavanaugh-ethics-questions/?sh512196ecd1877 (accessed August 16, 2024).

76. Ibid.

77. Chief Justice Roberts's full statement is available at https://www.cadc.uscourts.gov/intranet/home.nsf/Content/Announcement+-+Letter+from+Chief+Justice+Roberts+Transferring+Judicial+Misconduct+Complaints+Filed+Against+Former+Circuit+Judge+Brett+Kavanaugh+to+the+Tenth+Circuit/$FILE/Ltr%20to%20Chief%20Judge%20Tymkovich%20Oct%2010%202018.pdf (accessed August 16, 2024).

78. Joshua Kaplan, Justin Elliott, and Alex Mierjeski, "Clarence Thomas and the Billionaire," *ProPublica* (April 6, 2023), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow (accessed August 17, 2024).

79. Whitney K. Novak, "Financial Disclosure and the Supreme Court," *Congressional Research Service*

2024, https://www.cnn.com/2024/04/19/politics/takeaways-final-day-jury-selection-trump-hush-money-trial/index.html (accessed June 19, 2024)

19. Article III, Section 2, Clause 3. The Sixth Amendment as well requires that the impartial jury shall be "of the State . . . wherein the crime shall have been committed."

20. *Skilling v. United States*, 561 U.S. 358 (2010), at 378–79.

21. Kevin Breuninger, "Trump Loses Last-Minute Bid to Halt Hush Money Trial While He Seeks New Venue," *CNBC*, April 8, 2024, https://www.cnbc.com/2024/04/08/trump-hush-money-judge-recusal-bid-aims-to-delay-evade-gag-order-da-.html (accessed June 20, 2024).

22. Michael R. Sisak, Jennifer Peltz, Eric Tucker, and Jake Offenhartz, "Trump Tried to 'Corrupt' the 2016 Election, Prosecutor Alleges as Hush Money Trial Gets Underway," *APNews*, April 22, 2024, https://www.pbs.org/newshour/politics/trump-tried-to-corrupt-the-2016-election-hush-money-prosecutor-alleges-in-opening-statement (accessed June 20, 2024).

23. Aaron Katersky and Peter Charalambous, "Timeline: Manhattan DA's Stormy Daniels Hush Money Case Against Donald Trump," *ABCNews*, June 13, 2024, https://abcnews.go.com/Politics/timeline-manhattan-district-attorney-case-donald-trump/story?id=98389444 (accessed June 20, 2024).

24. Jeremy Herb, Lauren del Valle, and Kara Scannell, "Takeaways from Donald Trump's Defense in the Hush Money Trial," *CNN*, May 21, 2024, https://www.cnn.com/2024/05/21/politics/takeaways-from-donald-trumps-defense-in-the-hush-money-trial/index.html (accessed June 20, 2024).

25. Jesse McKinley and Kate Christobek, "Trump's Case Heads to the Jury: 5 Takeaways from Closing Arguments," *New York Times*, May 28, 2024, https://www.nytimes.com/2024/05/28/nyregion/trump-trial-closing-argument-takeways.html (accessed June 20, 2024).

26. Robin Levinson-King and Kayla Epstein, "Who Is Judge Merchan, the No-Nonsense Judge Who Oversaw Trump's Hush-Money Case?" *BBC*, May 31, 2024, https://www.bbc.com/news/world-us-canada-65182727 (accessed July 12, 2024).

27. Bill Boyarsky, "Ito's Attempt to Control Brings Chaos to Trial," *Los Angeles Times*, April 22, 1995, https://www.latimes.com/archives/la-xpm-1995-04-22-mn-57465-story.html (accessed July 17, 2024).

28. Lynne Forster Lee and Irwin A. Horowitz, "The Effects of Jury-Aid Innovations on Juror Performance in Complex Civil Trials," *Judicature* 86, no. 4 (2003): 184–90.

29. Jury instructions in the Trump case can be found at https://static01.nyt.com/newsgraphics/documenttools/d458fdbff3cd7a41/84784522-full.pdf (accessed June 20, 2024).

30. Ibid.

31. Elizabeth Murray, "Donald Fell Death-Penalty Retrial Set for 2016," *Burlington Free Press*, April 10, 2015, https://www.burlingtonfreepress.com/story/news/2015/04/10/fell-death-penalty-trial-due-in-us-court/25564925/ (accessed July 17, 2024).

32. Elizabeth Murray, "Donald Fell Case to Be Retried After 15 Years," *Burlington Free Press*, March 8, 2015, http://www.burlingtonfreepress.com/story/news/local/2015/03/08/death-penalty-case-retried-years/24629173/ (accessed July 17, 2024).

33. Alan J. Keays, "Judge Accepts Plea Deal; Fell Sentenced to Life," *VTDigger*, September 28, 2018, https://vtdigger.org/2018/09/28/breaking-judge

INDEX

F

G

H

I

J

O

P

R

S

V

W