JUDICIAL PROCESS *in* AMERICA

EDITION 10

Robert A. Carp | Ronald Stidham | Kenneth L. Manning | Lisa M. Holmes

Judicial Process in America

Tenth Edition

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Preface

Since the publication of the ninth edition of *Judicial Process in America* in 2014, many changes have taken place in the political scene of the United States and its federal and state judicial systems. The most profound of these is the fact that Barack Obama, the first African American to hold the office of president of the United States, has completed seven full years in office. The Obama administration heralded a new direction for the country, and its implications have been enormous for the composition of the Supreme Court and of the lower federal judiciary. The data we present in Chapter 7 show that the George W. Bush jurists were among the most conservative on record, and this is countered by the fact that the Obama cohort's voting patterns are distinctly left of center. All of this is having profound consequences on the decisional output of the federal courts: the ideological center of gravity for the federal judiciary as a whole is markedly more liberal now than it was several years ago. While the tragic events of September 11, 2001, are still at the back of the nation's mind, an assorted variety of new events have come to the forefront of the country's attention, many of which involve the judiciary to greater and lesser degrees: the Boston Marathon bombing in April 2013; the use of drones by domestic law enforcement officials, as well as their employment abroad to target the United States' enemies; the success of the so-called Islamic State on the battlefields of the Middle East; the disclosures by former government contract worker Edward Snowden via WikiLeaks that our intelligence agencies have spied on foreign foes and friends alike, as well as on millions of ordinary Americans; the legality of the Affordable Care Act that affects millions of people; the legitimacy of the use of the Confederate battle flag by governmental entities; how to address the issues of immigration and deportations, including what to do about so-called Dreamers (children brought illegally to the United States by their parents without the children's knowledge and who have spent much or all of their lives here); and, of course, the great changes in the issue of same-sex marriage, both among average Americans and within the state and federal court systems. Many of these topics will be explored in greater detail in the chapters that follow, particularly when they involve the American judicial system.

The composition of the U.S. Supreme Court has not changed since the publication of the previous edition. However, the presence of three women on the Court is beginning to be studied. What has their effect been on the decisional patterns of the Court, and to what degree is there meaningful interaction among the three female jurists? We shall examine those questions in subsequent chapters.

Finally, we note that during the past several years the composition of the lower courts has gone from a bare majority of Republicans over Democrats to the current mix, in which Republicans and Democrats are about evenly split both for the appellate courts and among U.S. trial judges. In this vein, we discuss the impact that President Obama has had on the partisan mix of the courts and on the subsequent

ideological output of these tribunals. We elaborate on this subject in much greater detail in Chapters 6 and 7.

At the state level, the movement toward tort reform has shown no signs of abatement, and legislatures continue to limit the size of awards that plaintiffs may win. As discussed in previous editions, tort reform continues in the face of civil damage awards that are at all-time highs. Furthermore, state legislatures have removed more and more policy disputes from the courts and have made them subject to binding arbitration. Finally, state tribunals continue to play mounting policymaking roles, as increased numbers of state programs and policies come under the review of state jurists.

In addition to comprehensive updating of such topics as the role of the courts in the war on terrorism, affirmative action, gay and lesbian rights, and business regulation, the tenth edition of this book includes data on the voting patterns of the U.S. trial judges appointed by President Obama. We have also expanded the number of comparative references and examples. Although we make no assertion that this is an exhaustive comparative judicial text, we continue to highlight with some frequency those aspects of the U.S. judicial system that are uniquely American and that may be compared with the judicial practices of other nations. We have included a wide variety of countries as the sources of our comparisons—not just Canada and the United Kingdom, whose judiciaries are most similar to the U.S. system. To the suggested resources at the end of each chapter we have added new Web sites that should be useful to students who wish to pursue the subject matter in greater depth. We have also made provisions for instructors to obtain objective-style questions to be used for examinations for students who are assigned this book as a classroom text.

As an additional learning aid, we encourage students to visit the Cornell University Law School Supreme Court Web site (https://www.law.cornell.edu/supremecourt/text/home), from which they can obtain, without cost, summaries of Supreme Court decisions immediately after they are handed down by the justices. For those interested in current developments in Supreme Court jurisprudence we also suggest the free, award-winning Web site SCOTUSblog.com, sponsored by Bloomberg Law. SCOTUSblog.com has become a "go-to" source for many Court watchers.

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

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

that is meaningful to an educated layperson. For students who may desire more specialized explanations or who wish to explore further some of the issues we discuss, the glossary, notes, and suggested resources contain ample leads.

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

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

Setting the theoretical stage in Chapter 1, we note Americans' great respect for the law but also their traditional willingness to violate the law when it is morally, economically, or politically expedient to do so. We also examine sources of jurisprudence in the United States and several of the major philosophies concerning the role and function of law.

In Chapter 2 we examine the organizational structure and workloads of the federal judicial system, and we have updated all the tables to reflect new caseload statistics for all three levels of the federal judiciary. In this tenth edition we provide a discussion of case backlogs that have resulted from congressional resistance to the creation of new courts and additional judges.

Chapter 3 focuses on the judicial systems in the various states. There is also expanded coverage of courts of limited jurisdiction, of the increasing use of administrative hearings (in place of litigation), and of the expanding role of state supreme courts in important areas of policymaking such as same-sex marriage. The statistical tables in this chapter reflect the most recent available data.

In Chapter 4 we outline the jurisdiction of the several levels of U.S. courts and discuss the political and nonjusticiable realms of American life into which judges in principle are not supposed to enter. We believe that a full understanding of how judges affect citizens' lives requires knowledge of the many substantive areas into which federal and state jurists may not roam. There is also a discussion of the recently and highly significant Supreme Court decisions upholding the Affordable Care Act and the right of same-sex marriage.

Chapter 5 focuses on the role and work of state judges. It contains new material on the 2015 *Williams-Yulee* case[1] on direct solicitation of campaign donations by judicial candidates, as well as a section on the Wisconsin Supreme Court, focusing

specifically on the effort to unseat Shirley Abrahamson as chief justice. Also, there is an update of what took place in Iowa after the 2010 retention election.

Focusing on the federal courts in Chapter 6, we take a close look at the men and women who wear the black robe in the United States. What are their backgrounds and qualifications for office? How are they chosen? How are they socialized into their judicial roles, and under what circumstances can they be removed from office? We also discuss the impact of the Obama administration on the composition of the federal judiciary, and we provide an expanded section on recess appointments that the president may make when Congress is not in session. We also provide an increased discussion of the role of the American Bar Association in the appointment process, along with a look at how its role might contain some inherent biases related to race and gender. Finally, we set forth an analysis of the Senate's 2013 decision, sometimes referred to as the "nuclear option," that permits the Senate to approve some of the president's appointees with a simple majority vote rather than the previously required sixty-vote supermajority.

Chapter 7 examines the work and decision-making patterns of federal judges. We find a discernible link among the values of a majority of the voters in a presidential election, those of the appointing president, and the subsequent policy content of decisions made by the judges nominated by the chief executive. Through original research, using significant amounts of our own data, we offer an in-depth assessment of President Obama's impact on the ideological orientation of the federal judiciary during the past six years.

Chapter 8 discusses the role of lawyers in American society—their training, values, and attitudes—and the public policy goals of their professional associations. There is an updated discussion of the law school curriculum, which now often includes an increased focus on negotiation and alternative dispute resolution. We also discuss how lawyers, along with their role as litigators, often engage in activities such as counseling, negotiations, document drafting, investigations, and research. We also discuss the impact of the recent *Hobby Lobby* case[2] on judicial lobbying, and we devote some attention to the work of the new attorney general of the United States—Loretta Lynch, the first African American woman ever to hold that position. Finally, we examine the role of elite attorneys in their work before the United States Supreme Court.

In Chapter 9 we focus on the nature of crime and on the various procedures prior to a criminal trial: the arrest, the appearance before a magistrate, the grand jury process, the arraignment, and the possibility of a plea bargain. We also address the recent scrutiny of grand juries in light of the reluctance of such tribunals to indict police officers who in the line of duty take the lives of minority citizens (such as the killing of Michael Brown in Ferguson, Missouri, in 2015). Here we also discuss the impact of two recent Supreme Court decisions that vastly expand lower court judges' supervision of the criminal justice system.[3] We further discuss the adversarial process as it exists in American courtrooms. We have updated the statistical information in this chapter since the previous edition, and we have also included a discussion of "political crimes" in light of the revelations of massive illegal government surveillance activities as divulged by Edward Snowden.

Chapter 10 continues this theme by exploring the criminal trial and its aftermath. We examine the procedural rights of the criminal defendant, the process of selecting a jury, the roles of judge and jury during the trial, the sentencing process, and the possibility of an appeal. We have updated the discussion of federal sentencing guidelines to incorporate recent changes and new research in this area. There are also many references to the trial of Dzhokhar Tsarnaev, who was convicted of planting bombs at the 2013 Boston Marathon.

Chapter 11 examines the civil court process, beginning with an analysis of the various types of civil cases and the options available to the complainant and the respondent. We then proceed through the various methods of alternative dispute resolution, followed by a discussion of pretrial hearings and jury selection. Finally, we discuss the trial and judgment. We have updated our material on the topic of binding arbitration, and we have made this information relevant to students by documenting that such arbitration clauses often exist in such matters as credit card disputes and disagreements over cell phone contracts. There is also a new section that discusses suits under Section 1983 of the Civil Rights Act,[4] including the suit by Michael Brown's parents against the City of Ferguson, Missouri; its former police chief; and former police officer Darren Wilson, who shot Brown. Finally, information is added about jury reform measures designed to help jurors better understand their role.

Chapter 12 is the first of two on judicial decision making. In this chapter we outline those aspects of the decision-making process that are common to all judges, in the context of the legal subculture (the traditional legal reasoning model for explaining judges' decisions) and the democratic subculture (a number of extralegal factors that appear to be associated with judges' policy decisions). This chapter contains updated statistics on the magnitude of partisan differences for thirty types of cases from 1932 through 2014.

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

In Chapter 14 we explore the policy impact of decisions made by federal and state courts and analyze the process by which some judicial rulings are implemented and some are not. We have updated this chapter to include examples from the most recent terms of the Supreme Court, including the high court's rulings on the constitutionality of the Affordable Care Act (*King v. Burwell*)[5] and on the subject of same-sex marriage (*Obergefell v. Hodges*).[6]

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

We also wish to take this opportunity to introduce the newest member of our team of authors—Professor Lisa M. Holmes of the University of Vermont. Professor Holmes is a leading scholar in the realm of judicial process and behavior, and she is the author of numerous highly respected journal articles and conference papers in

the political science subfield of public law. She has also received a number of honors and awards for the high quality of her teaching and academic work. We are very proud to have her serve as one of the authors of *Judicial Process in America.*

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NOTES

1. *Williams-Yulee v. Florida Bar*, 575 U.S. ____ (2015).
2. *Burwell v. Hobby Lobby*, 573 U.S. ____ (2014).
3. *Missouri v. Frey,* No. 10-444 (2012) and *Lafler v. Cooper,* No. 10-209 (2012).
4. 42 U.S.C., Section 1983.
5. Docket Number 14-114 (2015).
6. Docket Number 14-556 (2015).

A mon très grand ami François Cornic, en souvenir d'une amitié qui date de plus de cinquante ans.

R. A. C.

To my grandson, Aaron Paul Stidham

R. S.

To Marcia, Katie, and Kenny

K. L. M.

To my teachers, especially Susan B. Haire

L. M. H.

CHAPTER

1 Foundations of Law in the United States

Donald Rowland in court, charged with what some have called the "mercy-killing" of his wife.

On October 31, 2014, Mrs. Betty Rowland of Columbia, Missouri, was brutally and intentionally stabbed to death as she lay asleep in her bed. The eighty-six-year-old victim was a much-loved woman who had been an ideal wife and mother, and who was respected by all who knew her. Columbia police officers "were [mistakenly] dispatched to the Rowland home for a report of a gunshot victim, but police found no evidence of a gun in the house."[1] What they found instead was the body of Mrs. Rowland along with her killer—her husband, Donald Rowland.

One's first reaction to this tragedy is swift and natural: the husband should be arrested, convicted if found guilty, and sentenced to the fullest extent of the law—perhaps even with the death penalty. But wait. There is more to the story. Betty Rowland's health had been failing over the past few years. She recently had suffered a stroke, and one of her hands was partially paralyzed. She also had broken her hip and was wheelchair-bound. Her husband, who neighbors said loved her very much, was in despair over his wife's failing health and by the prospect of their running out

of financial resources. "Donald Rowland told police, according to a probable cause statement, that he took his wife's life and then made an [unsuccessful] attempt at his own because he didn't want them to be a burden on their family."[2]

Boone County prosecutor Dan Knight promptly filed charges against Donald Rowland for first-degree murder and with armed criminal action. But after second thoughts the charges were changed to first-degree involuntary manslaughter, and the judge assigned to the case, Kevin Crane, began to consider a sentence of "probation" while he awaited an advisory report from the Office of Probation and Parole. On April 13, 2015, Judge Crane finally sentenced Donald Rowland to "five years of supervised probation and a suspended seven-year prison sentence."[3]

The state of Missouri obviously didn't know what to do with a "criminal" such as Donald Rowland. The prosecutors and the judge were like many of Rowland's neighbors who "expressed sympathy for him."[4] On the one hand, Missouri could not just set Rowland free with no penalty. What kind of message would that send to other husbands and wives who might consider putting their spouses "out of their misery"? But Donald Rowland was far from the profile of the average murderer. And what sentence would be appropriate? At age eighty-eight, almost any meaningful sentence for him would be a death sentence. Would a sentence keep him from being a future threat to society? And what was the likelihood that if he went unpunished, Rowland would kill again? Not much. Clearly, the criminal code and sentencing guidelines had not been drafted to cover this type of situation.

This discussion reveals much about the United States and the rule of **law**, and it suggests themes that we will articulate not only in this chapter but throughout much of the book. Are there actions in which people engage, however immoral and shocking from one standpoint, that should still be treated outside of the prohibitions and sanctions of the ordinary criminal justice code? And if the law is to make critical distinctions between "ordinary crimes" and crimes such as the one described here, which institutions should be empowered to make these determinations: legislatures, courts, executives, juries?

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

Definition of Law

A useful definition of American law postulates that "law is a social norm the infraction of which is sanctioned in threat or in fact by the application of physical force by a party possessing the socially recognized privilege of so acting."[5] This definition suggests that law comprises three basic elements—force, official authority, and regularity—the combination of which differentiates law from mere custom or morals in society.

In an ideal society, force would never have to be exercised; in an imperfect world, the threat of its use is a foundation of any law-abiding society. Although substitutes for physical force may be used, such as confiscation of property or imposition of fines, the possibility of physical punishment must nevertheless remain to deter a potential lawbreaker. The right to apply this force constitutes the official element of the definition of law. The party that exercises this right of physical coercion represents a valid legal authority. Finally, the term *regularity,* as used in the legal sense, can be likened to its use by scientists. Although the term does not reflect absolute certainty, it does suggest uniformity and consistency. The law calls for a degree of predictability, of regularity, in the way individuals are expected to behave or to be treated by the state. In American society, this emphasis on regularity is manifested by adherence to prior court decisions and precedents (the **common law** doctrine of **stare decisis**) and also by the mandate of the Fourteenth Amendment to the U.S. Constitution, which forbids the state to "deny to any person within its **jurisdiction** the *equal protection* of the law" (emphasis added).[6]

Sources of Law in the United States

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

Constitutions

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

Acts of Legislative Bodies

Laws passed by Congress and by state legislatures constitute a sizable bulk of law in the United States. Statutes requiring the payment of income tax to Uncle Sam and state laws forbidding the robbing of banks are both examples. But many other types

of legislative bodies also enact statutes and ordinances that regulate the lives of U.S. residents. County commissioners (also known as county judges or boards of selectmen), for example, act as legislative bodies for the various counties within the states.

Likewise, city councils serve in a legislative capacity when they pass ordinances, set property-tax rates, establish building codes, and so on at the municipal level. Then there are almost 50,000 "special districts" throughout the country, each of which is headed by an elected or appointed body that acts in a legislative capacity. Examples of these would be school districts, fire prevention districts, water districts, and municipal utility districts.

Decisions of Quasi-Legislative and Quasi-Judicial Bodies

Sprinkled vertically and horizontally throughout the U.S. governmental structure are thousands of boards, agencies, commissions, departments, and so on, whose primary function is not to legislate or to adjudicate but that still may be called on to make rules or to render decisions that are semi-legislative or semi-judicial in character. The job of the U.S. Postal Service is to deliver the mail, but sometimes it may have to act in a quasi-judicial capacity. For example, a local postmaster may refuse to deliver a piece of mail because he or she believes it to be pornographic. (Congress has mandated that pornography may not be sent through the mail.) The postmaster is acting in a semi- or quasi-judicial capacity in determining that a particular item is pornographic and hence not protected by the First Amendment.

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

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

Orders and Rulings of Political Executives

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

When Congress passes reciprocal trade agreement legislation, the goal is to encourage other countries to lower trade and tariff barriers to U.S.-produced goods, in exchange for which the United States will do the same. But there are so many

thousands of goods, almost two hundred countries, and countless degrees of setting up or lowering trade barriers. What to do? The customary practice is for Congress not only to set basic guidelines for the reciprocal lowering of trade barriers but also to allow the president to decide how much to regulate a given tariff on any given commodity for a particular country. These executive orders of the president are published regularly in the *Federal Register* and carry the full force of law. In fact, at the national level more than 70,000 pages of new rules are churned out each year.[7]

Another example of an executive order came in November 2014. After attacking Congress for failing to enact legislation on immigration, President Barack Obama issued a series of executive orders that in effect spared five million illegal immigrants from deportation:

> Under Obama's plan, undocumented parents of U.S. citizens and legal permanent residents would qualify [for deportation relief] only if they have lived in the country at least five years—since Jan. 1, 2010. The administration said it will be ready to begin taking applications in the spring, and that those who qualify will be granted three years of deportation relief, meaning that they would be protected through the first year of Obama's successor in 2017.[8]

However, on February 16, 2015, U.S. District Judge Andrew Hansen held in a Brownsville, Texas, courtroom that "the administration's attempt to expand protections against deportation for certain segments of the immigrant population would cause 'dramatic and irreparable injuries' to the 26 states who joined together in a lawsuit again the president's action."[9] Then on May 26, 2015, by a vote of 2–1, the Fifth Circuit Court of Appeals in New Orleans sustained Judge Hansen's decision, saying that the Obama administration is "unlikely to succeed on the merits of its appeal."[10]

Likewise, at the state level, when a legislature delegates to the governor the right to "fill in the details of legislation," the state executive uses his or her **ordinance-making power**, which also is a type of lawmaking capacity. Political executives may promulgate orders that, within certain narrow but important realms, constitute the law of the land. For example, in the wake of the worst drought and water shortage in modern California history, Gov. Jerry Brown on April 1, 2015, "in an executive order directed the state Water Resources Control Board to impose a 25 percent reduction on the state's 400 local water supply agencies, which serve 90 percent of California residents, over the coming year."[11] Although limited and usually temporary, such orders are law, and violations invoke penalties.

Judicial Decisions

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

Judicial decisions may be grounded in or surround a variety of entities: any of the above-mentioned sources of law, past decisions of other judges, or legal principles

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

Types of Law

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

Codified (or Code) Law

Unlike the United States, most countries (including most of Europe and Latin America) refer to themselves as code law countries. A code is merely a body of laws, but it is one that consists of statutes enacted by a national parliament. These laws address virtually all aspects of the body politic; are often detailed; and are arranged in an orderly, systematic, and comprehensive manner. The U.S. legal system is often seen from abroad as a hodgepodge of legislative acts, judicial decisions, unwritten legal traditions, and so on.

Statutory Law and Common Law

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

Civil Law and Criminal Law

Civil law deals with disagreements between individuals—for example, a dispute over ownership of private property. It also pertains to corporations, admiralty matters,

and contracts. **Criminal law** pertains to offenses against the state itself—actions that may be directed against a person but that are deemed to be offensive to society as a whole. **Crimes** such as drunken driving, armed robbery, and so on are punishable by fines or imprisonment.

Equity

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

Private Law

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

Public Law

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

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

Constitutional Law. Basically, constitutional law is the compilation of all court rulings on the meaning of the various words, phrases, and clauses in the U.S. Constitution. Although all courts have the authority to perform this function, the U.S. Supreme Court has the final say about questions of constitutional law. For example, in 1952, during the Korean War, the United States was faced with a strike by the unions against the nation's steel producers. President Harry S. Truman believed that a steel strike would impair the production of armaments needed for the war. He decided to seize and run the steel mills in the name of the United States. He claimed that he had "inherent powers" under Article II of the Constitution to do this—for example, his power as "Commander in Chief of the Army and Navy" and the fact that "the executive power shall be vested in [the] president." The Supreme Court disagreed with Truman and ruled that the chief executive did not have inherent authority to seize and operate the steel mills—even in times of emergency—without specific congressional authorization.[12]

State Law and Federal Law

Laws passed by one of the fifty state legislatures, ordinances promulgated by a state governor, and decisions handed down by a state court all constitute the corpus juris of a single state. They are compelling only for the citizens of that state and for outsiders who reside or do business there. State laws must not conflict with either federal law or anything in the U.S. Constitution. Examples of state law are Illinois' income tax for those who reside within its boundaries and Utah's new law that approves the use of firing squads for executions "when no lethal-injection drugs are available."[13] Federal law is made up of acts of Congress, presidential orders, U.S. court decisions, and so on. This body of law applies throughout the United States and usually pertains to topics that are relevant to persons in more than just one state. Examples include a congressional act forbidding the transportation of a stolen car across state lines and a U.S. Supreme Court decision outlawing prayer in the public schools. As with state law, federal law must be in harmony with the strictures of the U.S. Constitution.

Functions of Law

What is the function of law in the United States (or in any country, given that the function of law is more or less universal)? What would the negative consequences be if there were no law? Or, conversely, what positive things could be done through law that would be impossible without it?

Throughout history some people have argued that there should be no government (and hence no laws) at all. Such individuals, called anarchists, have argued that governments by nature make rules and laws, and that such restrictions impinge on personal freedom. In the past anarchists have used violence to overthrow governments and have assassinated heads of state. Such attempts to abolish law and authority have resulted in much destruction of life and property and temporary reigns of terror, but they have never brought about the elimination of law or government. Instead of increasing personal freedom, a state of anarchy virtually destroys personal freedom

for all but the most powerful and savage individuals. Few would deny that in today's world, law is essential for ensuring that people live together amicably. As populations expand and modern transportation and communication link people together even more, every action that each individual takes affects others, either directly or indirectly, possibly causing harm. When conflict results, it must be resolved peaceably, using a rule of law. Otherwise, disorder, death, and chaos reign. Some common set of rules must exist that all agree to live by—in other words, a rule of law and order.

But what kind of law and order? The anarchist's argument that laws restrict personal freedom is based in fact. If there are too many rules, laws, and restrictions, totalitarianism results. This result may be just about as bad as a state of anarchy. The trick is to strike a balance so that the positive things that law can do are not strangulated by the tyranny of the law and order offered by the totalitarian state.

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

Providing Order and Predictability in Society

The world is chaotic and uncertain. People win lotteries while the price of oil collapses; more and more people are living to the age of one hundred while hundreds of thousands die amid fighting in the Mideast; some ranchers manage to enlarge their herds at a time of a beef shortage while farmers in California suffer from the worst drought in memory. Laws can neither avert most natural disasters nor prevent random episodes of misfortune, but they can create an environment in which people can work, invest, and pursue happiness with a reasonable expectation that their activity is worth the effort. Without an orderly environment based on and backed by law, the normal activities of life would be lacerated with chaos.

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

Resolving Disputes

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

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

Protecting Individuals and Property

Even libertarians, who take a narrow view of the role of government, will readily acknowledge that the state must protect citizens from the outlaw who would inflict bodily harm or steal or destroy their worldly goods. Because of the importance of the safety of persons and their property, many laws on the books deal with protection and security. Not only are laws in the criminal code intended to punish those who steal and do bodily harm, but civil statutes also permit many crime victims to sue for monetary **damages**. The law has created police and sheriffs' departments, district attorneys' offices, courts, jails, and death chambers to deter and punish the criminal and to help people feel secure. This is not to say that there is no crime; everyone knows otherwise. But without a system of laws, crime would be much more prevalent and the fear of it would be much more paralyzing. Unless everyone could afford to hire his or her own bodyguards and security teams, people would be in constant anxiety about the potential loss of life, limb, and property. However imperfect the system of law, prevention, and enforcement may be, it is certainly better than none.

Providing for the General Welfare

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

Protecting Individual Liberties

Law should protect the individual's personal and civil rights against those forces that would curtail or restrict them. These basic freedoms might include those provided for in the Bill of Rights, such as freedom of speech, of religion, and of the press; the right to a fair trial; and freedom from cruel and unusual punishment. They might also include some that are not stated in the Bill of Rights but are implied, such as the right to personal privacy, or they might be rights that Congress has provided through legislation, such as the right to be free from job discrimination based on gender or ethnic origin. Potential violators of these freedoms might be the government itself (for example, a law denying American citizens accused of terrorist acts the right to a civilian trial) or one's fellow citizens (for example, a conspiracy among private individuals to discourage certain persons from voting). Although disagreement may arise about which freedoms are basic or about how extensively they should be provided for, it is fair to say that unless the law protects certain basic immutable rights, the nation's citizens are no more than cogs in a machine. It is the meaningful provision for these basic liberties that ensures the dignity and richness of the life of the individual.

The United States and the Rule of Law

Americans pride themselves on being a law-abiding people, and to the casual observer they are. Few would question Abraham Lincoln's admonition that respect for the law should be taught to every child at his or her mother's knee, and most are glad to proclaim that the United States has a government of law, not of individuals. The fact that the United States is now paying over $200 billion a year to arrest, try, and incarcerate almost a quarter of the world's prisoners, even though it's home to only 5 percent of the world's inhabitants, is seen not as evidence that society is lawless but as proof that in the United States respect for the law is paramount and disobedience of the law is punished.[14] A careful analysis of U.S. history and traditions reveals, however, that this view of the law has in reality been ambivalent. A few examples will illustrate Americans' love–hate relationship with the rule of law.

The Revolutionary War

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

justify to the rest of the world why a bloody and illegal revolt against the lawful government is sometimes permissible:

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

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

John Brown at Harpers Ferry

Another example is John Brown's famous raid on the U.S. arsenal at Harpers Ferry, West Virginia, in the fall of 1859. With thirteen white men and five black men, this militant opponent of slavery launched his plan to lead a mass insurrection among the slaves and to create an abolitionist republic on the ruins of the South and its plantation economy. After a small but bloody battle that lasted several days, Brown was captured, given a public trial, and duly hanged for murder and other assorted crimes. But were Brown's flagrantly violent and illegal actions justifiable, given the nobility of his vision? Many in the North believed so. Its moral and cultural elite took the line that Brown might have been insane, but his acts and intentions should be excused on the grounds that the compelling motive was divine. Horace Greeley wrote that the Harpers Ferry raid was "the work of a madman," but he had not "one reproachful word." Ralph Waldo Emerson described Brown as a "saint." Henry David Thoreau, Theodore Parker, Henry Wadsworth Longfellow, William Cullen Bryant, and James Lowell—the whole Northern pantheon—took the position that Brown was an "angel of light," and that it was not Brown but the society that hanged him that was mad. It was also reported that "on the day Brown died, church bells tolled from New England to Chicago; Albany fired off one hundred guns in salute, and a governor of a large Northern state wrote in his diary that men were ready to march to Virginia."[15] Again the ambivalence is evident. One ought always to obey the law—unless one hears a divine call that transcends the law.

The Civil Rights Movement

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

> You express a great deal of anxiety over our willingness to break laws. This is certainly a legitimate concern. Since we would diligently urge people to obey the

> Supreme Court's decision in 1954 outlawing segregation in the public schools, at first glance it may seem rather paradoxical for us consciously to break laws. One may well ask: "How can you advocate breaking some laws and obeying others?" The answer lies in the fact that there are two types of laws: just and unjust. I would be first to advocate obeying just laws. One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. . . . Thus it is that I can urge men to obey the 1954 decision of the Supreme Court [*Brown v. Board of Education*, 347 U.S. 483 (1954)], for it is morally right; and I can urge them to disobey segregation ordinances, for they are morally wrong.[16]

Even a member of the Supreme Court of the United States sanctioned civil disobedience during the heady days of the civil rights movement. Justice Abe Fortas said,

> If I had been a Negro living in Birmingham or Little Rock or Plaquemines Parish, Louisiana, I hope I would have disobeyed the state laws that said that I might not enter the public waiting room in the bus station reserved for "Whites." I hope I would have insisted upon going into parks and swimming pools and schools which state or city law reserved for "Whites." I hope I would have had the courage to disobey, although the segregation ordinances were presumably law until they were declared unconstitutional.[17]

Those who opposed the civil rights movement and the Supreme Court decisions and congressional statutes that supported it likewise believed that their form of civil disobedience was in response to a higher calling. Quoting Scripture as support for their belief that God created the white race separately from races of color, segregationists argued that it was the divine will to keep the races apart. Thus defiance of integration orders was seen by many traditionalists as keeping in touch with the natural order of the universe as God had established it. That black and white should not mix with one another was believed to be "a self-evident truth," not to be overturned by the courts' desegregation orders.

More recently, we note the action of a forty-nine-year-old Kentucky county clerk, Kim Davis, who refused to issue marriage licenses to same-sex couples based on her beliefs as an Apostolic Christian. In September 2015 a federal judge temporarily jailed her for contempt of court because of her refusal to obey his orders to issue the contested marriage licenses.

We should also note that in today's world, civil disobedience to morally offensive statutes is not limited to the United States. For example, in 2007 former pope Benedict XVI told a group of Catholic pharmacists that they have a moral right to use "conscientious objection" to avoid dispensing emergency contraception or euthanasia drugs, and that they should also inform patients of the ethical implications of using such drugs. "Pharmacists must seek to raise people's awareness so that all human beings are protected from conception to natural death, and so that medicines truly play a therapeutic role," Benedict said. He added that conscientious objector status would "enable them not to collaborate directly or indirectly in supplying products that have clearly immoral purposes such as, for example, abortion or euthanasia."[18]

Civil disobedience does not need a divine call. Ample illustrations exist of the wholesale avoidance of laws that were thought to be economically harmful and unfair, or that were seen as beyond the rightful authority of the state to enact.

Examples of Civil Disobedience in the United States

American farmers are probably as law-abiding a segment of the population as any, but they too can thwart the law when their economic livelihood is at stake. During George Washington's administration, state militias were activated and sent out to quash what came to be known as the Whiskey Rebellion, a series of lawless acts by tillers of the soil who objected to the federal tax on their homemade elixirs. And during the terrible Great Depression of the 1930s, when, for example, one-third of the state of Iowa was being sold into bankruptcy, farmers often revolted. Thousands with shotguns held at bay local sheriffs who tried to serve papers on fellow farmers about to be dispossessed.

During the Prohibition era, from 1919 to 1933, many Americans refused to obey a law they regarded as unfair and in excess of the legitimate bounds of state authority. Not only did the laws prohibiting the production and sale of alcohol prove to be ineffective and unenforceable, but Americans also seemed to relish flouting the law. The statistics on Prohibition enforcement reveal how the laws were honored in the breach. In 1921 the government seized a total of 95,933 illicit distilleries, stills, still worms, and fermenters; this number rose to 172,537 by 1925 and jumped to 282,122 by 1930.[19] By 1932, President Herbert Hoover, who had originally supported Prohibition, began to talk about "the futility of the whole business."[20] More recently, the "occupy movement" has been a focus of civil disobedience in the United States (and elsewhere in the world). Beginning in September 2011, literally tens of thousands of Americans have "camped out" in public places such as parks or in private and public buildings in order to protest what they believe are severe inequalities in our economic and social systems. As of June 2014 there have been 7,775 arrests in 122 different cities resulting from these acts of civil disobedience.[21] In many states it is against the law to engage in certain sexual activities, such as fornication and adultery. "Fornication" is voluntary sexual intercourse between two unmarried persons, while "adultery" is voluntary sexual intercourse between a married person and someone other than his or her lawful spouse. Indeed, at the present time it is illegal in three states for straight couples to live together without being married.[22] That these laws are seldom obeyed or enforced is a secret to no one. Although most Americans still approve of forbidding sexual practices and acts that they find personally distasteful, few have much enthusiasm for putting police officers in every bedroom or for strictly enforcing laws that touch on very personal issues. There is some indication that the days may be numbered for laws dictating the nature of intimate relations between consenting adults. For example, on June 26, 2003, the Supreme Court struck down the Texas law that outlawed homosexual sex,[23] and after September 20, 2011, the U.S. military ended its "don't ask, don't tell" policy that forbade gays and lesbians from continuing to serve in the military once they had revealed their sexual identity. After this date such persons have been permitted to serve their country openly and freely. And on June 26, 2015, the U.S. Supreme Court made the highly significant ruling

that the Constitution upholds the right of same-sex couples to marry, all state laws and courts decisions to the contrary notwithstanding! Coincidentally, just prior to the U.S. Supreme Court's decision, the highest court in Mexico "ruled it is unconstitutional for states to bar same-sex marriages."[24] However, in other countries being gay is not looked upon so neutrally or benignly. For example, in December 2014 a court in Cairo, Egypt, "upheld the conviction of eight men for 'inciting debauchery' for appearing in an alleged same-sex video. . . . The eight men were convicted based on an Internet video showing two men exchanging rings and embracing among cheering friends at a party on a Nile boat."[25] And in January 2014 "a new law in Nigeria . . . has made it illegal for gay people to even hold a meeting. The Same Sex Marriage Prohibition Act also criminalizes homosexual clubs, associations and organizations, with penalties of up to 14 years in jail."[26]

Concluding Thoughts on the United States and the Rule of Law

So are Americans a law-abiding people or not? Is respect for the law only superficial, and the belief that everyone ought to obey the law mere cant? The truth, it would appear, is that Americans do honestly have great respect for the law and that their abhorrence of lawbreakers is genuine. But it is also fair to say that mixed with this tradition and orientation is a long-standing belief that sometimes people are called to respond to values higher than the ordinary law and thereby to engage in illegal behavior. However, one person's command to disobey the law and follow the dictates of conscience will appear to another as mere foolishness. Furthermore, Americans have a hefty, pragmatic tradition vis-à-vis the law. Laws that drive citizens to the wall economically (such as farm foreclosures during the 1930s) and laws that are seen to needlessly impinge on personal matters (such as Prohibition and laws prohibiting couples from living together without being married) are just not taken as seriously as those that forbid bank robbery and first-degree murder.

A Litigious Society

Like the law, judges are viewed ambivalently by Americans. In general, judges are held in inordinately high esteem, and most Americans would be proud if a son or daughter achieved this position. Yet Americans can be quick to condemn judges whose rulings go against deeply held values or whose decisions are not in the best interests of their pocketbooks.[27] Whether this is hypocrisy or merely the complex and ambivalent nature of humankind is perhaps in the eye of the beholder.

The raw statistics reveal that Americans readily look to the courts to redress their grievances. The quarter of a million suits that are filed in the federal courts each year are dwarfed by the sixteen million suits filed in the courts of the fifty states and the District of Columbia. That works out to one new lawsuit for every twelve adults in America.[28] Although some of these suits deal with relatively minor matters, at least three-fourths deal with fairly substantive legal issues. The financial cost of these lawsuits is staggering: the annual bill for such litigation is an estimated $200 billion (at least half of which represents legal fees and expenses).[29] Furthermore, the proportion

of lawyers in the United States is comparatively quite large, over one million according to the American Bar Association—more per capita than any other country.[30] As one contemporary expert has noted,

> Ours is a law-drenched age. Because we are constantly inventing new and better ways of bumping into one another, we seek an orderly means of dulling the blows and repairing the damage. Of all the known methods of redressing grievances and settling disputes—pitched battle, rioting, dueling, mediating, flipping a coin, suing—only the latter has steadily won the day in these United States.
>
> Though litigation has not routed all other forms of fight, it is gaining public favor as the legitimate and most effective means of seeking and winning one's just deserts.
>
> The impulse to sue is so widespread that "litigation has become the nation's secular religion," and a growing array of procedural rules and substantive provisions is daily gaining its adherents.[31]

It is useful to see Americans' love affair with lawsuits in some type of comparative perspective. Cross-national comparisons reveal that while the United States is a litigious society, citizens in many other industrialized nations are even more litigious. For example, in the United States, for every 1,000 people, some 74.5 law suits are filed. However, in Germany the number is 123.2; in Sweden it is 111.2; in Israel it is 96.8; and in Austria it is 95.9. So, contrary to much popular belief, America is not the most litigious nation in the world.[32]

This virtual explosion of primarily civil litigation in the United States has led the courts to consider cases that in years past were settled privately between citizens or were issues that often went unresolved. Some cases deal with momentous subjects, such as the right of the states to curtail abortion and efforts by the Environmental Protection Agency to enjoin polluters of the environment. But many suits are surprisingly audacious or trivial:

> [Americans] sue doctors over misfortunes that no doctor could prevent. They sue their school officials for disciplining their children for cheating. They sue their local governments when they slip and fall on the sidewalk, get hit by drunken drivers, get struck by lightning on city golf courses—and even when they get attacked by a goose in a park (that one brought the injured plaintiff $10,000). They sue their ministers for failing to prevent suicides. They sue their Little League coaches for not putting their children on the all star team. They sue their wardens when they get hurt playing basketball in prison. They sue when their injuries are severe but self-inflicted, and when their hurts are trivial and when they have not suffered at all.[33]

While such suits are frivolous, they still require the time and efforts of the jurists who must at least consider their merits in the 17,000 courthouses throughout the United States. For example, a federal judge in West Virginia took several printed pages of the *Federal Supplement* to explain why the punishment of a state prisoner

for his refusal to bury a dead skunk was not a violation of the prisoner's civil rights. A federal judge in Pennsylvania agonized at length in print about whether the First Amendment protected *Time* magazine from a **tort** action after the publication had printed a photograph of a man whose fly had become unzipped.[34]

Despite this plethora of less than monumental lawsuits, the judicial system appears to be fighting those who attempt to use the courts to advance frivolous causes. Rule 11 of the Federal Rules of Civil Procedure forbids the filing of worthless petitions, and this was made stronger in 1983, when U.S. trial judges were given the authority to impose sanctions for the filing of frivolous suits. (Critics of the rule have charged that it has had a chilling effect on civil rights suits, but law school studies have largely refuted that claim.)[35] In 1991 the U.S. Supreme Court handed down two key decisions that reaffirmed the imposition of large fines on those filing specious lawsuits—sending a strong message to the legal community that violations of Rule 11 will be taken seriously.[36] Also, in February 2005, President George W. Bush signed into law the Class Action Fairness Act (S. 5). The principal part of the act

> would allow defendants to remove what were formerly non-diverse state law class actions if minimal diversity exists (i.e., one member of the class and one defendant are citizens of different states), the class involves more than 100 people, and the aggregate amount in controversy exceeds $5 million. This effectively would foreclose the fraudulent joinder of local defendants, such as retailers or distributors, to defeat complete diversity and prevent removal. The bill would also foreclose the tactic of pleading damages of less than $75,000 per class member to block removal [from state to federal courts].[37]

Furthermore, the individual states are also electing to combat those who inundate their legal tribunals with worthless petitions.[38] But as with many things in the judiciary, the matter of human judgment is all important: what is frivolous to one person might be deadly serious to another.

Although a burst of litigation has been evident in the United States during the past several decades, Americans have always been litigious people. As early as 1835, the highly perceptive French observer Alexis de Tocqueville noted that "there is hardly a **political question** in the United States which does not sooner or later turn into a judicial one."[39] As one contemporary scholar has said, "To express amazement at American litigiousness is akin to professing astonishment at learning that the roots of most Americans lie in other lands. We have been a litigious nation as we have been an immigrant one. Indeed, the two are related."[40] This scholar goes on to argue that U.S. history was made by diverse groups who wanted to live according to their own customs but found themselves drawn haphazardly into a larger political community. As these groups bumped into one another and the edges became frayed, disputes resulted. But given a fairly strong common law legal tradition, such disputes were channeled, for the most part, into the courtroom rather than onto the battlefield. Many reasons can be cited as to why Americans have been and continue to be highly litigious, and it is beyond the scope of this chapter to examine them all systematically. Suffice it to say that in the United States the courthouse has been and is the anvil on which a significant portion of personal, societal, and political problems are hammered out.

Although America is a litigious society, this trend may be part of a worldwide phenomenon. Even countries that historically made little use of public law courts are seeing increasing use of these tribunals as their citizens gradually deem it appropriate and useful to bring grievances before the courts that in earlier times would have been borne in silence or at least viewed as unsuitable for a judicial tribunal. A case in point is China, which is now seeing lawsuits on an issue that a decade ago would have been considered unthinkable: parents suing the government for the death of their children, which resulted from shoddy workmanship on a collapsed schoolhouse. This stemmed from the horrendous earthquake that occurred in western China on May 12, 2008. The quake left 88,000 people dead or missing, including up to 10,000 schoolchildren, as some 7,000 classrooms and dormitories collapsed across the quake zone. (The government conceded that in the rush to build schools during the Chinese economic boom, poor workmanship or faulty planning might have contributed to the school's collapse during the quake.) In the past, to bring a lawsuit against the Chinese government in such an instance would have been unheard of at best and an act of treason at worst. But on December 1, 2008, the parents whose children died in the collapse of Primary School No. 2 in the town of Fuxin brought suit against the town government, the education department of the nearby city of Mianzhu, the school principal, and the company that built the school. The parents demanded compensation equivalent to $19,000 per child.[41] But, alas, this attempt to use the Chinese courts in this novel way died aborning (at least this time). For on December 23, 2008, U.S. National Public Radio announced in a news broadcast, "A court in southwest China has rejected a lawsuit brought by the parents of schoolchildren who died in the May 12 earthquake in Sichuan province."[42] Still, it was clear to all observers that this was truly a novel phenomenon in modern-day China, and the final chapter in this overall legal upheaval is yet to be written. Additional evidence that a changing, modernizing China is becoming a more litigious society is seen in the number of lawyers per capita. In 2013 China had almost a quarter of a million lawyers, a whopping average annual growth rate of 9.1 percent, and there are now about 20,000 law firms in the country, up 6 percent annually on average. As the All China Lawyers Association said in a recent report: "The ratio of lawyers per 10,000 people is an important indicator of development in the legal industry."[43] A more recent study concluded:

> One thing's for sure in China: Courts of law are increasingly stepping out of the shadows to play a more prominent role regulating Chinese society by settling disputes, with landmark cases aimed at enforcing environmental law, checking the abuse of governmental power and just figuring out how to split up property in messy divorce cases. And more of what they do is on public record, making big areas of law more transparent. Instead of lodging a petition with the government, says Beijing lawyer Wei Shilin, the Chinese are increasingly taking their complaints to a judge, and the courts are often asked to weigh in on the complicated issues thrown up by the rapid changes in this society.[44]

These facts suggest that modern life and the increasing use of law courts may go hand in glove.[45] Because America's judicial caseload is so enormous and far-ranging,

the courts must be examined to understand fully how the nation is governed and how its resources are allocated. Given the significance of courts in formulating and implementing public policy in the United States, it is important to know who the judges are, what their values are, and what powers and prerogatives they possess. And it is essential to study how decisions are made and how they are implemented if the judicial game is to be understood.

Summary

In this chapter we looked briefly at law in the United States—the wells from which it springs, its basic types, and its functions in society. We also examined the ambivalent attitude Americans have about the rule of law; this is a nation born in an illegal revolution, yet it is proud of its respect for law and order. Finally, we noted that Americans' contentiousness as a people has been channeled largely through the legal and court systems. As a consequence, the high priests of the judicial temples, the judges, play a significant role in Americans' personal lives and in their evolution as a society and political entity.

FURTHER THOUGHT AND DISCUSSION QUESTIONS

1. In the introduction to this chapter we discussed the case of Donald Rowland, who took the life of his ailing, elderly wife and then attempted to take his own because of his fear that the couple were going to be a burden on their family. How should society and our legal system respond to such matters? Would it have been more permissible, legally and morally, if Mrs. Rowland had been in a terminal state in a hospital bed, sustained only by a respirator, and Mr. Rowland had requested that the respirator be disconnected? Should "mercy killings" be allowed by law if the murderer seemed to have "good reasons" for his or her actions? If not, should juries be permitted by law to determine by their own standards whether the killer's actions should be excused, using contemporary community standards of right and wrong?
2. In the United States today almost seven million adults—about 3 percent of the population—are either incarcerated or on probation or parole.[46] Is this a sign of the inherent lawlessness of the American people, or is it evidence that the United States is a nation that believes in strict law enforcement?
3. Americans are known internationally for their high numbers filing lawsuits, but many other nations, particularly the developing countries, are beginning to close the gap. Is this a sign of progress or regression on their part?
4. How many U.S. citizens would be willing to break the law and risk imprisonment if their economic survival depended on it? If they believed the law were illegal and unjustified? If they felt the law violated a higher moral or religious belief? If they felt the law unfairly violated their individual liberties?

SUGGESTED RESOURCES

Calvi, James V., and Susan Coleman. *American Law and Legal Systems,* 7th ed. Upper Saddle River, N.J.: Prentice Hall, 2011. A systematic discussion of all the major types of law in the United States.

Hall, Kermit L., and Peter Karsten. *The Magic Mirror: Law in American History.* New York: Oxford University Press, 2008. A discussion of the historical interactions of law with events in the social and political realms.

Howard, Philip K. *Life without Lawyers: Restoring Responsibility in America.* New York: W. W. Norton, 2009. This legal reformer argues that we are being choked to death by lawyers and with too much law. His critique is directed mainly toward the realms of health care, education, and the plaintiffs' bar.

Irons, Peter. *The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court.* New York: Penguin, 1990. Examines sixteen case studies of strong-minded individuals who fought their legal battles all the way to the Supreme Court.

Macaulay, Stewart, Lawrence Friedman, and John Stookey, eds. *Law and Society: Readings on the Social Study of Law.* New York: W. W. Norton, 1997. A comprehensive and well-edited reader for the more advanced student interested in the interaction among the values of law and society.

May, Larry, and Jeff Brown. *Philosophy of Law: Classic and Contemporary Readings*. West Sussex, UK: Wiley-Blackwell, 2010. A wide selection of readings about various philosophies of law, punishment, liberty, legal reasoning, and so on.

Sarat, Austin, ed. *Law, Politics, and Society.* Bingley, UK: Emerald Books, 2012. A collection of readings on diverse topics such as the purpose of law, the dilemmas inherent in social organization, and the discretionary aspects of the judicial system.

Vago, Steven. *Law and Society,* 10th ed. Upper Saddle River, N.J.: Prentice Hall, 2011. A good summary of law and society issues in the United States, with an excellent comparative perspective on these issues.

NOTES

1. Alan Burdziak, "Man Pleads Guilty to Reduced Charge in Wife's Stabbing Death," *Columbia Daily Tribune,* March 3, 2015, http://www.columbiatribune.com/news/crime/man-pleads-guilty-to-reduced-charge-in-wife-s-stabbing/article_18205be2-be9c-5b80-8584-f81ff71fe62d.html (accessed September 8, 2015).
2. Ibid.
3. "Columbia Man, 88, Gets 5 Years of Probation in Wife's Death," *News Democrat,* April 14, 2015, http:www.bnd.com/2015/04/14/3764155/Columbia-man-88-gets-5-yars-of.html (accessed April 14, 2015).
4. Ibid.
5. Stephen D. Ford, *The American Legal System: Its Dynamics and Limits* (St. Paul, Minn.: West, 1974), 13. Our elaborations on this definition of law are borrowed from chap. 1 of Ford's text.
6. U.S. Constitution, Amendment XIV, Section 1.
7. Dahlia Lithwick, "Imagining Life without Lawyers," *Newsweek,* February 9, 2009, 20.
8. Geoff Earle, "Obama to Spare 5M Illegal Immigrants from Deportation," *New York Post,* http://nypost.com2014/11/20/defying-gop-obama-spares-5M-immigrants-from-deportation/ (accessed March 16, 2015).

9. Jon Queally, "Federal Judge in Texas Places Injunction on Obama Immigration Plan," http://www.southernstudies.org/2015/02/federal-judge-in-texas-places-injunction-on-obama-immigration-policy/ (accessed March 16, 2015).
10. David Nakamura, "Appeals Court Rules against Obama on Immigration Program," *Washington Post,* May 26, 2015, http://www.washingtonpost.com/politics/appeals-court-rules-against-obama-on-immigration/2015/05/26/7546832a-03d9–11e5-a428-c984eb077d4e_story.html?wpisrc=nl_headlines&wpmm=1 (accessed May 27, 2015).
11. Adam Nagourney, "Drought Forces California's First-Ever Water Restrictions," *Houston Chronicle*, April 2, 2015, A4.
12. *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952).
13. "Utah OK's 'A Little Bit Gruesome' Firing Squads," *Houston Chronicle*, March 24, 2015, A5.
14. Andrew Romano, "Jailbreak!" *Newsweek*, April 23 and 30, 2012, 22.
15. T. R. Fehrenbach, *Lone Star: A History of Texas and the Texans* (New York: American Legacy Press, 1968), 336.
16. Martin Luther King Jr., "Letter from Birmingham Jail, April 16, 1963." The full text of the letter may be found in *Why We Can't Wait* (New York: Harper and Row, 1963).
17. Abe Fortas, *Concerning Dissent and Civil Disobedience* (New York: Signet, 1970), 18.
18. Nicole Winfield, "Pope Says Druggists Have Moral Right," *Houston Chronicle,* October 30, 2007, A10.
19. Andrew Sinclair, "Prohibition: The Era of Excess," in *Law and the Behavioral Sciences,* ed. Lawrence M. Friedman and Stewart Macaulay (New York: Bobbs-Merrill, 1977), 353.
20. Ibid.
21. "Occupy Arrests.com," http://occupyarrests.moonfruit.com/ (accessed March 17, 2015).
22. "Cohabitation in the United States," http://enwikipedia.org/wiki/Cohabitation_in_the_United States (accessed March 17, 2015).
23. *Lawrence v. Texas,* 539 U.S. 558 (2003). By a 6–3 vote, the justices overturned their previous ruling to the contrary, *Bowers v. Hardwick,* 478 U.S. 186 (1986), decided some seventeen years earlier.
24. "Mexico: Supreme Court Bars State Bans on Gay Marriage," *Houston Chronicle,* June 13, 2015, A2.
25. "Sentences Cut for Same-Sex Wedding," *Houston Chronicle*, December 28, 2014, A22.
26. "Nigeria's New Anti-Gay Law condemned by U.S., Britain," *Houston Chronicle,* January 14, 2014, A7.
27. See, for example, Jack W. Peltason, *Fifty-Eight Lonely Men* (New York: Harcourt, Brace and World, 1961); and Jack Bass, *Unlikely Heroes* (New York: Simon and Schuster, 1981).
28. "How Many Court Cases Are Filed Every Year?" http://answers.yahoo.com/question/index?qid (accessed March 17, 2015).
29. Stuart Taylor Jr. and Evan Thomas, "Civil Wars," *Newsweek,* December 15, 2003, 45.
30. Lithwick, "Imagining Life without Lawyers," 20.
31. Jethro K. Lieberman, *The Litigious Society* (New York: Basic Books, 1983), viii.
32. "Global Litigation Rates: The U.S. Is Not the Leader," *doeLegal Journal*, March 29, 2011, http://doelegal.blogspot.com/2011/03/global-litigation-rates-us-is-not.html (accessed April 9, 2012).
33. Taylor and Thomas, "Civil Wars," 45.
34. Robert A. Carp and C. K. Rowland, *Policymaking and Politics in the Federal District Courts* (Knoxville: University of Tennessee Press, 1983), 18.
35. Stephen Wermiel, "High Court Agrees to Hear Case on Segregation at State Colleges," *Wall Street Journal,* April 16, 1991.
36. *Chambers v. U.S. Department of the Army,* 499 U.S. 645 (1991); and *Kunstler v. Britt,* 499 U.S. 969 (1991).
37. This quotation was taken from the Web site of the American Tort Reform Association: www.atra.org.
38. For example, see the Web site of the American Tort Reform Association, ibid., and its state-by-state analysis of tort reform.

39. Alexis de Tocqueville, *Democracy in America,* ed. J. P. Mayer and Max Lerner, trans. George Lawrence (New York: Harper and Row, 1966), 248.
40. Lieberman, *The Litigious Society,* 13.
41. Edward Wong, "Quake in China Prompts Lawsuit," *Houston Chronicle,* December 23, 2008, A12.
42. Statement on National Public Radio by Anthony Kuhn, December 23, 2008, www.npr.org/templates/story/story.php?storyId=98657422 (accessed July 15, 2012).
43. "The Rule of Law Ascends in China?" http://www.ozy.com/fast-forward/the-rule-of-law-ascends-in-china/60347?utm_source=dd (accessed June 10, 2015).
44. The evidence suggests that this litigious trend is also being experienced in Europe. For example, see Charles Fleming, "Europe Learns Litigious Ways: Union's Tactic Spotlights Trend toward U.S.-Style Lawsuits," *Wall Street Journal,* February 24, 2004.
45. "China Has 1.6 Lawyers per 10,000 People," http://news.xinhuanet.com/english/china/2013–08/27c_132667809.htm (accessed March 17, 2015).
46. "Incarceration in the United States," http://enwikipedia.org/wiki/incarceration_in_the_United_States (accessed March 17, 2015).

CHAPTER

2

The Federal Judicial System

Courtesy of the Library of Congress, Prints and Photographs Division

U.S. Supreme Court Building, Washington, D.C.

One of the most important, most interesting, and most confusing features of the judiciary in the United States is the dual court system—that is, each level of government (state and national) has its own set of courts. Thus there is a separate court system for each state, one for the District of Columbia, and one for the federal government. Some legal problems are resolved entirely in the state courts, whereas others are handled entirely in the federal courts. Still others may receive attention from both sets of tribunals.

To simplify matters, we discuss the federal courts in this chapter and the state courts in Chapter 3. Because knowledge of the historical events that helped shape the national court system can shed light on the present judicial structure, our study of the federal judiciary begins with a description of the court system as it has evolved over more than two centuries. We first examine the three levels of the federal court system in the order in which they were established: the Supreme Court, the courts of

appeals, and the district courts. The emphasis in our discussion of each level will be on policymaking roles and decision-making procedures.

In a brief look at other federal courts we focus on the distinction between constitutional and legislative courts. Next, we discuss the individuals and organizations that provide staff support and administrative assistance in the daily operations of the courts. Our overview discussion concludes with a brief look at the workload of the federal courts.

The Historical Context

Prior to ratification of the Constitution, the country was governed by the Articles of Confederation. Under the Articles, almost all functions of the national government were vested in a single-chamber legislature called Congress. There was no separation of executive and legislative powers.

The absence of a national judiciary was considered a major weakness of the Articles of Confederation. Both James Madison and Alexander Hamilton, for example, saw the need for a separate judicial branch. Consequently, the delegates gathered at the Constitutional Convention in Philadelphia in 1787 expressed widespread agreement that a national judiciary should be established. A good deal of disagreement arose, however, on the specific form that the judicial branch should take.

The Constitutional Convention and Article III

The first proposal presented to the Constitutional Convention was the Randolph Plan (also known as the Virginia Plan), which would have set up both a Supreme Court and inferior federal courts. Opponents of the Virginia Plan responded with the Paterson Plan (also known as the New Jersey Plan), which called for the creation of a single federal supreme tribunal. Supporters of the New Jersey Plan were especially disturbed by the idea of lower federal courts. They argued that the state courts could hear all cases in the first instance and that a right of appeal to the Supreme Court would be sufficient to protect national rights and provide uniform **judgments** throughout the country.

The conflict between the states' rights advocates and the nationalists was resolved by one of the many compromises that characterized the Constitutional Convention. The compromise is found in Article III of the Constitution, which begins, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Thus the conflict would be postponed until the new government was in operation.

The Judiciary Act of 1789

Once the Constitution was ratified, action on the federal judiciary came quickly. When the new Congress convened in 1789, its first major concern was judicial organization. Discussions of Senate Bill 1 involved many of the same participants and arguments that were involved in the Constitutional Convention's debates on the judiciary. Once again, the question was whether lower federal courts should be created at

all or whether federal claims should first be heard in state courts. Attempts to resolve this controversy split Congress into two distinct groups.

One group, which believed that federal law should be adjudicated in the state courts first and by the U.S. Supreme Court only on appeal, expressed the fear that the new government would destroy the rights of the states. The other group of legislators, suspicious of the parochial prejudice of state courts, feared that litigants from other states and other countries would be dealt with unjustly. This latter group naturally favored a judicial system that included lower federal courts. The law that emerged from the debate, the Judiciary Act of 1789, set up a judicial system comprising a Supreme Court, consisting of a chief justice and five associate justices; three circuit courts, each with two justices of the Supreme Court and a district judge; and thirteen district courts, each presided over by one district judge. The power to create inferior federal courts, then, was immediately exercised. Congress created not one but two sets of lower courts.

The U.S. Supreme Court

A famous jurist once said, "The Supreme Court of the United States is distinctly American in conception and function, and owes little to prior judicial institutions."[1] To understand what the framers of the Constitution envisioned for the Court, another American concept must be considered: the federal form of government. The founders provided for both a national government and state governments; the courts of the states were to be bound by federal laws. However, final interpretation of federal laws could not be left to a state court and certainly not to several state tribunals, whose judgments might disagree. Thus the Supreme Court must interpret federal legislation. Another of the founders' intentions was for the federal government to act directly on individual citizens as well as on the states. The Supreme Court's function in the federal system may be summarized as follows:

> In the most natural way, as the result of the creation of Federal law under a written constitution conferring limited powers, the Supreme Court of the United States came into being with its unique function. That court maintains the balance between State and Nation through the maintenance of the rights and duties of individuals.[2]

Given the high court's importance to the U.S. system of government, it was perhaps inevitable that the Court would evoke great controversy. A leading student of the Supreme Court said,

> Nothing in the Court's history is more striking than the fact that, while its significant and necessary place in the Federal form of Government has always been recognized by thoughtful and patriotic men, nevertheless, no branch of the Government and no institution under the Constitution has sustained more continuous attack or reached its present position after more vigorous opposition.[3]

The Impact of Chief Justice Marshall

John Marshall served as chief justice from 1801 to 1835, and although he was not the nation's first chief justice, he dominated the Court to a degree unmatched by anyone who came after him. In effect, Marshall was the Court—perhaps because, in the words of one scholar, he "brought a first-class mind and a thoroughly engaging personality into second-class company."[4] Marshall's dominance of the Court enabled him to initiate some major changes in the way opinions were presented. Before his tenure, the justices ordinarily wrote separate opinions (called seriatim opinions) in major cases. Under Marshall's stewardship, the Court adopted the practice of handing down a single opinion, and the evidence shows that from 1801 to 1835 Marshall himself wrote almost half the opinions.[5] In addition to bringing about changes in opinion-writing practices, Marshall used his powers to involve the Court in the policymaking process. Early in his tenure as chief justice, in *Marbury v. Madison* (1803), the Court asserted its power to declare an act of Congress unconstitutional.[6]

This case had its beginnings in the presidential election of 1800, when Thomas Jefferson defeated John Adams in his bid for reelection. Before leaving office in March 1801, Adams and the lame-duck Federalist Congress combined efforts to create several new federal judgeships. To fill these new positions Adams nominated, and the Senate confirmed, loyal Federalists. In addition, Adams named his outgoing secretary of state, John Marshall, to be the new chief justice of the United States.

As secretary of state, Marshall had the job of delivering the commissions of the newly appointed judges. Time ran out before the new administration took over, however, and seventeen of the commissions were not delivered before Jefferson's inauguration. Jefferson in turn ordered his secretary of state, James Madison, to abstain from delivering the remaining commissions.

One of the disappointed nominees, William Marbury, and three of his colleagues, all confirmed as justices of the peace for the District of Columbia, decided to ask the Supreme Court to force Madison to deliver their commissions. They relied on Section 13 of the Judiciary Act of 1789, which granted the Supreme Court the authority to issue **writs of mandamus**—court orders commanding a public official to perform an official, nondiscretionary duty.

The case placed Justice Marshall in an uncomfortable position. Some proposed that he disqualify himself because of his earlier involvement as secretary of state. There was also the question of the Court's power. If Marshall were to grant the writ, Madison (under Jefferson's orders) would be almost certain to refuse to deliver the commissions. The Supreme Court would then be powerless to enforce its order. However, if Marshall refused to grant the writ, Jefferson would win by default.

The decision Marshall fashioned from this seemingly impossible predicament was evidence of sheer genius. He declared Section 13 of the Judiciary Act of 1789 unconstitutional because it granted **original jurisdiction** to the Supreme Court in excess of that specified in Article III of the Constitution. Thus the Court's power to review and determine the constitutionality of acts of Congress was established. This decision is rightly seen as one of the single most important decisions the Supreme Court has ever handed down. A few years later the Court also claimed the right of **judicial review** of actions of state legislatures. During Marshall's tenure it overturned

more than a dozen state laws on constitutional grounds.[7] Inferior federal and state courts also exercise the power to review the constitutionality of legislation. Judicial review is one of the features that set American courts apart from those in other countries. Judicial scholar Herbert Jacob says that "the United States is the outlier in the extraordinary power that its ordinary courts exercise in reviewing the constitutionality of legislation; France and Germany occupy intermediate positions, and the Japanese courts are the least active."[8] Constitutional challenges to legislation do occur in France and Germany, but ordinary judges sitting in ordinary courts do not exercise these powers. In Japan the Supreme Court, although possessing the power of constitutional review, rarely exercises it. Judicial review in the United Kingdom is basically of administrative actions.[9]

The Supreme Court as a Policymaker

The Supreme Court's role as a policymaker derives from the fact that it interprets the law. Public policy issues come before the Court in the form of legal disputes that must be resolved:

> Courts in any political system participate to some degree in the policymaking process because it is their job. Any judge faced with two or more interpretations and applications of a legislative act, executive order, or constitutional provision must choose among them because the controversy must be decided. And when the judge chooses, his or her interpretation becomes policy for the specific litigants. If the interpretation is accepted by the other judges, the judge has made policy for all jurisdictions in which that view prevails.[10]

In an article about the European Court of Justice, which serves the twenty-five member states of the European Union, judicial scholar Sally J. Kenney said that this court, like the U.S. Supreme Court, "is grappling with the most important policy matters of our time—separation of powers, the environment, communications, labor policy, affirmative action, sex discrimination, and human rights issues."[11] Fundamental human rights issues in the European Court of Justice are typically raised in the context of trade, however.[12]

An excellent example of U.S. Supreme Court policymaking may be found in the area of racial equality. In the late 1880s many states enacted laws requiring the separation of blacks and whites in public facilities. In 1890, for instance, Louisiana enacted a law requiring "separate but equal" railroad accommodations for blacks and whites. A challenge came two years later, when Homer Plessy, who was one-eighth black, protested the Louisiana law by refusing to move from a seat in the white car of a train traveling from New Orleans to Covington, Louisiana. Arrested and charged with violating the statute, Plessy contended that the law was unconstitutional. The U.S. Supreme Court, in *Plessy v. Ferguson* (1896), upheld the Louisiana statute.[13] Thus the Court established the separate-but-equal policy that was to be in effect for about sixty years. During this period many states required that the races sit in different areas of buses, trains, terminals, and theaters; use different restrooms; and drink from different water fountains. Blacks were sometimes excluded from restaurants

and public libraries. Perhaps most important, black students often had to attend inferior schools set aside for a black-only constituency. This body of laws and extralegal practices was unofficially referred to as Jim Crow, after the title of an anonymous nineteenth-century song.

Separation of the races in public schools was contested in the famous *Brown v. Board of Education* case of 1954.[14] Parents of black schoolchildren claimed that state laws requiring or permitting segregation deprived them of equal protection of the laws under the Fourteenth Amendment. The Supreme Court ruled that separate educational facilities are inherently unequal and, therefore, segregation constitutes a denial of equal protection. In the *Brown* decision the Court overturned the separate-but-equal doctrine and established a policy of desegregated public schools.

In an average year the Court decides, with signed opinions, some seventy to ninety cases.[15] Thousands of other cases are disposed of with less than the full treatment. Thus the Court deals at length with a very select set of policy issues that have varied throughout its history.

In a democracy broad matters of public policy are, at least in theory, presumed to be left to the elected representatives of the people—not to judicial appointees with life terms. In principle, U.S. judges are not supposed to make policy, but in practice they cannot help but do so to some extent, as the examples discussed earlier demonstrate.

The Supreme Court, however, differs from legislative and executive policymakers. Especially important is the fact that the Court has no self-starting device. The justices must wait for problems to be brought to them; there can be no judicial policymaking if there is no litigation. The president and members of Congress have no such constraints. Moreover, even the most assertive Supreme Court is limited to some extent by the actions of other policymakers, such as lower court judges, Congress, and the president. The Court depends on others to implement its decisions.

The Supreme Court as Final Arbiter

The Supreme Court has both original and **appellate jurisdiction**. Original jurisdiction means that a court has the power to hear a case for the first time. Appellate jurisdiction means that a higher court has the authority to review cases originally decided by a lower court.

The Supreme Court is overwhelmingly an appellate court because most of its time is devoted to reviewing decisions of lower courts. The Supreme Court is the highest appellate tribunal in the country, and as such, it has the final word in the interpretation of the Constitution, acts of legislative bodies, and treaties—unless the Court's decision is altered by a constitutional amendment or, in some instances, by an act of Congress.

Since 1925 a device known as certiorari has allowed the high court to exercise discretion in deciding which cases it should review. Under this method a person may request Supreme Court review of a lower court decision; then the justices determine whether the request should be granted. In the October 2012 term the Court granted review to only seventy-seven cases.[16] If review is granted, the Court issues a **writ of certiorari**, which is an order to the lower court to send up a complete record of the case. When certiorari is denied, the decision of the lower court stands.

The Supreme Court at Work

The formal session of the Supreme Court lasts from the first Monday in October until the business of the term is completed, usually in late June or July. Since 1935 the Supreme Court has had its own building in Washington, D.C. The imposing five-story marble building, which stands across from the Capitol, has the words "Equal Justice Under Law" carved above the entrance. Formal sessions are held in a large courtroom that seats three hundred people. At the front of the courtroom is the bench where the justices are seated. When the Court is in session, the chief justice, followed by the eight associate justices (the number since 1869) in order of seniority (length of continuous service on the Court), enters through the purple draperies behind the bench and takes a seat. Seats are arranged according to seniority, with the chief justice in the center, the senior associate justice on the chief justice's right, the second-ranking associate justice on the left, and continuing alternately in descending order of seniority. Near the courtroom are the conference room, where the justices decide cases, and the chambers that contain offices for the justices and their staffs.

The Court's term is divided into sittings, each lasting approximately two weeks, during which the justices meet in open session and hold internal conferences, and recesses, during which the justices work behind closed doors to consider cases and write opinions. The seventy to ninety cases per term that receive the Court's full treatment follow a fairly routine pattern, which is described below.

Oral Argument. **Oral arguments** are generally scheduled on Monday through Wednesday during the sittings. The sessions run from 10:00 a.m. to noon and from 1:00 to 3:00 p.m. Because the procedure is not a trial or the original hearing of a case, no jury is assembled and no witnesses are called. Instead, the two opposing attorneys present their arguments to the justices. The general practice is to allow thirty minutes for each side, although the Court may decide that additional time is necessary. For example, when the Court heard oral arguments in the same-sex marriage case (*Obergefell v. Hodges*) on April 28, 2015, it allotted two-and-a-half hours. The Court normally hears four cases in one day. Attorneys presenting oral arguments are frequently interrupted with probing questions from the justices. The oral argument is considered very important by both attorneys and justices because it is the only stage in the process that allows such personal exchanges.

The Conference. On Fridays preceding the two-week sittings the Court holds conferences; during sittings it holds conferences on Wednesday afternoon and all day Friday. At the Wednesday meeting the justices discuss the cases argued on Monday. At the longer conference on Friday they discuss the cases that were argued on Tuesday and Wednesday, plus any other matters that need to be considered. The most important of these other matters are the certiorari petitions.

Before the Friday conference, each justice is given a list of the cases that will be discussed. The conference begins at about 9:30 or 10:00 a.m. and runs until 5:30 or 6:00 p.m. As the justices enter the conference room, they shake hands with one another and take their seats around a rectangular table. They meet behind locked doors, and no official record is kept of the discussions. The chief justice presides over

the conference and offers an opinion first in each case. The other justices follow in descending order of seniority. At one time a formal vote was then taken in reverse order (with the junior justice voting first); today the justices usually indicate their view during the discussion, making a formal vote unnecessary.

A quorum for a decision on a case is six members; obtaining a quorum is seldom difficult. Cases are sometimes decided by fewer than nine justices because of vacancies, illnesses, or nonparticipation resulting from possible conflicts of interest. Supreme Court decisions are made by a majority vote. In the event of a tie, the lower court decision is upheld.

Opinion Writing. After a tentative decision has been reached in conference, the next step is to assign an individual justice to write the Court's opinion. The chief justice, if voting with the majority, either writes the opinion or assigns it to another justice who voted with the majority. When the chief justice votes with the minority, the most senior justice in the majority makes the assignment.

After the conference the justice who will write the Court's opinion begins work on an initial draft. Other justices may work on the case by writing alternative opinions. The completed opinion is circulated to justices in both the majority and the minority groups. The writer seeks to persuade justices originally in the minority to change their votes and to keep their majority group intact. A bargaining process ensues, and the wording of the opinion may be changed to satisfy other justices or obtain their support. A deep division in the Court makes it difficult to achieve a clear, coherent opinion and may even result in a shift in votes or in another justice's opinion becoming the Court's official ruling.

In most cases a single opinion does obtain majority support, although few rulings are unanimous. Those who disagree with the **opinion of the Court** are said to dissent. A dissent does not have to be accompanied by a **dissenting opinion**, but in recent years it usually has been. Whenever more than one justice dissents, each may write an opinion or all may join in a single opinion.

On occasion a justice will agree with the Court's decision but differ in his or her reason for reaching that conclusion. Such a justice may write what is called a **concurring opinion.** A classic example is Justice Sandra Day O'Connor's concurring opinion in *Lawrence v. Texas* (2003).[17] In that case the majority relied on the Due Process Clause of the Fourteenth Amendment to declare a Texas statute banning same-sex sodomy unconstitutional. Justice O'Connor agreed with the majority that the statute should be struck down, but based her conclusion on the Fourteenth Amendment's Equal Protection Clause. As sodomy between opposite-sex partners is not a crime in Texas, the state treats the same conduct differently based solely on the sex of the participants. According to Justice O'Connor, that violates the Equal Protection Clause.

An opinion labeled "concurring and dissenting" agrees with part of a Court ruling but disagrees with other parts. Finally, the Court occasionally issues a **per curiam** opinion—an unsigned opinion that is usually brief. Such opinions are often used when the Court accepts the case for review but gives it less than full treatment. For example, it may decide the case without benefit of oral argument and issue a per curiam opinion to explain the disposition of the case.

The U.S. Courts of Appeals

The **courts of appeals** have been described as "perhaps the least noticed of the regular constitutional courts."[18] They receive less media coverage than the Supreme Court, in part because their activities are simply not as dramatic. However, one should not assume that the courts of appeals are unimportant to the judicial system. For example, in its 2012 term the Supreme Court handed down decisions with full opinions in only seventy-six cases; this means that the courts of appeals are the courts of last resort for most appeals in the federal court system.

Originating in the Judiciary Act of 1789 as three circuit courts, the courts making up the intermediate level of the federal judiciary evolved into courts of appeals in 1948. Despite this official name, they continue to be referred to colloquially as circuit courts. Although these intermediate appellate courts have been headed at one time or another by circuit judges, courts of appeals judges, district judges, and Supreme Court justices, they now are staffed by 167 authorized courts of appeals judges.

Nine regional courts of appeals, each encompassing several states, were created in 1891. Another, covering the District of Columbia, was absorbed into the system after 1893. Next came the Court of Appeals for the Tenth Circuit, which was carved from the Eighth Circuit in 1929. In 1981, following a long battle during which many civil rights activists expressed fear that a split might negate gains they had made acting through the courts, the Court of Appeals for the Eleventh Circuit was carved from the Fifth Circuit.[19] The courts of appeals in each of the twelve regional circuits are responsible for reviewing cases appealed from federal district courts (and in some cases from administrative agencies) within the boundaries of the circuit. Figure 2.1 depicts the appellate and district court boundaries and indicates the states contained in each.

A specialized appellate court came into existence in 1982, when Congress established the Federal Circuit, a jurisdictional instead of a geographic circuit. The U.S. Court of Appeals for the Federal Circuit was created by consolidating the Court of Claims and the Court of Customs and Patent Appeals.

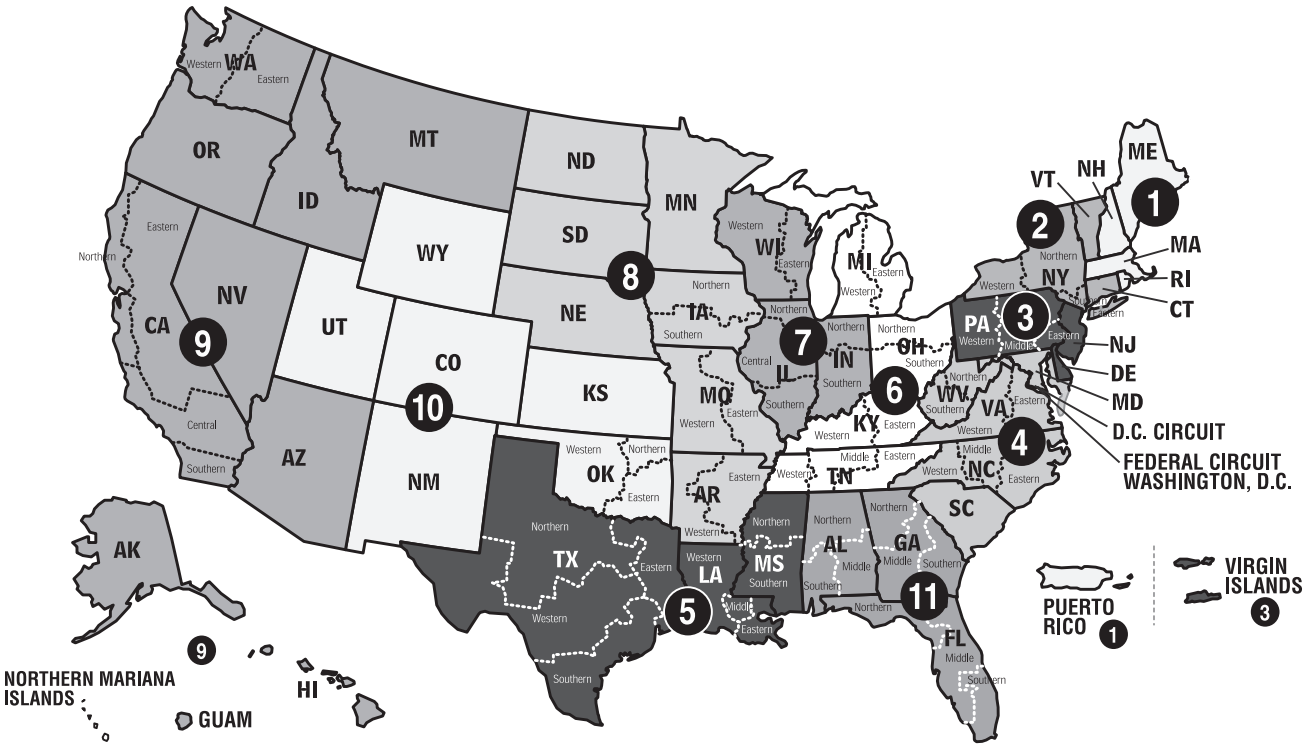
The Review Function of the Courts of Appeals

As one modern-day student of the judiciary has noted,

> The distribution of labor among the Supreme Court and the Courts of Appeals, implicit in the Judiciary Act of 1925, has matured into fully differentiated functions for federal appellate courts. Substantively, the Supreme Court has become more and more a constitutional tribunal. Courts of Appeals concentrate on statutory interpretation, administrative review, and error correction in masses of routine adjudications.[20]

Although the Supreme Court has had discretionary control of its docket since 1925, the courts of appeals still have no such luxury. Instead, their docket depends on how many and what types of cases are appealed to them.

FIGURE 2.1 District and Appellate Court Boundaries



Source: Administrative Office of the United States Courts, www.uscourts.gov/uscourts/images/CircuitMap.pdf.

Note: The large numerals indicate the Courts of Appeals; the dashed lines indicate district boundaries. Number and composition of circuits set forth by 28 U.S.C. § 41.