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Judicial Process and Judicial Policymaking

SEVENTH EDITION

G. Alan Tarr

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SEVENTH EDITION

G. ALAN TARR

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For Bob and Andy

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Preface

The seventh edition of *Judicial Process and Judicial Policymaking*, like the six preceding editions, is designed as a basic text for courses on the judicial process, the American legal system, or law and politics. Its approach rests on four major premises.

First, courts in the United States have always played an important role in governing, and that role has increased over time. Various factors have been suggested to explain this judicial involvement in governing, including the common-law system imported from England and modified in response to American conditions and beliefs, the institution of judicial review, and the legalistic and litigious orientation of the American populace. Whatever its causes, the phenomenon of judicial participation in governing makes understanding the processes and consequences of judicial policymaking crucial for understanding U.S. government.

Second, judicial policymaking is distinctive. Judges develop public policy in the course of resolving disputes. They bring to the task of policymaking a particular training and orientation. The institutional constraints they operate under differ considerably from those of legislators or administrators. Together, these factors affect the way that judges view problems and the policies they develop; they also highlight why understanding the judicial process and the participants in it is crucial for understanding judicial policymaking. Therefore, Chapters 2 through 8 are devoted to examining the processes by which courts operate and the participants in those processes.

Third, courts make policy in a variety of ways. Sometimes, a court announces a landmark decision with national implications. More frequently, however, judicial policymaking occurs through less heralded

rulings or a series of rulings. At times, this policymaking brings courts into conflict with other branches of government, as when a court strikes down a statute as unconstitutional. But often judicial policymaking complements policymaking by another branch, as when courts choose between competing understandings of the law through statutory interpretation. At other times, judicial policymaking may be altogether independent of the actions of other branches, as when judges elaborate the common law. To provide a sense of this diversity, Chapter 9 surveys the various forms of judicial policymaking, and Chapters 10 and 11 provide detailed case studies of the development and consequences of important judicial policies.

Finally, courts may be the objects of public policy, as well as its creators. Reformers have attacked various features of the administration of justice in the United States, including the insanity defense, the adversarial system, plea bargaining, and the jury system. Sometimes they have succeeded in enacting their reforms into law. Even when they have not, their criticisms require us to consider how effectively the judicial process in the United States promotes justice and what effects the proposed reforms would have on the administration of justice. Throughout the book, therefore, we discuss and assess these various reform proposals. We also survey legal practices and institutions in other nations, so readers can consider how other countries have dealt with common legal problems.

The seventh edition is thoroughly updated to reflect recent developments and scholarship. Among these developments are:

- President Trump's executive orders dealing with immigration and refugees from Muslim countries and how lower federal courts and the U.S. Supreme Court addressed those orders (Chapter 2)
- The conflicts over the blocked nomination of Merrick Garland to the U.S. Supreme Court and over the appointment of Neil Gorsuch to the Court (Chapter 3)
- The effects of the internet and advances in technology on the practice of law (Chapter 4)
- Problems with the provision of attorneys to indigent defendants in criminal cases (Chapter 6)
- Problems with providing access to justice for indigent plaintiffs (Chapter 7)
- The debate over originalism as an approach to the interpretation of the Constitution (Chapter 8)
- The U.S. Supreme Court's ruling in *Hellerstedt v. Whole Women's Health* dealing with state restrictions on abortion (Chapter 10)
- The U.S. Supreme Court's ruling in *Obergefell v. Hodges* and its effects (Chapter 11)

Many people contributed to the completion of this project. At Rutgers University (Camden), Lisa Alston and Sylvia Somers provided needed secretarial assistance with their usual cheerfulness and efficiency. Mary Cornelia Porter read portions of the manuscript and offered excellent suggestions on how to improve it. For the seventh edition I wish to thank Jennifer Knerr, Jessica Moran and Anna Dolan at Routledge, as well as several anonymous reviewers. For earlier editions, several reviewers provided useful comments and rescued me from errors of fact or interpretation: Lauren Bowen, John Carroll University; John C. Domino, Sam Houston State University; Margaret E. Ellis, James Madison University; Larry Elowitz, Georgia College; Sheldon Goldman, University of Massachusetts; Jona Goldschmidt, Northern Arizona University; A. J. Goubler, Delgado Community College; Roger Handberg, University of Central Florida; Mark Iris, Northwestern University; Christopher L. Markwood, University of Central Oklahoma; Phillip M. Simpson, Cameron University; Ken R. Stockholm, University of Alaska; Richard N. Weldon, Coastal Carolina University; Gary Young, George Washington University; Paul M. Collins, Jr., University of North Texas; Sarah H. Ludwig, Mary Baldwin College; Philip Dynia, Loyola University (New Orleans); and Steven Tauber, University of South Florida. For the current edition: Kathryn DePalo, Florida International University and Stuart Shiffman, Feldman-Wasser and formerly of Illinois State University. Any errors that remain are, of course, solely my responsibility. Finally, I would like to thank my wife, Susan, for her loving support, and my sons, Bob and Andy, to whom this book is dedicated.

1

Courts and Law

Today the United States has more than a million lawyers, and in 2017, the country's law schools graduated an additional 36,000. The same year, the nation's state and federal courts resolved more than 100 million cases, almost one for every three Americans. Striking as these figures are, they do not capture the full impact of law and the courts in the United States. Scan a newspaper, and you are immediately struck by how often Americans call upon judges to resolve important policy disputes. Judicial rulings affect everything from health care to conditions in jails and prisons, from the definition of marriage to the selection of the president.[1] Most judicial decisions, of course, affect only the parties to the dispute. But as the U.S. Supreme Court's rulings on school desegregation and abortion illustrate, other decisions may focus public attention on issues and encourage broad social changes.[2] Thus, courts do not merely resolve large numbers of disputes; they also actively participate in governing.

So it is hardly surprising that Americans have long had a fascination with law, lawyers, and legal institutions. We closely follow publicized trials—more than 150 million Americans tuned in for the verdict in the O. J. Simpson murder case—and monitor other legal developments daily. We indulge our interest in the law through novels and movies such as *To Kill a Mockingbird* and *The Firm*, as well as television programs as different as *CSI* and *Judge Judy*. We incorporate legal terms such as "taking the Fifth" and "the right to privacy" into everyday conversations. We even tend to think about political issues from a legal perspective—witness the legal challenges to President Barack Obama's health-care law and to President Donald Trump's ban on people entering the United States from some Muslim-majority countries. Ours is truly a law-permeated society.

Often, however, our fascination with the legal order is combined with a concern about the law and American legal institutions. Thus, a 2017

Gallup Poll found that only 27 percent of Americans had "a great deal" or "quite a lot" of confidence in the criminal justice system, while 34 percent had "very little or none". Many Americans see courts as too lenient in their sentencing of criminals, although the percentage holding this view has declined over time, but they also (inconsistently?) believe that too many people are in prison, and they tend to favor alternatives to incarceration for those convicted of property crimes or non-violent offenses. A majority of Americans say that courts are not even-handed in dispensing justice. According to a 2014 ABC/*Washington Post* poll, 54 percent of Americans believed that blacks and other minorities do not receive equal treatment in the criminal justice system. Underlying these figures are stark racial differences in perceptions of American criminal justice. For example, following the "not guilty" verdict in the 2013 trial of George Zimmerman, a white neighborhood-watch volunteer who shot and killed Trayvon Martin, an unarmed black teenager, 51 percent of whites approved of the verdict, whereas only 9 percent of blacks and 24 percent of Hispanics did so. Popular confidence in the legal profession is also low—since 1984, the percentage of respondents voicing "a great deal of trust" in law firms has never exceeded 17 percent. Simply put, there is a perception that American legal institutions are not working well.[3]

Whether this perception is correct is, of course, a matter of dispute. This book is designed to provide readers with the information and range of perspectives they need to arrive at their own assessment. To do so, it first describes the nation's legal structures and the participants—judges, lawyers, and litigants—in the judicial process. Next, it examines the processes by which courts, from trial courts to the U.S. Supreme Court, resolve the cases that come before them and how judges reach their decisions. Finally, it surveys how courts participate in policymaking and analyzes the consequences of this judicial involvement in governing.

This book also analyzes various reform proposals, such as eliminating plea bargaining and permitting the use of illegally seized evidence at trial, so that readers may consider the likely consequences of the adoption of such reforms. In addition, it compares the legal arrangements in the United States with those in other countries. These comparisons highlight what is distinctive about the American legal system and show how other countries have dealt with legal problems similar to those in the United States.

LEGAL SYSTEMS

Legal scholars group the legal systems of the world into "legal families," based on their origins and on similarities in their laws and legal institutions (see Table 1.1).[4] The most influential families of secular legal systems, the common-law and civil-law (Romano-Germanic) families,

originated in Europe. These legal systems have spread their influence throughout the world through colonialism and through the process of modernization in non-European countries. Nevertheless, many countries in Africa and Asia have also retained elements of their indigenous legal systems, and several Muslim countries have introduced religiously based Shari'a law as the foundation for their law and legal systems.

TABLE 1.1 Families of Legal Systems

Legal Family	Origins	Geographic Area	Distinguishing Feature
Common Law	England, beginning in the twelfth century	England, former English colonies, and other countries with strong political ties to England such as Australia and New Zealand. North America: the United States and Canada (with the exception of Quebec). Africa: Nigeria, Kenya, and Uganda, among others. Asia: India	Judges decide cases through inductive reasoning, relying heavily on precedent.
Civil Law (Romano-Germanic)	European universities, during the twelfth and thirteenth centuries, which adapted the Code of Justinian to new circumstances	Most countries in continental Europe and in Latin America, as well as former French colonies in North America (Quebec and Louisiana) and the former Belgian and French colonies in Africa (e.g., Rwanda and Burundi). Some other legal systems (e.g., Algeria, Morocco, and Indonesia) contain elements of civil law and other legal traditions.	Judges decide cases through the application of legal principles, which are typically drawn from a legal code.
Socialist Law	The Soviet Union, in the aftermath of the Russian Revolution of 1917	Formerly, all communist countries in Europe, such as the Soviet Union, Albania, and Bulgaria; today, with the collapse of European communism, a few countries that continue as communist, such as Cuba and Vietnam.	Its primary objective is to move society toward communism in accordance with Marxist-Leninist theory.

(*continued*)

TABLE 1.1 Families of Legal Systems (Continued)

Legal Family	Origins	Geographic Area	Distinguishing Feature
Islamic Law	The founding of Islam in the sixth century	Most Muslim nations in North Africa, the Middle East, and Asia base their law, at least in part, on Islamic law.	Islamic law is religious law, understood by believers as divinely revealed and inseparable from the religion.
Hindu Law	Sacred texts known as the dharmasastras, written between 800 B.C. and A.D. 200	While Hindu law imposes obligations on all Hindus, it primarily affects the national law of India.	Hindu law is religious law, regulating virtually all aspects of life for believers.
Far Eastern Law	Traditional Chinese notion of social order, exemplified by writings of Confucius (551–479 B.C.)	Historically, China, Japan, Korea, and Indochina; today, despite communism in China and Vietnam and changes in Japanese law associated with its economic development, it still influences the law in all those countries.	Far Eastern legal systems encourage the resolution of disputes by compromise, settlement, or other mechanisms rather than by the rule of law.
African Law	Custom within various African tribes	Although some African states (e.g., Senegal and Tanzania) have sought since independence to collect and codify tribal customs, the influence of those customs on the law of modern African states has been minimal.	Traditional African law stresses custom and tradition as authoritative.

The legal system of the United States belongs to the family of common-law legal systems. So, too, do the legal systems of other former British colonies, such as Australia, India, and Nigeria. Most legal systems on the European continent belong to the civil-law family, as do the legal systems of most Latin American countries and of former French and Belgian colonies in Africa and Asia. In some countries—for instance, in Japan—the legal system defies easy categorization into a legal family, because it has derived elements from French, German, English, and American law.

The Common-Law Legal Family

Although each country within the common-law legal family has its own legal institutions and bodies of law, common-law systems resemble each other in the general organization of their courts, in the rules of evidence and procedure they employ, and in the legal doctrines they have developed. Because these features of common-law systems derive from English law and legal practice, understanding of the origins of the common law in England is crucial to understanding other common-law systems.

The Development of the Common Law The Norman conquest of England in 1066 under William the Conqueror laid the groundwork for the development of the common law. To extend royal authority over their dominion, King William's successors created permanent courts, staffed by judges appointed by the king, to administer the law of the realm. From the twelfth century onward, the English monarchs also dispatched "traveling justices" to rule in the king's name in the county courts. By the thirteenth century, the kings had succeeded in establishing a common set of legal procedures and legal standards throughout England.

But what legal procedures were the royal judges to follow in deciding cases, and what legal principles were they to employ? The judges could not rely upon parliamentary enactments for guidance—Parliament's emergence as a legislative body was still several centuries in the future. Nor could the judges rely much on royal edicts, for these did not extend to many of the legal problems confronting the judges. Rather, as William Blackstone observed in his famous treatise on the common law, the judges looked to a body of "unwritten law," the common law, for guidance.[5] In speaking of the common law as "unwritten," Blackstone was emphasizing that the doctrines of the common law, unlike legislative enactments, "are not set down in any written statute or ordinance, but depend merely upon immemorial usage." Common law was thus custom sanctioned by popular acceptance. Judges served as the "depositories of the law," and their decisions served as "the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law."[6] Thus, the common law originated in judicial decisions, which enunciated authoritative legal principles, presumably drawn from the customs and practices of the society, in the course of resolving disputes between litigants.

These judicial decisions created a body of law that judges could draw upon to resolve the cases coming before them. Referring to precedent—that is, to the judges' own earlier decisions or to those of their predecessors or colleagues—facilitated judicial decision making by giving judges standards that they could apply. Initially, "there was merely a tendency to establish a procedure, and perhaps adopt a few substantive principles

which, taken together, constituted the custom of the court" and provided a standard for judicial decisions.[7] Over time, however, as the practice of publishing written reports of judicial decisions developed, judges could consult the rulings of other courts. Over time, too, the authority of these precedents increased. This was reflected in the judges' acceptance of the doctrine of *stare decisis et non quieta movere*, to stand by precedents and not to disturb settled points. Under the doctrine of *stare decisis*, common-law judges were obliged to conform their decisions to those that earlier judges reached in similar cases.

Despite the proliferation of legislation and administrative regulations over the last two centuries, judge-made law continues to play a role in common-law countries. In addition, the common law provides "a mode of treating legal problems rather than a fixed body of definite rules."[8] Thus, in dealing with statutes and other enactments, judges in common-law systems employ the same approaches to decision making, such as reliance on precedent, that they had developed for dealing with the common law. Recent legal developments therefore have not altered the basic character of common-law legal systems.

The Common Law in the United States During the seventeenth century, most colonists immigrated to North America from England, and they brought the English legal system with them. When the United States declared its independence from England, the new states retained their common-law legal systems. Thus, like their English counterparts, American judges have enunciated legal standards in the absence of legislation to resolve disputes between litigants. This in turn has guaranteed American judges a major role in lawmaking.

Nevertheless, U.S. courts modified the body of common law that they received from England. In the decades following independence, American judges expunged aspects of the common law that reflected the aristocratic character of English society and were therefore inappropriate for the more democratic society being created in the United States.[9] During the nineteenth century, American judges also adapted common-law doctrines that originated in an agrarian society to encourage economic development and accommodate industrialization.[10] Finally American judges have never viewed precedent as binding to the same extent their English counterparts have. They have been more willing to overrule earlier decisions and alter the common law in response to changing circumstances.

The Civil-Law Legal Family

A second major family of legal systems is the civil-law, or Romano-Germanic, family. Civil-law legal systems are found on the European

continent, throughout South America, and in various countries in Africa and Asia. The origins of the civil law, however, can be traced to the rediscovery of Roman law during the Middle Ages in Europe.

The Rediscovery of Roman Law The creation of civil-law systems began with the intellectual revival during the twelfth and thirteenth centuries in Western Europe.[11] The founding of universities and the spread of learning during this period led to the rediscovery of the highly developed body of law that had governed ancient Rome. Collected in the Emperor Justinian's *Corpus Juris Civilis*, a systematic compilation or code of law dealing with relations between private persons, Roman law became the subject of law studies in major European universities. The study of Roman law promoted the notion that society should be governed by formal law, and it provided the vocabulary, categories, and concepts needed for the construction of a modern body of law.

This is not to say that European monarchs seized upon Roman law in order to impose it on their subjects. Because of the political fragmentation in Europe, rulers were rarely in a position to impose much law on anyone. In addition, societal changes had rendered parts of the Roman law obsolete—for example, those sections dealing with slavery. Other elements of the Roman law—for example, family law—were already dealt with by the Canon law established by the Catholic Church. As a result, the law that came to prevail in Europe also reflected local, non-Roman sources. Nevertheless, jurists and practitioners alike drew their conceptions of law, as well as their legal terminology and their approach to legal reasoning, from the tradition of Roman law.

The Napoleonic Code The influence of Roman law on civil-law systems, especially on its approach to law and legal terminology, continued from the Middle Ages to the nineteenth century. For modern civil-law systems, the decisive event was the formulation of the Napoleonic Code in 1804. This French civil code, developed by legal experts in France with Napoleon's active participation, immediately became the law in France. French conquests in Europe under Napoleon spread the code throughout the continent. Various European countries quickly developed their own codes modeled on Napoleon's, either under pressure from France or out of respect for the country's military prowess. Even after the defeat of Napoleon, his code continued to influence law throughout much of Europe, and it became the basis for legal codes in Central America and South America.

Developed in the aftermath of the French Revolution, the Napoleonic Code destroyed the remaining vestiges of feudalism and replaced them with a body of modern law. The code recognized the legal equality of all citizens, freed economic enterprise from traditional constraints,

and secularized family law. Equally important, it demonstrated the advantages of systematizing the national law and provided a model for other countries.

Civil Law versus Common Law

Civil-law systems differ from their common-law counterparts in more than their historical roots.[12] Some differences involve the structure and operation of legal institutions, such as the role of judge and attorney at trial and the forms of legal procedure (discussed in Chapters 3 and 4). Others involve the characteristic source of law. In common-law systems, it is the judge, enunciating law in the course of resolving disputes. In civil-law systems, it is the legislative authority, announcing governing legal principles or, in the case of the Napoleonic Code, a more or less comprehensive body of law. Perhaps the most important difference, however, relates to what might be called the legal "frame of mind." Legal thinking in common-law systems emphasizes the concrete rather than the general and places its faith in experience rather than in abstractions. In contrast, legal thinking in civil-law systems reasons from principles to particular instances and has an inclination toward systematizing. As one commentator has put it, a civil-law system "differs from a common-law system much as rationalism differs from empiricism or deduction from induction."[13]

Yet it is easy to exaggerate the differences between these legal systems. International legal tribunals, such as the European Court of Human Rights, have no difficulty recruiting their judges from both common-law and civil-law systems and drawing upon the legal principles and practices of both. Globalization has also encouraged legal relationships spanning civil-law and common-law systems. Over time, the differences between the two systems will continue to diminish.

LAW

A speed limit is law; so, too, are wills, regulations established by the Internal Revenue Service, congressional statutes, trial court rulings, and business contracts. The length of the list—and it is hardly comprehensive—illustrates the diversity of law. To make sense of this diversity, practitioners and scholars have devised various ways of categorizing law.

Private Law and Public Law

Legal scholars often distinguish between private law and public law. This distinction is particularly important in civil-law systems, such as those in France and Argentina. Many civil-law countries have established separate sets of courts that hear only cases involving public law.

Private law is concerned with relations among private citizens, private organizations, or both. Often these private parties enter into legal agreements (contracts) to order their affairs and to prevent disputes from arising. These efforts, however, are not always effective. Disputes between tenants and landlords, between neighbors over a noisy pet, and between family members over an inheritance are all examples of private law disputes. So too are suits by consumers injured by unsafe products, by patients accusing physicians of medical malpractice, and by retailers claiming that their suppliers failed to deliver merchandise as promised. These disputes may arise out of legal obligations voluntarily assumed by the parties, as in contracts. Or the applicable law may be found in statutes or in judicial decisions. Whatever its source, in the realm of private law "the sole function of the government [is] the recognition and enforcement of private rights."[14] Table 1.2 identifies several important fields of private law. Public law, in contrast, involves relations between the government and private citizens or organizations. Thus, public law includes statutes outlawing murder or fraud, setting auto emissions standards, and taxing capital gains. It also encompasses Supreme Court rulings protecting constitutional rights, such as the freedom of speech, and administrative regulations governing airline safety.

TABLE 1.2 Some Categories of Private Law

Type of Law	What Does It Address?	Who Makes It?
Contract law	The enforcement of those promises for the breach of which the law provides a remedy	State law (primarily state courts through the decision of cases at common law
Tort law	Legal wrongs committed upon a person or property, other than the breach of contract, and the award of damages for such torts	State law, primarily state common law, but more recently legislation as well
Family law	Relationships between husband and wife and between parent and child, with the rights and duties arising from those relationships	Chiefly state legislation; also federal legislation (social welfare and taxation) and judicial rulings (e.g., abortion)
Commercial law	Aspects of business, such as the sale of goods, bank deposits, investment services, and so on	State law (especially the Uniform Commercial Code, legislation adopted by almost all legislatures)
Business law	The formation and conduct of business enterprises (corporations, partnerships, etc.)	State law primarily (e.g., incorporations), but also congressional enactments

Two major branches of public law are constitutional law and administrative law. Constitutional law is the fundamental law within a political unit, embodied in the Constitution itself and in the decisions of courts and other bodies interpreting that document. The Constitution establishes the government and prescribes how public business shall be conducted. More specifically, it creates the major offices within a government, determines how they shall be filled, distributes governmental power among those offices, defines the procedures by which government shall operate, and establishes limitations on the scope of governmental power. The United States has 51 constitutions: the federal Constitution establishes the national government and governs its operations, and state constitutions do the same for the governments of the 50 states.

Courts in the United States, both federal and state, participate in the development of constitutional law through the exercise of judicial review. Because the U.S. Constitution is the "supreme law of the land," actions of the national or state governments that conflict with the Constitution are invalid, and persons affected by those actions can challenge them in court. Similarly, litigants may challenge state or local actions that they believe violate a state constitution. When a litigant claims that the government has acted unconstitutionally, the judge must decide whether the government has exceeded its powers or violated rights guaranteed by the Constitution. In exercising this judicial review of governmental enactments, the U.S. Supreme Court has struck down more than 160 federal statutes and more than 1,100 state statutes and municipal ordinances as unconstitutional.[15]

Administrative law is concerned with the powers and procedures of governmental bodies that exercise power delegated to them by the legislature. Within the U.S. government, these bodies include government departments such as the Department of State, administrative agencies such as the Environmental Protection Agency, and independent regulatory commissions such as the Securities and Exchange Commission. These institutions establish rules and regulations that have the force of law. They also conduct hearings and adjudicate disputes that arise from such actions as the termination of welfare benefits. In addition, these institutions decide on the award or withdrawal of government grants to individuals and to communities. Finally, they control the distribution of other government benefits; for example, the broadcast licenses awarded by the Federal Communications Commission to radio and television stations. Administrative law largely deals with the processes by which public officials discharge their responsibilities and with the oversight of administrative action by the courts.

Criminal Law and Civil Law

Law can be categorized based on the relationships it regulates. The criminal law establishes which actions are offenses against society and prescribes the punishment to be imposed for such conduct. The criminal law thus is a branch of public law. The parties in a criminal case are always the government, which prosecutes the case, and the defendant charged with the criminal violation. Although they may have an interest in the outcome of a prosecution, victims of crime are not parties to the litigation. The criminal offense is understood as a violation of the public order, not as an offense against a particular person. Familiar crimes include murder, arson, fraud, and burglary.

All other law is classified as civil law. This is different from the distinction between common-law and civil-law systems discussed earlier. Civil law, in contrast to criminal law, is concerned with private rights and obligations and legal remedies when those rights are violated or those obligations are unmet. It usually involves legal relationships between private persons, organizations, or both.

Rights and obligations at civil law may arise from voluntary agreements, such as a contract between a borrower and a lender. They may also result from legislation or administrative action. A law establishing tax rates, a statute permitting victims of discrimination to sue for damages, a governmental regulation setting auto emission levels—all involve civil law. Finally, rights and obligations at civil law may be established by judicial decisions interpreting the common law. For example, if you are involved in an automobile accident because your car malfunctions, you may sue the manufacturer for damages. The obligation of manufacturers to produce safe and serviceable products—and their legal liability when they fail to do so—is established by the common law.

Substantive Law and Procedural Law

The distinction between substance and procedure, or substantive law and procedural law, cuts across the previous classifications into public law and private law, criminal law and civil law. *Substantive law* creates, defines, and delimits rights, duties, and obligations. *Procedural law*, in contrast, prescribes the processes by which those substantive rights and obligations are enforced by courts or by other public agencies.

For example, suppose you are seriously injured by a reckless driver. The substantive law determines your right to redress—whether you can obtain damages for your hospital costs, for the pain and suffering you endured, and for the loss of income caused by your hospitalization. The procedural law determines in what court you should file your

complaint, what evidence can be admitted, whether you are entitled to a jury trial, and whether you have a right to appeal should the trial court rule against you.

Law and Equity

The distinction between law and equity dates from the fourteenth century in England. Parties unable to obtain satisfaction in the royal courts, often because of burdensome and inflexible procedural requirements, applied to the king for redress. As petitions for relief outside normal legal channels multiplied, the responsibility for deciding on them devolved from the monarch to the chancellor, the highest administrative official of the realm. Petitions were addressed to the chancellor directly, who would render decisions based on "the equity of the case"—that is, based on his own sense of the justice of the claim.

By the eighteenth century, the process of considering petitions for equitable relief had become institutionalized in a Court of Chancery, separate from the regular law courts and presided over by the chancellor. This court differed from the regular law courts in the flexibility of its procedures, the absence of a jury, and the broad relief it could provide. Over time, however, as volumes of Chancery decisions were published and a system of precedent was established, "the rules of law applied by the Court of Chancery [became] as much fixed by decisions and as much formed into technical legal rules as the rules of the Common Law."[16] As the Court of Chancery became more and more judicial in its decision-making, equity emerged as an alternative to—and a rival of—the law propounded by the regular law courts. This dual system of courts operated in England until the late nineteenth century. Thus, when the American colonists developed their legal systems, they adopted the dual system of courts familiar to them. Most American states merged their law courts and equity courts during the century after independence, but Mississippi and Tennessee still maintain separate courts for law and equity.

The merger of legal institutions did not eliminate equity from the U.S. legal system; it merely placed law and equity powers in the same set of hands. Thus, in interpreting a statute or awarding monetary damages in a civil case, a judge is exercising law powers. However, when a judge provides a remedy other than monetary damages—such as issuing an injunction (a legal order to a defendant to stop or start doing something)—the judge is exercising equity powers. Judicial orders that limit picketing by strikers outside a business or compel local school districts to bus children to desegregate their schools are current examples of how judges use their equity powers. These examples show that equity powers today are used primarily in devising remedies for violations of the law.

COMMON MISCONCEPTIONS ABOUT LAW AND COURTS

Misconceptions about law and the courts, as much as lack of information, prevent a full understanding of the role of courts in the United States. Often these misconceptions are half-truths, capturing part—but only part—of the reality of law and courts. Two common misconceptions are that law is a body of established rules that govern behavior and that judicial decisions on important policy issues resolve those issues.

Law and Uncertainty

In thinking of "the law," one tends to think in terms of a body of established, authoritative rules. There is some truth to this notion. Obviously, most people most of the time understand what the law requires and conform their conduct to its requirements. According to Oliver Wendell Holmes, a famous justice on the U.S. Supreme Court, this applies to bad people as well as good ones. Even bad people crave certainty about the law, so that they know how far they can go without running afoul of governmental authorities.[17]

Yet as Holmes himself recognized, not all law is clear and certain. Consider, for example, the case of *Lee v. Weisman*.[18] Robert Lee, the principal of a public middle school in Providence, Rhode Island, invited Rabbi Leslie Gutterman to give the invocation and benediction at the school's graduation. In extending the invitation, Lee was following the school district's longstanding practice of having local clergy offer prayers at the graduation ceremony. However, Daniel Weisman, a parent of one of the graduating students, objected to the invitation. He claimed that the practice of prayers at graduation violated the establishment clause of the First Amendment, which requires a degree of separation between church and state.[19] Four days before graduation, Weisman filed suit in federal district court to prevent the prayers at graduation. Although Weisman's suit came too late to block the prayers at his daughter's graduation, the court agreed with his contention that religious ceremonies at public-school graduations violated the establishment clause. It issued a permanent injunction prohibiting the Providence school district from including religious ceremonies as part of future graduations. The school district appealed the decision, but both the federal court of appeals and the U.S. Supreme Court upheld the trial court's ruling.

What is striking about *Lee v. Weisman* is the nature of the dispute. Lee and Weisman agreed completely as to the facts of the case. Both acknowledged that the school had invited Rabbi Gutterman to give the invocation and benediction, that inviting clergy to offer prayers at graduation was an established practice in the district, and that students were

not obliged to attend the graduation. What they disagreed about was whether the practice of having clergy lead prayers at graduation was legally permissible. More precisely, they disagreed about the meaning of the law—in this case, the establishment clause of the First Amendment—and about its application to religious ceremonies at public-school graduations. If the meaning of the establishment clause was clear and unchanging, there would have been no dispute and no litigation.

Lee v. Weisman's exclusive focus on legal rather than factual questions is hardly exceptional. Often, in cases ranging from the most highly charged constitutional conflicts to the most mundane private disputes, the issue is solely the meaning of the law and how it applies. Other cases may raise issues of fact and law simultaneously. Yet the view that litigation is aimed at defining what the law means is inconsistent with the notion that law is a set of rules whose meaning is stable and certain. Indeed, much litigation arises precisely because the meaning of the law is neither stable nor certain.

Law may be uncertain for several reasons. The language of the law may be vague or general, either by design or because of poor draftsmanship. The aims of those who enacted the law may be unclear. The situation in the case may not have been contemplated by those who enacted the law, and so on. But whatever the reason, judges must "say what the law is" to decide cases.[20] And if a case arises because the law is unclear, then judges must choose between the competing understandings of the law and of how it applies that are offered by the attorneys arguing the case. In making this choice, judges are not simply substituting certainty for uncertainty, clarity for obscurity. They are, in a very real sense, creating the law.

Of course, judges are not free to give whatever interpretation they wish to the law, to decide cases however they choose. Judges operate within legal and political constraints. For example, all judges take an oath to decide cases in accordance with the law and have been trained as to how to ascertain its meaning. Even before their elevation to the bench, they are socialized through years of legal training and experience as to the proper behavior for a judge. They also are influenced by the expectations of colleagues and lawyers. These factors affect the range of discretion judges exercise and the constraints they feel. Ultimately, however, judicial choice is channeled rather than eliminated. Because the law may be uncertain or unclear, a judicial commitment to decide cases according to the law does not eliminate judicial choice.

Courts, Law, and Public Policy

Courts in the United States often resolve disputes involving contentious public issues. Indeed, one of the most perceptive observers of American politics, Alexis de Tocqueville, suggested that "there is hardly a political

question in the United States which does not sooner or later turn into a judicial one."[21] This transformation of political issues into legal disputes gives judges the opportunity to influence public policy. And judges have sometimes been more than willing to seize the opportunities presented to them.

Because courts regularly decide cases that involve important policy issues, it might seem that they are in a position to dominate policymaking in the United States. But in actuality the relationship between judicial decisions and public policy is quite complex. *Regents of the University of California v. Bakke*, the U.S. Supreme Court's first ruling on affirmative action, reveals some of these complexities.[22]

Ten years after graduating from the University of Minnesota with a degree in engineering, Allan Bakke decided to become a physician. He applied to the medical school of the University of California at Davis in 1973 and again in 1974, but on both occasions he was rejected. At that time the university had a special admissions program, under which 16 seats in the entering class were reserved for minority students. This quota system was not established to remedy past discrimination by the medical school—there was no evidence that the school had discriminated—but to redress societal discrimination against minority group members. Bakke, who was white, did not qualify for admission under the program. However, his undergraduate grades and his score on the Medical College Admission Test were higher than those of some students accepted under the special admissions program. Bakke claimed that he was the victim of "reverse discrimination" and sued the university in state court, insisting that his constitutional rights had been violated.

When the U.S. Supreme Court heard Bakke's case on appeal, the justices split sharply. Four justices voted to strike down the university's affirmative action program, insisting that racial preferences in admissions were illegal. But four other justices voted to uphold the university's program and deny Bakke's appeal. Justice Lewis Powell cast the decisive vote. Powell agreed that the university had violated Bakke's rights by establishing a racial quota and denying him admission on that basis. But Powell also concluded that the Constitution did not bar affirmative action admissions programs, as long as there were no fixed quotas, even if race figured into admissions decisions.

When the Supreme Court announced its decision in *Bakke*, the case was viewed as a landmark ruling; and in a sense, it was, for the ruling did more than compel the University of California to admit Allan Bakke to its medical school and to abandon its quota system for admitting minority group members. *Bakke* also established national policy on affirmative action in college admissions. Other universities that had instituted similar quota programs were also obliged to eliminate them to comply with the Court's ruling.

Yet *Bakke* did not resolve the issue of affirmative action. Opponents of affirmative action hailed the invalidation of the University of California's quota system and called upon other universities to abandon their race-conscious admissions programs. But proponents of affirmative action noted that the Court permitted the use of race as a factor in admissions decisions, and they urged universities to adopt more aggressive affirmative action programs consistent with the Court's ruling. Thus, instead of being converted by the Court's ruling, both opponents and proponents of affirmative action used it to buttress their own positions.

Affirmative action programs have not disappeared in the decades since *Bakke*. Rather, they have expanded—indeed, the University of California at Davis itself introduced a new affirmative action admissions program. Nor did the decision end conflict over affirmative action. In 1996, California voters approved an initiative (Proposition 209) to terminate affirmative action programs for hiring and admissions at the state's colleges and universities, prompting California's government to revise admission standards for the state's universities to ensure diversity within the student population.[23] And in 2003, the Supreme Court revisited the issue of affirmative action in university admissions, striking down one program at the University of Michigan but upholding another.[24] Once again voters reacted, amending the Michigan Constitution to foreclose racial preferences in admissions. And in 2016 a sharply divided Supreme Court upheld an affirmative action program at the University of Texas.[25] Thus, instead of establishing public policy, the Court's ruling in *Bakke* turned out to be merely one skirmish in an ongoing policy dispute.

In this respect, *Bakke* is hardly unique. Although judicial rulings may establish legal obligations, those affected by a ruling may refuse to comply with it. For example, a decade after the Supreme Court ruled in *Brown v. Board of Education* and ordered the elimination of racially segregated dual school systems, less than 2 percent of black children in the South were attending integrated schools. Rather than endorsing judicial rulings, public officials may ignore them, attack them, or attempt to overturn them. For instance, in the 1990s, many members of Congress pushed for a constitutional amendment to override a Supreme Court's ruling that the First Amendment protected the burning of the American flag as a form of symbolic protest.[26] Groups also may reject judicial rulings and organize to oppose them in other political arenas. One example of this is the right-to-life movement, which emerged as a national movement during the 1970s and 1980s in response to the Supreme Court's ruling in *Roe v. Wade*, which announced a constitutional right to obtain an abortion.[27] Indeed, the controversy engendered by the Supreme Court's abortion rulings suggests that judicial rulings sometimes aggravate rather than resolve policy disputes.

Taken together, these examples indicate that although courts often announce rulings on policy issues, they are seldom in a position to dictate public policy. Whether judicial rulings accomplish their objectives often depends upon, among other things, the political support they generate and the opposition they encounter. Courts do not operate outside the political process; like other governmental institutions, they are enmeshed in it.

CONCLUSIONS

This chapter has examined law and the U.S. legal system from both legal and political perspectives. From a legal perspective, probably the most important point to note about the American system is that it is a common-law legal system. As such, it shares many features with the legal systems of Great Britain and its other former colonies. From a political perspective, the distinctive aspect of the American legal system is the courts' involvement in policymaking. This involvement often stems from the courts' responsibility to say what the law is, even in cases with political ramifications. Thus, although courts in the United States do not dominate policymaking, their responsibilities nonetheless enmesh them in the political process.

This chapter has also explored the character of law. From a legal perspective, what is most striking are the diverse types of law that courts interpret. As we have seen, to make sense of this diversity, scholars and attorneys have categorized law in various ways: public law and private law, criminal law and civil law, law and equity, and so on. From a political perspective, what is most important is the degree of uncertainty in the law. This uncertainty in the law forms the basis for disputes and hence for litigation. It also creates opportunities for judicial discretion in interpreting the law and in deciding cases. The range of discretion that judges exercise—and the uses that they make of it—is an ongoing theme of this book. Part I, however, focuses on the structure of American legal institutions and the judges, lawyers, and litigants involved with them.

NOTES

1. Data on students graduating from law school are drawn from the website of the American Bar Association at http://www.abanet.org/legaled.
2. On health care, see *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012); on prison conditions, see *Hudson v. McMillian*, 503 U.S. 1 (1992); on same-sex marriage, see *Obergefell v.*

Hodges, 576 U.S. ___ (2015); and on the presidential election of 2000, see *Bush v. Gore*, 531 U.S. 98 (2000).

3. Gallup Poll data are available at https://news.gallup.com/poll/1597/Confidence-Institutions.aspx. Other poll data on American criminal justice are collected at www.pollingreport.com/crime.htm. Poll data on the performance of judges are found at "NCSC Sentencing Attitudes Survey: A Report on the Findings," at https://www.ncsc.org/~/media/Microsites/Files/CSI/The%20NCSC%20Sentencing%20Attitudes%20Survey.ashx, and discussion of trends in popular confidence in law firms is found in Neil Hamilton and Mark Jones, "A Look at Levels of Public Trust in the Professions," at www.stthomas.edu/media/hollorancenter/pdf/Minn_Lawyer_Public_T.pdf.
4. Major works analyzing contemporary legal systems include Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, 2nd rev. ed. (Oxford: Clarendon Press, 1987); Rene David and John Brierley, *Major Legal Systems in the World Today*, 3rd ed. (London: Stevens & Sons, 1985); and Glenn, H. Patrick, *Legal Traditions of the World*, 2nd ed. (New York: Oxford University Press, 2004).
5. William Blackstone, *Commentaries on the Law of England*, vol. 1 (Chicago: University of Chicago Press, 1979), p. 63.
6. Ibid., p. 69.
7. Theodore F. T. Plucknett, *A Concise History of the Common Law*, 5th ed. (Boston: Little, Brown,1956), p. 342.
8. Roscoe Pound, *The Spirit of the Common Law* (Francestown, NH: Marshall Jones, 1921), p. 1.
9. William E. Nelson, *The Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830* (Cambridge, MA: Harvard University Press, 1975).
10. Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, MA: Harvard University Press, 1977).
11. Zweigert and Kötz, *Introduction to Comparative Law*, pp. 76–86; David and Brierley, *Major Legal Systems*, pp. 33–59; and Alan Watson, *The Making of the Civil Law* (Cambridge, MA: Harvard University Press, 1981), chapters 1–3.
12. Zweigert and Kötz, *Introduction to Comparative Law*, chapter 20.
13. Thomas Mackay Cooper, "The Common Law and the Civil Law—A Scot's View," *Harvard Law Review* 63 (January 1950): 470–471.
14. John H. Merryman, *The Civil Law Tradition* (Stanford, CA: Stanford University Press, 1969), p. 100.
15. For federal and state statutes invalidated by the U.S. Supreme Court, see https://www.govinfo.gov/.
16. Zweigert and Kötz, *Introduction to Comparative Law*, p. 195.
17. Oliver Wendell Holmes, "The Path of the Law," *Harvard Law Review* 10 (1897), quoted in *Courts, Judges, and Politics*, 2nd ed. Walter F. Murphy and C. Herman Pritchett, eds. (New York: Random House, 1974), p. 21.
18. *Lee v. Weisman*, 505 U.S. 577 (1992).

19. The establishment clause states: "Congress shall make no law respecting an establishment of religion." Originally a limitation only on the national government, the clause was made applicable to state and local governments in *Everson v. Board of Education*, 330 U.S. 1 (1947).
20. The judicial responsibility to "say what the law is" was recognized by Chief Justice John Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173 (1803).
21. Alexis de Tocqueville, *Democracy in America*, Harvey C. Mansfield and Delba Winthrop, eds. (Chicago: University of Chicago Press, 2000), p. 257.
22. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).
23. The constitutionality of Proposition 209 was upheld in *Coalition for Economic Equity v. Wilson*, 122 F.3d 718 (9th Cir. 1997).
24. *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003).
25. *Fisher v. University of Texas*, 570 U.S. ___ (2016).
26. *Texas v. Johnson*, 491 U.S. 397 (1989).
27. *Roe v. Wade*, 410 U.S. 113 (1973)

PART I

Structures and Participants in the Judicial Process

2

The Federal and State Court Systems

On its face, the case seemed routine. Although Clarence Earl Gideon was not a professional criminal, by age 57 he had a history of run-ins with the law and had four times been convicted of minor felonies and imprisoned. Thus, when he was charged with breaking into a poolroom in Bay Harbor, Florida, with intent to commit petty larceny, it seemed to be merely another episode in Gideon's rather unsuccessful criminal career.[1]

Gideon was tried before a six-member jury in one of Florida's circuit (trial) courts in August 1961. At the outset of the trial, Gideon requested that a lawyer be appointed to defend him, because he was too poor to hire one himself. But the judge refused Gideon's request, maintaining that neither Florida law nor the U.S. Constitution required that an attorney be provided. The trial thus proceeded with Gideon representing himself.

One prosecution witness testified he had seen Gideon leaving the poolroom carrying a pint of wine at 5:30 a.m. on the morning of the break-in. The eye-witness also claimed that, looking into the poolroom, he could see that someone had removed the front of the cigarette machine and emptied its money box. The operator of the poolroom confirmed that a window had been smashed and the cigarette machine and the jukebox broken into. Gideon's cross-examination of the witnesses was unfocused and ineffectual, and he offered no explanation for why he was outside the poolroom in the early morning. The jury convicted Gideon, and Judge Robert McCrary sentenced him to 5 years in prison.

This, however, did not end the case. Writing from his prison cell, Gideon petitioned the Florida Supreme Court for a writ of habeas corpus, a legal order freeing him on the ground that he was illegally imprisoned. The Florida justices denied Gideon's petition, rejecting his claim that the U.S. Constitution guaranteed him a right to an attorney at trial. Gideon then appealed the Florida Supreme Court's decision to the U.S. Supreme Court, requesting that the Court agree to review his case.

The Supreme Court annually receives hundreds of petitions from prisoners claiming their trials were unfair and that they should be released. Thus, Gideon's petition—four pages painstakingly printed in pencil on lined paper—was hardly unique. Most prisoner petitions lack legal merit and are dismissed by the Court, but in this instance, the justices granted Gideon's petition in order to consider whether the Constitution requires states to provide a defense attorney to poor defendants in criminal cases. After receiving legal briefs and hearing oral argument from Florida's assistant attorney general and from Abe Fortas, a prominent Washington attorney appointed by the Court to represent Gideon, the justices unanimously ruled in Gideon's favor. Overruling a 20-year-old precedent, *Betts v. Brady* (1942), the Court concluded in *Gideon v. Wainwright* that the Sixth Amendment, made applicable to the states by the Fourteenth Amendment, required states to provide counsel to indigent defendants in felony cases.[2]

The Supreme Court's decision overturned Gideon's conviction but did not decide his fate. The state of Florida appointed an attorney to represent Gideon and proceeded to retry him for the break-in. But having an attorney made all the difference. Gideon's lawyer deftly undermined the credibility of the prosecution's eyewitness, and after an hour's deliberation, the jury returned a verdict of not guilty.

The story of Clarence Gideon illustrates four key aspects of the structure and operation of courts in the United States.

1. *A dual court system.* Under American federalism, each of the 50 states operates its own judicial system. So, too, does the federal government. Although the state and federal judicial systems are separate, federal and state courts can both rule on the same case. *Gideon v. Wainwright*, for example, began in a Florida state court, was appealed to the U.S. Supreme Court, and eventually was returned to a Florida trial court for resolution. Gideon's case, however, is atypical. Most cases remain in the judicial system in which they are initiated. Indeed, this might well have happened in Gideon's case. Had he not appealed the Florida Supreme Court's ruling, his case would have been resolved within the state judicial system; and if the U.S. Supreme Court had refused to review that ruling, the Florida court's decision would have been final.

2. *Separate courts performing distinct functions.* Gideon's case was considered by two different types of court, each of which played a distinct role in the resolution of the case. The Florida circuit court served as the trial court, hearing evidence from witnesses about the facts of the case, deciding whether Gideon was guilty or not guilty, and imposing sentence following his conviction. When Gideon appealed his conviction to the Florida Supreme Court and then to the U.S. Supreme Court, the issue changed, and so too did the function of the courts. For these appellate courts, which review the rulings of lower courts, the concern was not Gideon's guilt or innocence but rather the legal correctness of the procedures under which he was convicted. Thus, when the Florida Supreme Court concluded that the trial judge had acted properly in refusing to appoint a lawyer to defend Gideon, it upheld his conviction. When the U.S. Supreme Court ruled that the judge had erred and that Gideon was entitled to a lawyer, it did not decide his guilt or innocence. Rather, it sent the case back for a new trial, at which Gideon's right to counsel was honored.
3. *Hierarchies of courts.* Not only are there various types of court, but those courts are hierarchically arranged. This means that cases follow a set path when they move from one court to another, proceeding step by step from the lowest court up the various rungs of the judicial ladder. In *Gideon*, for example, the case began in a Florida trial court, moved to the highest court in the state, and then to the nation's highest court, the U.S. Supreme Court. In addition, the hierarchical arrangement of courts reflects the authority exercised by some courts over others. Lower courts are legally obliged to abide by the rulings of higher courts. Thus, once the Supreme Court had ruled in *Gideon* that states must furnish an attorney to indigent defendants, the Florida court retrying Gideon had to comply with the ruling and appoint a lawyer to defend him.
4. *Multiple bodies of law.* Just as both the state and federal governments have their own court systems, so too each has its own body of law. It might seem logical therefore for state courts to decide cases involving state law and federal courts cases involving federal law. But the rules governing the jurisdiction of U.S. courts—that is, the types of cases a federal court is authorized to decide—are not that simple. For one thing, a single case might involve more than one body of law. Gideon, for example, was convicted of violating a Florida criminal statute in a court established by the constitution and laws of Florida. However, he claimed that the U.S. Constitution guaranteed him the right to an attorney. Thus, the Florida courts in Gideon's case had to consider both state law (the criminal statute) and federal law (the constitutional rights guaranteed to defendants in state court).

THE FEDERAL COURT SYSTEM

Structure

Although Article III of the federal Constitution establishes only the U.S. Supreme Court, it authorizes "such inferior Courts as the Congress may from time to time ordain and establish." The courts that Congress creates under Article III of the Constitution are known as constitutional courts or Article III courts; those it creates under Article I are known as legislative courts or Article I courts. Constitutional courts handle the bulk of federal litigation. The independence of their judges is secured by constitutional guarantees that the judges serve during "good behavior" and that their salaries cannot be reduced while they remain in office. By contrast, legislative courts may have administrative and quasi-legislative responsibilities, as well as judicial duties. Congressional statutes determine how long judges on legislative courts serve and whether their salaries can be reduced. Because they do not have the Article III guarantees of judicial independence, the Supreme Court ruled in 1982 that judges on legislative courts cannot be assigned the same duties and jurisdiction as judges on constitutional courts.[3] In fact, most legislative courts—for example, the U.S. Court of Military Appeals and the U.S. Tax Court—have quite specialized jurisdictions.

Figure 2.1 outlines the organization of the federal judicial system. Despite the multiplicity of courts, the structure of the federal judicial

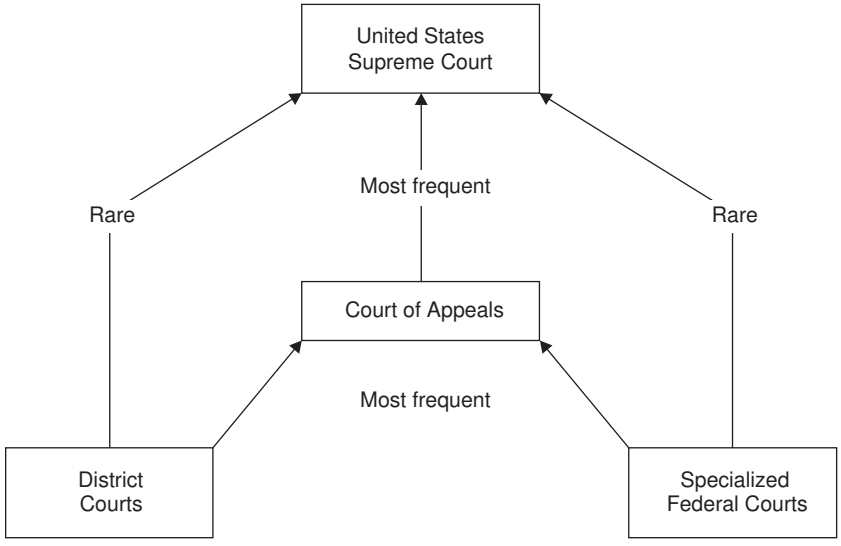

FIGURE 2.1 The Federal Court System.

system is really quite simple; basically, it is a three-tiered structure. The most important federal courts are the constitutional courts: the district courts, the courts of appeals, and the U.S. Supreme Court. The district courts serve as the primary trial courts of the federal judicial system. Most federal cases originate in the district courts and are resolved by those courts. However, dissatisfied litigants may appeal the district courts' rulings to the courts of appeals, the first-level appellate courts. The U.S. Supreme Court is the sole second-level appellate court, the court of last resort. It hears appeals from the federal courts of appeals, from various specialized federal courts, and—when issues of federal law are involved—from state supreme courts. In rare cases, it may also hear appeals directly from federal district courts. Whereas the district courts and the courts of appeals must decide all cases properly brought before them, the Supreme Court has almost complete discretion in choosing what cases it will hear.

The Development of the Federal Judicial System

Creation Political conflict over the structure of the federal judicial system began at the Constitutional Convention of 1787 and has erupted periodically ever since. The delegates at the Convention agreed a national judiciary should be established, but they disagreed over its structure and organization. Some delegates wanted only a single federal court: a supreme court to review state court decisions on matters of federal concern. Other delegates, among them James Madison, distrusted state courts and insisted that federal trial courts should also be instituted. Rather than resolving the conflict, the delegates in effect postponed it. Article III of the Constitution created the Supreme Court but left the creation of additional courts up to Congress.

As its first order of business, Congress in the Judiciary Act of 1789 established the nation's judicial system. Atop the structure was the Supreme Court, consisting of six justices. The Act also provided for two tiers of federal trial courts. The 13 district courts were each staffed with a single district judge. Although the number of district courts and judges has increased, this set of federal trial courts, organized along geographic lines that do not overlap state boundaries, has survived to the present day. Less familiar is the second set of trial courts created in 1789, the three circuit courts. These courts initially had no judges of their own. They operated in three-judge panels consisting, at least at the outset, of the district court judge for the district and two Supreme Court justices who "rode circuit" to hear cases.

From the beginning, the circuit courts posed problems. Transportation in the new nation was primitive, and the justices found themselves riding circuit almost constantly. As early as 1792, they complained to

Congress that it was "too burdensome" for them "to pass the greater part of their days on the road, and at inns, and at a distance from their families."[4] But advocates of state power opposed the creation of circuit court judges, fearing that increasing the number of federal judges would permit more cases to be routed to federal courts. When Congress finally did create circuit judges in 1801, the partisan fashion in which it acted virtually guaranteed the reform would not last. After having lost the election of 1800, President John Adams and the lame-duck Federalists who controlled Congress pushed through legislation that abolished circuit riding and created judgeships for each circuit. Adams then proceeded to appoint Federalists to all the new positions. According to legend, Adams signed the commissions for these "midnight judges" late into the last night of his presidency. Incoming president Thomas Jefferson and his Democratic-Republican Party were outraged; and in 1802, Congress—now controlled by Jefferson's party—abolished the new judgeships and reinstituted circuit riding.

Later Developments For most of the nineteenth century, the structure of the federal judicial system remained unchanged. In 1891, Congress added a new set of courts, the circuit courts of appeals, to expand the capacity of the federal courts to hear appeals and to relieve caseload pressures on the Supreme Court. These courts, now simply called the courts of appeals, remain a vital component of the federal judicial system. In 1911, Congress completed the basic structure of the federal judicial system by abolishing the circuit (trial) courts and transferring their responsibilities to the district courts.

Since 1911, despite dramatic increases in the caseloads of federal courts, Congress has rejected fundamental changes in the structure of the federal judicial system. It has dealt with increasing caseloads by creating new district courts and appeals courts and by increasing the number of federal judges. Congress has also added various specialized courts to the federal judicial system. Some of these courts resolve cases arising under particular statutes. For example, the U.S. Tax Court, originally part of the Internal Revenue Service, was established as an independent court in 1969 and charged with deciding taxpayer challenges to income tax assessments. Other specialized courts deal with cases in a specific area of the law. The U.S. Court of Military Appeals (1950) hears appeals from court-martial convictions, and the Foreign Intelligence Surveillance Court (1978) oversees the issuance of warrants to use electronic surveillance to acquire "foreign" intelligence within the United States. The Alien Terrorist Removal Court (1996) was created in the wake of the terrorist bombing of the federal building in Oklahoma City to streamline the deportation of criminal aliens after they served their sentences.

Federal Jurisdiction

The Law of Federal Jurisdiction For a court to decide a case, the case must fall within the court's jurisdiction—that is, the range of cases it is empowered to rule on by constitutional provision or by statute. Article III of the U.S. Constitution sets the outer reaches of the federal judicial power by specifying the types of cases federal courts may be empowered to hear. Table 2.1 describes the scope of federal judicial power and explains why those types of cases were given to the federal courts.

Within these boundaries, the Constitution generally leaves it to Congress to define the jurisdiction of the various federal courts. Congress is not obliged to vest the full federal judicial power in the federal courts. Thus, federal statutes largely determine the actual division of responsibility between federal and state courts and among federal courts.

The bases for exercising federal jurisdiction are diverse and complex. The subject matter of a case, the identity of the parties to a case, or the citizenship of those parties all may provide a basis for federal courts to hear a case. For example, a job applicant may sue an employer for discrimination in federal court (1) if the statute securing the right against employment discrimination is a federal statute, or (2) if the employer is the federal government or one of its agencies, or (3) if the employer and the job applicant are citizens of different states. If the job applicant sues in a state court, and the employer and job applicant are citizens of different states, the employer can have the case transferred to a federal district court on the basis of diversity of citizenship.

The federal judicial power does not extend to all cases. When a person is charged with violating a state criminal statute, the case is heard in state court. Most criminal statutes are state statutes, and more than 98 percent of criminal prosecutions occur in state courts. State courts also have exclusive jurisdiction when a civil case involves only state law and the parties to the case are each citizens of the same state. Because the vast majority of civil cases have that character, they likewise are heard in state courts. Finally, the U.S. Supreme Court has held that the doctrine of sovereign immunity restricts Congress's power to authorize suits against state governments without their consent in federal courts.[5]

Congress has not required all cases arising under the federal judicial power be heard in federal court. Instead, it has allowed state courts to decide some of these cases by granting concurrent, rather than exclusive, jurisdiction to federal courts. That means that, with a few exceptions such as criminal cases based on federal statutes, cases that could be filed in federal court can be initiated in state courts as well. Lawyers can choose to file a case in the court in which they believe they have the best chance of winning or where they expect the highest awards should they prevail. Throughout the nation's history, Congress has also limited

TABLE 2.1 The Federal Judicial Power

Article III of the U.S. Constitution defines the federal judicial power. Underlying the specific grants of power are four basic purposes:

1. Vindicating the authority of the federal government
   a) Cases arising under the laws of the United States
   b) Cases arising under the U.S. Constitution
   c) Cases in which the federal government is a party
2. Maintaining the exclusive control of the federal government over foreign relations
   a) Admiralty and maritime cases
   b) Cases arising under treaties
   c) Cases affecting ambassadors or other representatives of foreign countries
   d) Cases between states, or the citizens thereof, and foreign states, citizens, or subjects
3. Umpiring interstate disputes
   a) Controversies between two or more states
   b) Controversies between a state and the citizen of another state
4. Protecting out-of-state litigants from the possible bias of local tribunals
   a) Controversies between citizens of different states

the jurisdiction of federal courts. One example is federal jurisdiction over diversity of citizenship cases. Although the Constitution permits federal courts to be assigned all cases involving a suit by a citizen of one state against the citizen of another state, Congress has restricted federal courts to those cases in which a sizable amount of money is involved. Federal courts currently hear diversity cases only when at least $75,000 is at stake.

The Politics of Federal Jurisdiction

Federalism and Federal Jurisdiction Although federal jurisdiction might seem merely a technical concern, it has at times generated intense conflict. During the nation's first century, the conflict centered on questions of federalism. Nationalists in Congress sought to enlarge federal jurisdiction, and champions of states' rights wanted to maintain the prerogatives of state courts, assuming those courts would reflect a more localist perspective.

The Judiciary Act of 1789 was a partial victory for both nationalists and states' rights advocates. Congress created lower federal courts, as the nationalists wished, but severely limited their jurisdiction. Federal district courts were vested with jurisdiction only over admiralty

cases and petty crimes, those for which punishment could not exceed 6 months in jail, a fine of $100, or 30 stripes of whipping. Federal circuit courts, the main trial courts, could hear diversity of citizenship cases where more than $500 was at stake, major criminal cases arising under federal law, and appeals from the district courts in admiralty cases. But neither district nor circuit courts were given jurisdiction over all cases arising under federal law ("federal question" cases); thus, many of these cases were heard in state courts. Not until 1875 were federal trial courts awarded "federal question" jurisdiction.

The Judiciary Act of 1789 also circumscribed the appellate jurisdiction of the Supreme Court. The Court could not review federal court rulings in criminal cases, and it could review state rulings involving federal constitutional claims only if state judges rejected the constitutional claim and upheld the challenged state law. Underlying the second limitation was the assumption that, although state judges might be prone to favor state law against federal claims, they would be unlikely to expand federal restrictions on the governing power of their states.

The strength of states' rights forces was also manifest in a controversy that arose just 4 years after the passage of the Judiciary Act of 1789. In *Chisholm v. Georgia*, the Supreme Court ruled that the executor of the estate of a South Carolina citizen could sue the state of Georgia in federal court to recover payment for supplies that were sold to the state during the American Revolution.[6] The Court's decision was arguably a faithful reading of Article III of the Constitution, which authorized federal courts to hear disputes "between a state and citizens of another state." However, states rights' advocates were outraged, detecting a threat to state sovereignty. The lower house of the Georgia legislature responded by passing a bill to punish by "hanging without benefit of clergy" any person aiding in the enforcement of *Chisholm*. A more lasting response was the adoption of the Eleventh Amendment, which prohibited the federal courts from hearing suits against a state by a citizen of another state or of a foreign country.

The Impact of the Civil War After the Civil War, the issue of federal jurisdiction reemerged, but this time a nationalist perspective prevailed. Congress suspected, with good reason, that Southern courts might refuse to vindicate the rights of newly freed slaves. To ensure those rights were protected, it expanded the jurisdiction of the federal courts. The Habeas Corpus Act of 1867 enabled all persons in custody "in violation of the Constitution, or of any treaty or law of the United States" to seek redress in federal court. This in effect authorized federal courts to oversee state courts in criminal cases to ensure that defendants were not imprisoned in violation of federal law. The Judiciary Act of 1875 conferred on the federal courts jurisdiction in all cases involving questions of federal

law and in all diversity cases where more than $500 was at stake. This ensured that those who believed their federal rights had been infringed could get a hearing before a federal judge.

Congress Versus the Courts Since the late nineteenth century, changes in federal jurisdiction have reflected either congressional dissatisfaction with judicial decisions or a concern to relieve caseload pressures on the federal courts. An example of the former is a 1914 statute empowering the Supreme Court to review all state rulings that relied on federal law. Congress's action was in response to *Ives v. South Buffalo Railway*, in which New York's supreme court ruled that the state's workmen's compensation act (the first in the nation) violated the federal Constitution.[7] Because most members of Congress favored such legislation and believed it constitutional, they wanted the Supreme Court to be able to overturn constraints placed on state legislatures by state courts. The congressional enactment ensured that state courts could not restrict state power on federal constitutional grounds further than the Supreme Court authorized.

Beginning in the 1970s, conservatives in Congress responded to controversial judicial rulings by proposing legislation to restrict the power of federal courts to rule on particular issues. During the 1970s and 1980s, they attempted to prevent federal courts from ruling on abortion, school prayer, and school busing, but none of the bills they introduced was enacted. Following the election of Republican majorities in both houses of Congress in 1994, however, less drastic restrictions on the jurisdiction of federal courts were approved. In 1995, Congress enacted the Prison Litigation Reform Act, which reduced the discretion of federal courts in supervising prisons and requiring the early release of prisoners. It also adopted the Effective Death Penalty Act of 1996, which limited the power of federal courts to consider petitions filed by inmates awaiting execution. With the election of Republican presidents and the appointment of more conservative judges, congressional efforts to limit the jurisdiction of federal courts dwindled. However, in the Military Commissions Act of 2006, Congress withdrew the power of federal courts to hear habeas corpus petitions challenging their detention from aliens detained as enemy combatants. The Supreme Court overturned this restriction in *Boumediene v. Bush* (2008).[8]

Caseloads and Federal Jurisdiction Concern about caseload pressures on the federal courts emerged after Congress expanded the federal courts' jurisdiction in 1875, as this created a demand for court services those courts were ill-equipped to handle.

Congress alleviated caseload pressures on the Supreme Court by reducing its mandatory jurisdiction; that is, those cases it is legally obliged to hear. Until 1925, the Court had little control over which cases it decided, because Congress had awarded litigants a right of appeal to the Supreme Court. The Judges' Bill of 1925, so named because it was

drafted by Chief Justice William Howard Taft and supported by the other justices, dramatically altered the Court's jurisdiction by giving the justices broad discretion in choosing their cases. This reform temporarily relieved case pressures. Since 1925, Congress has eliminated more and more of the Supreme Court's mandatory jurisdiction, so that the Court today has almost total discretion in setting its agenda.

Contraction of the Supreme Court's mandatory jurisdiction, although prompted by caseload concerns, also has affected how the Court views its responsibilities. Relieving the Court of unimportant cases has allowed it to focus on those cases that are crucial to the development of federal law. The justices now deliberately choose cases with that function in mind. Thus, the reform of the Court's jurisdiction has produced effects likely never contemplated by its proponents.

Congress has sought to ease caseload pressures on federal district and appeals courts by increasing the number of courts and judges. For example, the number of federal district court judges has increased from 241 in 1960 to 677 in 2018. Some scholars and jurists, most notably former Chief Justice William Rehnquist, proposed reducing the caseloads of federal district and appeals courts by eliminating their diversity-of-citizenship jurisdiction. They insist that state courts today treat residents and nonresidents evenhandedly, so that the original justification for the diversity jurisdiction—avoiding bias against nonresidents in state courts—no longer exists. Opposing this change have been the American Bar Association and various trial lawyers' organizations, who argue that federal courts do a better job of dispensing justice than do state courts. Thus far, these groups have blocked all efforts to curtail federal jurisdiction over diversity cases.

Although both proponents and opponents of this reform are concerned about the just and efficient operation of the federal judicial system, this is not all that is involved. Because the procedural rules in federal and state courts differ, attorneys may believe their clients would have a better chance of presenting their case or winning in one forum than in another. Some litigants seek to have their cases heard in federal court and others in state court, indicating a perception that where a case is heard makes a difference. Finally, the transfer of diversity cases to state courts would increase state court caseloads. Thus, reforms designed to promote efficiency may have other effects as well.

THE FEDERAL COURTS TODAY

The District Courts

"The people of this district either get justice here with me, or they don't get it at all. Here at the trial court—that's where the action is."[9] This comment by a district court judge in Iowa is no exaggeration. Most

federal cases begin and end in the district courts, the primary trial courts of the federal judicial system. About 15 percent of district court rulings are appealed, but even then the district court's handling of issues affects how appellate courts view those issues. Only about 16 percent of district court rulings are reversed. Taken together, the low rates of appeal and reversal mean that fewer than 4 percent of district court judgments are ultimately overturned.

Congress has established 94 district courts, serving the 50 states, the District of Columbia, and various U.S. territories, staffed by 677 district judges. As Figure 2.2 indicates, every state has at least one district court, and no district extends beyond the borders of a single state. More populous states are divided into more than one district, with three states—California, New York, and Texas—each having four district courts.

Each district court has at least two judges. How many judges are assigned to a district court, however, depends on its caseload and thus varies from district to district. The Southern District of New York, which includes Manhattan and the Bronx, is the nation's largest with 28 district judges. By federal law, reapportionment cases and voting rights cases must be heard by three-judge panels, comprised of two district court judges and one appeals court judge. But most cases in district courts are tried before a single judge. District courts therefore hear several cases simultaneously in various courtrooms.

The Cases District courts exercise no discretion over the cases they hear. Any litigant who satisfies the jurisdictional requirements and follows proper legal procedures can initiate a case in federal district court. However, a federal district court cannot address a legal issue unless a litigant brings it before the court in a bona fide case, so litigant demand determines the business of the district courts.

In recent decades, filings in federal district courts have risen sharply: from 87,421 cases in 1960 to 350,469 in 2016.[10] Civil filings, which represent more than three-quarters of filings in district courts, totaled 291,851 cases in 2016, up more than one third since 1990. Filings in criminal cases totaled 75,671, an increase of almost 25 percent since 2001, although this represents a decline of more than 16,000 criminal cases since 2013.

Congressional statutes and executive-branch actions affect the number and type of cases brought before the district courts. In 1960, for example, only 306 civil rights cases were filed in district courts. But in succeeding decades, Congress adopted major civil rights laws, such as the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, and the Americans with Disabilities Act of 1990. These laws encouraged victims of discrimination to seek redress in the federal courts; and the number of discrimination cases rose accordingly.

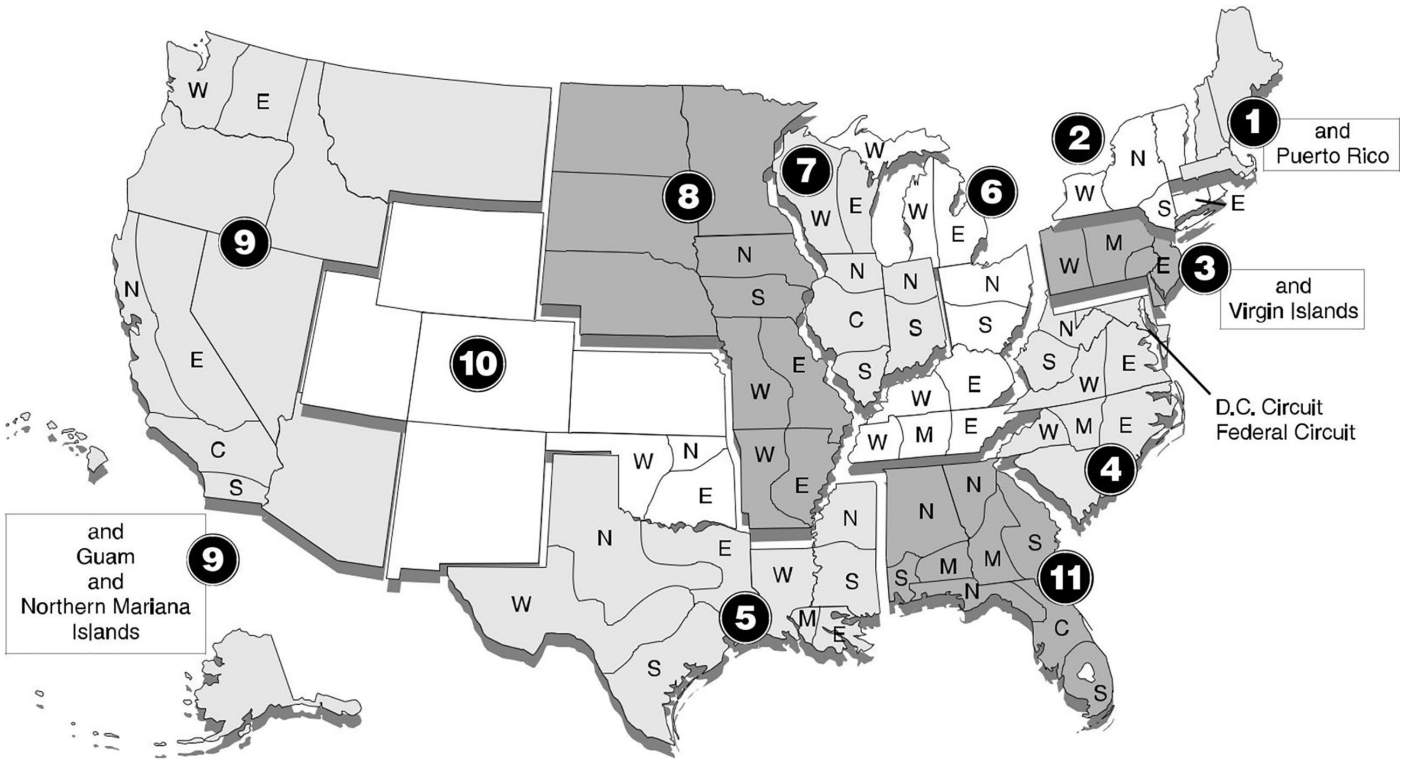

FIGURE 2.2 This figure is adapted from Russell Wheeler and Cynthia Harrison, *Creating the Federal Judicial System* (Federal Judicial Center: Washington, D.C., 1989), Figure 4. The letters and boundaries within states refer to federal court districts with states (W: West, C: Central, etc.). The circled numbers refer to federal appellate circuits.

A similar pattern can be seen in criminal cases. During the 1980s, concern about the influx of cocaine and other illegal drugs into the United States led President Ronald Reagan to announce a "war on drugs" to deal with the problem. By devoting more funds and personnel to the interdiction of drugs and the enforcement of drug laws, the federal government increased its number of drug arrests and thus the number of drug cases heard in district courts. Over the decade, the criminal workload of the district courts increased 50 percent, but drug cases increased more than 270 percent. But federal cases involving drug trafficking and use have declined almost 20 percent since 2013.

Court Operations In hearing cases, district courts may operate as we have come to expect from television and novels. This means that in criminal trials, the judge presides while the prosecutor and defense attorney call witnesses and introduce evidence designed to prove the guilt or innocence of the defendant. In trials in civil cases, the legal rights or obligations of the plaintiff and defendant are at issue, but the process is much the same. If it is a jury trial—and just under half of the trials in district courts are—the judge instructs the jury about the law, following the presentation of evidence and the attorneys' closing arguments, and the jury decides the case. If there is no jury, the judge decides the case; and when the case has a broader legal significance, the judge may write a judicial opinion explaining the reasons for the decision.

More frequently, however, cases follow a quite different pattern. Most criminal cases in federal district courts are resolved by guilty pleas, and most civil cases are resolved by a settlement between the parties following pretrial negotiations. When this occurs, no jury is selected, no witnesses are called, and no formal courtroom sessions are held except to ratify the decision reached by the parties in the case. Chapters 5–7 treat the process of litigation in district courts in greater detail.

The Courts of Appeals

The courts of appeals are the first-level appellate courts of the federal judicial system. As Figure 2.2 shows, 11 of these courts are organized regionally, with "circuits" made up of three or more states. Thus, the Fifth Circuit includes Texas, Louisiana, and Mississippi, and the Seventh Circuit includes Illinois, Indiana, and Wisconsin. The sole exception is the Court of Appeals for the Federal Circuit, which reviews large numbers of appeals from administrative agencies and serves as a sort of state supreme court for the District of Columbia. The boundaries of most circuits were established long ago, and as population shifts occurred, some courts of appeals experienced disproportionate increases in their caseloads. Congress has responded by adding judges to overburdened

circuits, and as a result, the number of judges varies considerably among the courts of appeals. The First Circuit, which includes Maine, Vermont, New Hampshire, Massachusetts, and, surprisingly, Puerto Rico, has the fewest appeals court judges (five). The Ninth Circuit, which includes Alaska, Washington, Oregon, California, Nevada, Idaho, and Montana, has the most (28).

The Cases Every litigant in federal court has a right to an appeal. As a result, courts of appeals primarily engage in error correction, overseeing the work of the district courts in cases that are of interest only to the immediate parties. More than three-quarters of their cases come to courts of appeals from district courts within their circuits, the remainder coming from federal administrative agencies and from specialized courts, such as the Tax Court. The mix of cases varies from circuit to circuit. The Court of Appeals for the Second Circuit, for example, considers large numbers of banking cases because New York City, the hub of the nation's banking, is within its jurisdiction. And because so many federal administrative agencies are located in the District of Columbia, about half the caseload of its court of appeals involves challenges to orders issued by those agencies. Like the district courts, the courts of appeals have experienced increases in their caseloads in recent decades. Indeed, the figures for the two courts are connected, because an increase in district court rulings means an increase in the number of potential appeals. In 1982, the courts of appeals heard 27,946 cases, but by 2017, 58,951. Civil cases comprise about 83 percent of the caseloads of courts of appeals, which is consistent with the composition of the caseloads of federal district courts.

Intercourt Relations After a court of appeals decides a case, a dissatisfied litigant might appeal to the Supreme Court—about 12 percent do so. However, most litigants accept the appeals court ruling as final, and the Supreme Court generally refuses to hear most appeals. As a result, the courts of appeals have the final say in more than 99 percent of the cases they decide.

Over time, a rough division of labor developed between the courts of appeals and the Supreme Court. As the Supreme Court became more involved in resolving constitutional disputes, it ceded primary responsibility for the interpretation of federal statutes and the supervision of administrative agencies to the courts of appeals. This poses the danger, however, that a court of appeals in one circuit might interpret a statute differently from a court of appeals in another circuit. Different interpretations of the same law would thus be authoritative in various regions of the country. What prevents this threat to the uniformity of federal law from posing a serious problem is the tendency of courts of appeals to

consider the rulings of sister courts. Even if those rulings are not authoritative, they may well be persuasive. When differences in interpretation do emerge, the Supreme Court can step in to resolve the conflict; indeed, the rules of the Supreme Court list conflict between the circuits as one of the criteria for deciding to hear cases.[11]

Court Operations The courts of appeals hear more than 95 percent of their cases in three-judge panels, deciding cases by majority vote. This means that several cases can be heard simultaneously by different three-judge panels, often sitting in various cities throughout the circuit. In some cases, the judges decide solely on the basis of the written record from the lower court and legal briefs submitted by the attorneys on each side. In particularly important cases, however, counsel for each side may present oral argument as well. When the judges have reached a decision in a case, they may announce their decision in a brief order or in a longer written opinion.

Because judges bring different perspectives to the law, the decision that an appeals court renders may depend on the composition of the panel that hears the case. Judges are rotated so that the same ones do not sit together constantly. Extraordinary efforts are made to ensure randomness in the assignment of cases to panels. For example, the Eleventh Circuit uses a computer-generated random matrix to set the composition of every panel a year in advance.

Federal statutes also permit courts of appeals to hear cases *en banc*; that is, with the court's entire membership hearing the case together. Courts of appeals use this procedure to resolve intracircuit conflicts, when different panels within a circuit have reached conflicting results in similar cases. They also may sit *en banc* to decide particularly important cases. Each circuit has discretion to determine when an *en banc* panel is warranted.

The U.S. Supreme Court

The U.S. Supreme Court sits at the apex of the federal judicial system. It hears appeals from the federal courts of appeals, from state supreme courts, and, occasionally, from federal district courts or the Court of Military Appeals. The Constitution also assigns the Supreme Court a very limited original jurisdiction (cases it hears as a trial court), but this rarely involves more than one or two cases per year. Over the last decade, more than 7,000 cases were appealed to the Supreme Court annually, and the Court typically accepted about 1 percent for review. The number of cases heard by the Supreme Court has declined dramatically in recent years. Whereas the Court decided 147 cases in its 1987 term, it decided only 69 in its 2016 term. In choosing the cases it will hear, the Court exercises almost total discretion. Because virtually all cases coming to

the Court have already been tried and have received appellate review, the justices are less concerned with correcting lower court errors than with establishing legal principles or resolving disputes that have national implications. During its 2016 term, in marked contrast with a decade or so earlier, less than half the cases the Court chose to hear raised constitutional issues. Chapter 5 describes in detail how the Court operates.

Interaction Among the Federal Courts

To get a sense of how federal courts interact, let us look at a recent controversy. On January 27, 2017, 7 days after taking office, President Donald Trump signed an executive order suspending for 90 days the entry into the United States of foreign nationals from seven countries (Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen), all of which had large Muslim majorities. The order also placed a 120-day freeze on entry for refugees, although it granted an exception for those who were religious minorities in their home country (i.e., non-Muslims). Opponents of the measure immediately challenged it in federal court. The District Court for the Western District of Washington entered a temporary restraining order blocking the entry restrictions, pending a ruling on the substance of the case, and the Court of Appeals for the Ninth Circuit denied the Government's request to suspend the restraining order. Rather than continue to litigate, President Trump revoked the executive order and issued a new one imposing a temporary ban on entry into the United States by foreign nationals from six of the seven countries covered in the initial executive order and suspended the entry of refugees, this time without the exception for religious minorities. This new executive order was likewise challenged. District Courts in Maryland and Hawaii issued a preliminary injunction barring enforcement of the entry restrictions, and the respective Courts of Appeals upheld these injunctions. The President appealed these rulings to the Supreme Court, which in part stayed (suspended) the injunctions. But the temporary restrictions in the second executive order expired before the Supreme Court could take more definitive action on the cases.

President Trump then issued a proclamation placing restrictions on entry into the United States of persons from eight countries. When this proclamation was challenged in District Court in Hawaii, the court ruled for the opponents of the entry restrictions, imposing an injunction barring their enforcement nationwide. On appeal, the Court of Appeals upheld the injunction in part, permitting enforcement of the ban on persons from the listed countries who lacked a preexisting relationship with the United States (such as relatives living in the country). On appeal, the Supreme Court stayed the injunction in full, pending disposition of the substance of the case. When the case was sent back to the Court of Appeals for the Ninth Circuit, it ruled that the proclamation exceeded the president's

powers. But in *Trump v. Hawaii* (2018) the Supreme Court reversed the court of appeals, upholding the president's action by a 5-4 vote.[12]

The complexities of this litigation may be unusual, but they point out the important role played by federal district courts and federal courts of appeals in even the most controversial cases. These courts are the first to address the issues, and their rulings affect what occurs later in the process. This litigation also reveals that sharp disagreements may arise among judges seeking to resolve complex legal issues. Ultimately, the U.S. Supreme Court has the final word for federal courts. But as Justice Robert Jackson acknowledged, "We are not final because we are infallible, but we are infallible only because we are final."[13]

STATE COURTS

Justice William Brennan, who served on the New Jersey Supreme Court before his elevation to the U.S. Supreme Court, once observed that "the composite work of the courts in the fifty states probably has greater significance [than that of the U.S. Supreme Court] in measuring how well America attains the ideal of equal justice for all."[14] This is true in part because of the sheer volume of cases state courts decide annually. For example, there were over 10 million cases filed in California's trial courts in 2009, more than 27 times the number decided by federal district courts during the same year. Thus, for most Americans, their personal experience with courts—and the ideas they develop about the fairness of the nation's courts—usually involve state courts. Figures 2.3 and 2.4 show the change over time in the caseloads of state trial courts of general jurisdiction.

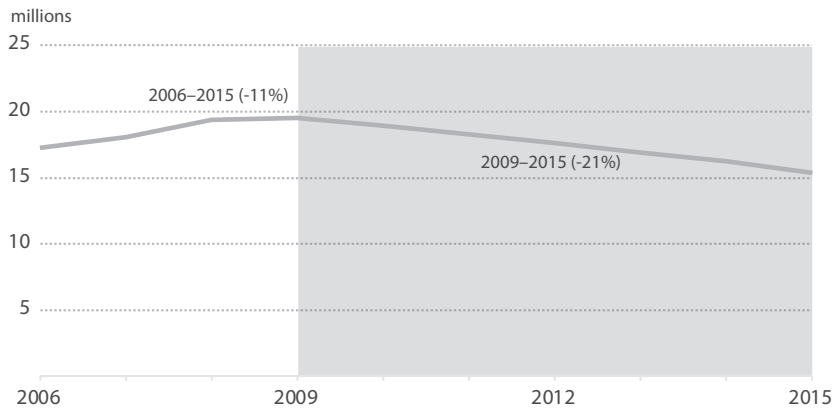

FIGURE 2.3 Total Incoming Civil Caseloads, 2006–2015.