Civil Procedure

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Civil Procedure

A Coursebook

Fourth Edition

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I dedicate this book to Carol McGeehan.
—J.W.G.

To Lisa, Maya, Brynne, and Talia
—A.M.P.

To Winnie, Erik, and Anna
—P.R-H.

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PREFACE

After decades of teaching Civil Procedure, we became convinced that students need a text that offers more than a series of cases followed by dense post-case notes and questions. Simply put, we concluded that students need a *coursebook,* not simply a *casebook.*

Based on this premise, we developed a number of features in this book that should help you to place the material in context. For example, each chapter begins with a brief summary of contents to orient you to the topics covered in the chapter. Moreover, each case begins with an introduction that provides context for the opinion and offers factual and legal background to make the case more accessible. The case introductions also pose questions for you to consider *before* you read each case to help you focus on the important aspects of the opinion.

Following each case, we provide textual notes and questions, but, unconventionally, *we answer almost all of the questions we pose.* We believe that the typical unanswered casebook question is ineffective. If you think that you know the answer, you have no way of confirming it. If you do not know the answer, the authors have lost an opportunity to educate you. Unanswered questions and dense post-case notes that require you to consult outside authorities often produce more frustration than understanding, so we have largely avoided them.

We also have adopted a number of other techniques that make this book more user-friendly. We have written short chapters of manageable scope. We have used a different font and a shaded border for the text of opinions, so you will know when you are reading original material as opposed to our text. For some especially difficult cases, we have inserted bracketed editorial guidance into the case itself. We include multiple choice questions to test your understanding of new concepts and, in keeping with our pedagogical approach, we include our analyses of these questions. We also have adopted another simple feature that our students appreciate: a summary of key concepts at the close of each chapter.

The coursebook will also improve your capacity for legal analysis. For example, by highlighting the subtle distinctions between the best answer to a multiple choice question and "near misses," the coursebook will help you to develop the ability to make fine distinctions in applying complicated concepts. We also offer several detailed questions for more in-depth treatment, followed by a sample "issue analysis" so that you can see how to analyze a sophisticated problem.

We expect that the coursebook will hone your analytical skills, give you a rich understanding of civil procedure, and provide important insights into the role that procedure plays in the American system of justice.

Joseph W. Glannon
Andrew M. Perlman
Peter Raven-Hansen

November 2020

BOOK FEATURES AND CONVENTIONS

This book uses several unique features and conventions, including the following:

Q / A — These icons flag questions and answers for your consideration. We recommend that you try to answer these questions on your own before reading the answers that we supply.

Case reading guidance — We include a boxed, shaded guide to reading each case, which provides important background material and questions that you should try to answer while reading the opinion.

Italicization of terms of art — When we mention a term of art for the first time, we place the word or phrase in italics. Some Latin phrases also consistently appear in italics.

Shaded borders — We use a shaded border to the left of the principal cases to highlight when you are reading the text of a case rather than our own text and to make it easier for you to locate case excerpts during class.

Bracketed editorial inserts — We occasionally include our own explanatory material in the body of an opinion. This material, which appears in the case itself or in an asterisked footnote, is set off in brackets and, if it is more than two lines long, begins with "EDS.—" to make clear that you are reading our text rather than the text of the case.

Internal case citations — We regularly omit internal case citations that appear in the body of an opinion without noting the omission. We have retained citations (without parallel citations) when needed to identify the source of a quotation, and we indicate textual omissions (other than internal case citations) through the use of ellipses.

Footnotes — When we have retained a footnote in a case, we have kept its original Arabic number. We have omitted all other case footnotes without noting the omission. Our own footnotes have asterisks.

Short forms for commonly cited books and treatises — We have adopted short citation forms for certain books and treatises frequently cited in the text, including:

Richard D. Freer, CIVIL PROCEDURE (4th ed. 2018) is referred to as *Freer*.
James W. Moore et al., MOORE'S FEDERAL PRACTICE is referred to as *Moore*.
Gene R. Shreve, Peter Raven-Hansen & Charles Gardner Geyh, UNDERSTANDING CIVIL PROCEDURE (6th ed. 2019) is referred to as *Shreve, Raven-Hansen & Geyh*.
Charles Alan Wright & Mary Kay Kane, LAW OF FEDERAL COURTS (8th ed. 2017) is referred to as *Wright & Kane*.
Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE is referred to as *Wright & Miller*.

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Writing and updating a book of this size and scope is a major undertaking. We have been fortunate to receive invaluable assistance from Darren Kelly and Tom Daughhetee at The Froebe Group in preparing the Fourth Edition. We are also grateful for the indispensable role played by Carol McGeehan in encouraging and supporting this project through its ten-year gestation period.

Thanks, too, to the many research assistants who assisted us in preparing and revising the book, and to members of the Civil Procedure professoriat who reviewed various chapters and gave us valuable input and advice, and continue to do so. We are especially grateful to Professor Aaron Caplan for his many helpful comments and corrections.

It is common for authors to thank their spouses and families. After writing this book, it is clear why they deserve our thanks. A project of this sort requires efforts above and beyond the usual demands of academic life. We are grateful to our families for their support, patience, and encouragement, and especially to our spouses, Ann Glannon, Lisa Aidlin, and Winnie Raven-Hansen.

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Civil Procedure

PART I

Introduction

1

An Introduction to American Courts

I. Some Introductory Comments

The purpose of this book is to introduce you to the process of civil litigation in American courts. To help you understand this process, the book includes not only cases—the staple of most first-year courses—but a variety of other materials as well, including explanatory text, multiple choice questions, hypotheticals, and questions for further study.

First-year law casebooks have traditionally tended to "hide the ball," leaving students to struggle with complex problems without much guidance or background. This book starts from a different premise: that you will learn more from class preparation and from class if the coursebook provides explanatory material to accompany the cases. We explain basic principles fully and (departing again from tradition) we answer most of the questions that we pose in our notes. Even with such explanations, much sophisticated material remains for you and your procedure professor to work through in class. A firm grasp of the basics will help you to address the complex issues more effectively.

This chapter and the next introduce basic concepts about litigation in American courts. We then turn to a fundamental question that arises at the beginning of every lawsuit: In which court should a lawyer file (i.e., start) the case? As these chapters indicate, counsel must consider three requirements in choosing a proper court: subject matter jurisdiction, personal jurisdiction, and venue.

First, the court must have *subject matter jurisdiction* over the case, that is, authority to hear the type of dispute at issue. If you want to sue someone for hitting your car, you need to figure out which courts have the power to hear motor vehicle accident cases. Can a federal court hear this type of dispute? How about a state court? If a state court can hear it, which of the various courts within the state court system is authorized to hear it? The answers to these questions require an understanding of the concept of subject matter jurisdiction. Chapters 3 through 5 analyze this fundamental requirement.

Second, the court must have *personal jurisdiction* over the defendant. Lawsuits are a great inconvenience to defendants. Consequently, both the United States Constitution and statutes restrict the power of courts to force a defendant from one state to appear and defend a lawsuit in another. If Stein lives in Colorado and hits Fernandez's car in Denver, can Fernandez sue Stein for his injury in Nebraska? The answer depends on whether the Nebraska court has personal jurisdiction over Stein, that is, the power to force her to appear in a Nebraska court to defend the case. Chapters 6 through 9 introduce the accepted bases on which a court can exercise personal jurisdiction.

Third, the plaintiff must choose a court that is an authorized *venue* for the action under the relevant venue statute. Venue defines which courts within a court system (e.g., the California state court system) can hear a particular suit. If you live in California and have an accident in Los Angeles, can the driver of the other car sue you in a state court in San Francisco? The answer to this question turns on whether the San Francisco court is "a proper venue" under California venue statutes. While personal jurisdiction restricts a court's power over an out-of-state defendant, venue regulates which specific court within a court system may hear a particular case. Chapters 11 and 12 discuss venue and transfers of venue.

After analyzing these three principles that determine where a suit may be brought, we turn to the actual process of litigation. Several chapters analyze *pleadings*, the documents by which parties commence a case and state their positions on the issues in dispute. We then turn to the problem of *joinder*, the rules governing who can be made parties to a single case and the scope of claims that may be asserted in a single action. Several chapters cover pretrial *discovery* of evidence, the process by which parties exchange relevant information before trial. Later chapters cover trial procedure, motions that may resolve a case prior to or during trial, and complex issues involving the substantive law that applies to claims litigated in federal court. The book closes with an examination of *claim preclusion* and *issue preclusion*, two doctrines that limit relitigation of claims or issues resolved in a prior case.

***Students, please take note*:** There is no one way to structure the Civil Procedure course, which is indeed a seamless web. While there is a fairly broad consensus on the core issues that should be covered in the course, procedure teachers often present them in a different order than they appear in this coursebook. So don't be surprised if your professor takes the chapters out of order or, as is frequently the case where the course is allocated fewer credits, does not cover certain chapters at all.

II. The Two American Court Systems

Let's start with some basics. The Framers of the United States Constitution chose to create a federal form of government, in which governmental power is shared between a national government—the federal government—and state governments in each state of the union.

The original states existed long before the Constitution was adopted, and each had its own court system. The Framers saw no reason to abolish these state courts, which functioned well enough in many respects. However, they did see the need for a set of national courts that could hear certain types of cases that implicate national interests or pose significant risks of local bias. Consequently, in Article III of the United States Constitution, they empowered Congress to establish a separate system of federal courts, which co-exists with the courts of the states.

Each of these court systems has *trial courts*, in which cases are litigated through trial, as well as *appellate courts*, which hear appeals from the trial courts within that system. Before we explore the subject matter jurisdiction of state and federal courts, we will look briefly at the structure of state court systems and of the federal court system.

While this coursebook focuses on the state and federal courts, the heading above—*The Two American Court Systems*—is actually a serious misnomer, since there are many more than two systems of courts in the United States. Many American Indian tribes maintain tribal courts, which adjudicate cases involving tribal members and cases arising on Indian reservations. *See generally* William Canby, American Indian Law in a Nutshell 67–69 (6th ed. 2015). In addition, many agencies of both the states and the federal government adjudicate claims related to their administrative roles. For example, state departments of employment frequently adjudicate unemployment claims. State motor vehicle bureaus may administer license revocation proceedings. At the federal level, the Social Security Administration has an adjudicatory division that hears claims for benefits and the National Transportation Safety Board entertains claims involving denial or revocation of pilot licenses. Such administrative agencies are legion, and collectively hear a great many more claims than state and federal courts do. (The Social Security Administration website states that its 1,300 administrative law judges heard almost 800,000 appeals in 2019. *See* www.ssa.gov/appeals (last visited May 28, 2020).) Such bodies—studied in the course on Administrative Law—have their own procedural rules for processing claims,* which may or may not look much like the civil procedure rules that we cover in this book.

* Federal administrative adjudication, for example, usually follows rules of procedure set out in the federal Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

III. The Structure of State Court Systems

Every state has a set of trial courts, or courts of *original jurisdiction*, in which cases are filed and litigated through final judgment. Since the states establish their own court systems they can call their courts whatever they like, and states have chosen different names and configurations for their courts. For example, in New Jersey and California, the trial courts of general jurisdiction are called superior courts; in Texas, they are called district courts; in Florida, circuit courts; in New York, some of them are, surprisingly, called supreme courts.

In most states, the plaintiff commences litigation by filing a pleading called a *complaint* in the trial court, setting forth her claims against the defendant. The defendant files an *answer* to the complaint setting forth his position on the facts alleged by the plaintiff and any defenses he has to the claims in the complaint. The parties develop the facts relevant to their claims and defenses through *discovery*—the process of production of evidence from opposing parties and witnesses—in the trial court. If the case goes to trial, it will be tried in that court, and a final *judgment* will be entered there for the winning party.

In addition to trial courts of broad jurisdiction, most states also have several specialized trial courts with limited subject matter jurisdiction. Often, there is a probate or family court, which has jurisdiction over estates, guardianships, divorces, child support, and other domestic matters. There may also be a housing court, which handles landlord-tenant cases; a land court, which deals with cases involving interests in or title to real property; a small claims court; or others suited to local needs. Some of our thirstier states have "water courts," which decide the allocation of water resources. While such courts have limited subject matter jurisdiction, they are still *trial* courts, that is, they are the courts in which cases within that court's jurisdiction are filed, litigated, tried, and decided. Lastly, many states have municipal courts that handle relatively minor criminal and civil matters. *See generally* Daniel John Meador & Gregory Mitchell, American Courts 9 (3d ed. 2009).

Q **The creation of state court systems.** The configuration of broad trial courts and specialized courts differs from state to state. Who decides which state courts will exist within a state court system and which trial court will hear which cases? If a lawyer decides to bring a tort case in a New Mexico state court, how would she find out which court within the New Mexico court system has the authority to hear it?

A Each state determines the structure of its state court system for itself. Some state constitutions specify broad aspects of the structure of that state's courts. In most states, the state legislature prescribes the structure of the state courts and determines the subject matter jurisdiction of each court within the state. Thus, counsel should review the New Mexico *statutes* (laws passed by the state legislature) defining the jurisdiction of the various trial courts within the state, to determine which one has statutory authority to hear tort claims. If she sued in a Minnesota court, she would search the Minnesota statutes governing subject matter jurisdiction of its trial courts, and so on.

Every state also has at least one appellate court that hears appeals from trial courts within the state. Typically, a state will have an intermediate appellate court, which hears most appeals from the trial courts. (In a few smaller states, there are only trial courts and a state supreme court, which hears all appeals.) There may be one intermediate appellate court covering the entire state, or there may be several units of the appellate court. Illinois, for example, is divided into five geographic appellate districts, each with its own intermediate appellate court to hear appeals from trial courts within that district. If you appeal a judgment rendered by a trial court in Edwards County, which is within the Fifth Appellate District, your appeal goes to the Appellate Court for the Fifth Appellate District. If you appeal a case tried in Cass County, your appeal would go to the Appellate Court for the Fourth Appellate District.

In states with intermediate appellate courts, litigants usually have a right to appeal to that appellate court. The party who loses the appeal may ask the state's highest court—usually, but not always, called the state supreme court—to take further review of a case. However, in most states the state's highest court is not required to hear such appeals. It chooses whether to grant further review (*appeal by permission* or *discretionary appeal*) and typically does so only in cases that pose novel issues of law or involve important public issues.*

Figures 1–1 and 1–2 illustrate the structure of two state court systems. (There is a good discussion of the structure of state court systems in Daniel John Meador & Gregory Mitchell, AMERICAN COURTS 9–19 (3d ed. 2009).)

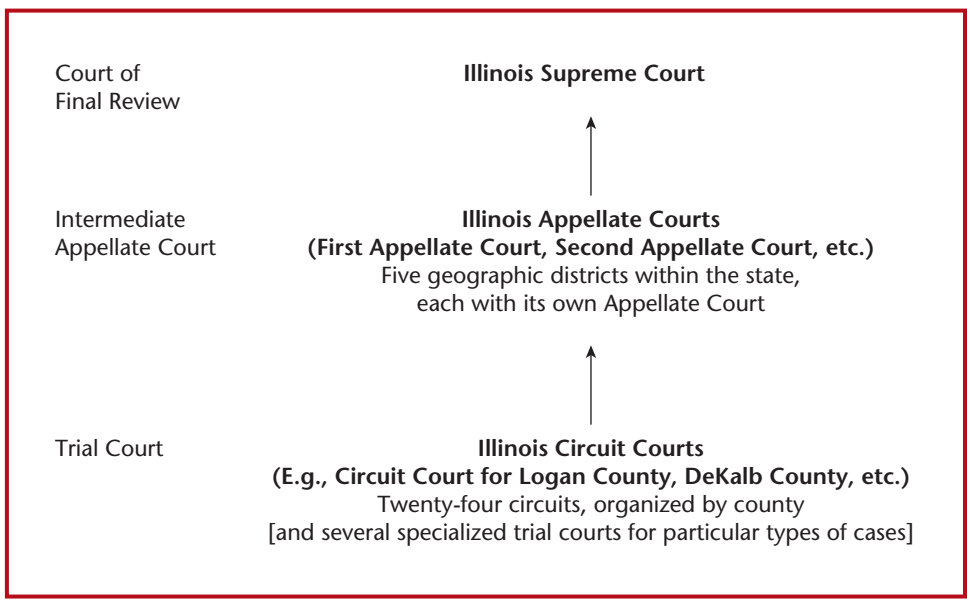


Figure 1–1: STRUCTURE OF THE ILLINOIS STATE COURT SYSTEM

* State supreme courts may hear direct appeals from the trial courts in some types of cases. The structure and process for taking an appeal are determined by the legislature in each state and vary a good deal from one state to another. A good source on American appellate courts is Daniel John Meador, APPELLATE COURTS IN THE UNITED STATES (2006).

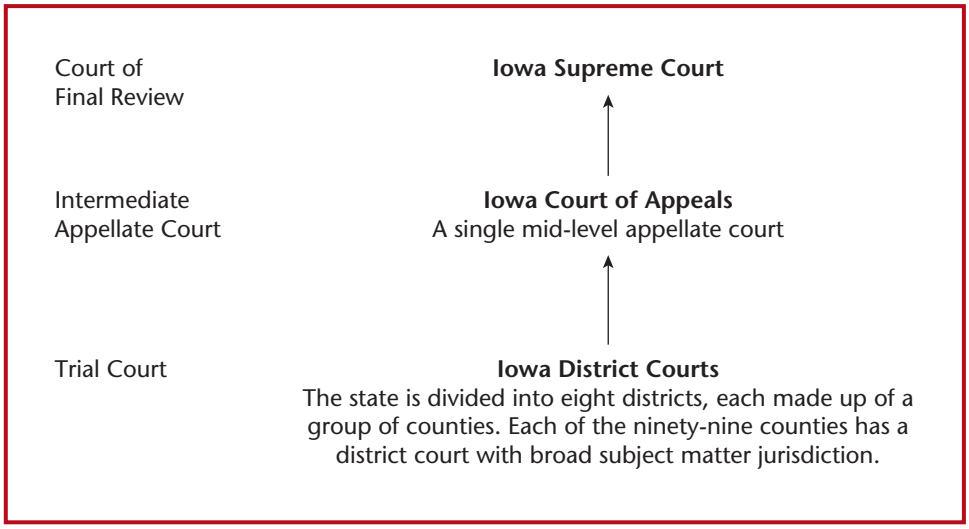


Figure 1–2: STRUCTURE OF THE IOWA STATE COURT SYSTEM

As Figures 1–1 and 1–2 illustrate, the court systems in these two states are not exactly the same, but both systems include trial courts, one or more intermediate appellate courts, and a state supreme court. As the mechanic said when asked how he could work on so many different kinds of cars, "They're all a little bit different, but they're all basically the same."

IV. The Structure of the Federal Court System

Article III, Section 1 of the United States Constitution provides that "[t]he judicial Power of the United States [that is, the federal government], shall be vested in one Supreme Court, and . . . such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. Thus, the United States Supreme Court is created by the Constitution itself. But the decision whether to create "inferior" federal courts, that is, federal trial courts or federal appellate courts below the Supreme Court, is left by Article III, Section 1 for Congress to decide.

Congress might have decided not to create any lower federal courts. If so, all cases would be litigated through trial in state courts. However, the first Congress favored a strong national government and immediately exercised its authority in Article III, Section 1 by creating lower federal courts, in the Judiciary Act of 1789.* Since then Congress has periodically revised the structure and jurisdiction of the lower federal courts, but both federal trial courts and federal appellate courts below the Supreme Court have operated continuously since the First Judiciary Act.

* Judiciary Act of 1789, 1 Stat. 73 §§ 3–4 (1789).

The federal trial courts are called the *federal district courts*. These courts sit in ninety-four federal districts within the United States. Each district comprises a state or part of a state. The federal District of South Carolina, for example, includes the entire state of South Carolina. California, on the other hand, because of its size and the number of cases it generates, is divided into four federal districts, the Northern, Eastern, Central, and Southern Districts of California, with a federal court sitting in each district. Figure 1–3 illustrates the configuration of the federal districts as of 2016.

As the diagram shows, the size of the federal districts varies substantially. For example, the Northern District of California is much smaller than the Eastern District. These district lines have been drawn more with a view to population and the presence of commercial, litigation-generating centers (e.g., San Francisco) than to square mileage. The number of federal judges sitting in each district also varies depending on the caseload of the court.

Like the trial courts of state court systems, the federal district courts are courts of original jurisdiction, that is, they are trial courts, in which cases are filed and litigated through to a final decision. The plaintiff commences the action there; the parties develop the facts through discovery in the district court; if the case goes to trial, it will be tried in the district court, and a final judgment will be entered there for the winning party.

Usually, a federal case ends with the final decision in the federal district court, either after trial or by settlement or dismissal. However, a party who loses in the district court and claims some error in the course of the litigation may appeal from the district court's judgment to one of the federal courts of appeals. Like the federal district courts, the courts of appeals (other than the Federal Circuit)

Figure 1–3: GEOGRAPHICAL BOUNDARIES OF UNITED STATES FEDERAL JUDICIAL DISTRICTS

are organized geographically. Each hears appeals from the federal district courts sitting in a group of states. Figure 1–4 illustrates the geographic scope of the federal courts of appeals. For example, if a case is filed, litigated, and decided in the District of Maine, an appeal from the district court's judgment will go to the Court of Appeals for the First Circuit. An appeal from a case decided in the Federal District Court for the Northern District of Illinois goes to the Court of Appeals for the Seventh Circuit, and so on.*

The United States Supreme Court sits at the top of the federal court system. A litigant who loses an appeal in the court of appeals may ask the Supreme Court to review that court's legal rulings. Unlike appeals to the federal courts of appeals, review in the Supreme Court is almost always discretionary, that is, the Court chooses to review only those cases that involve important federal issues or conflicts in lower courts' interpretation of federal law. The Supreme Court only grants certiorari (agrees to review) in a small percentage of the cases in which review is sought—perhaps one to two percent. Thus, the decision of the court of appeals usually ends the case. Figure 1–5 illustrates the relationship of the trial and appellate courts in the federal court system.

The unique role of the United States Supreme Court. We have described two separate court systems, each operating independent of the other. But the United States Supreme Court has a unique role in our federal system. Each state supreme court is the court of last resort for most cases tried in that state's courts. For example, if a case involves the meaning of an Iowa statute, the Iowa Supreme Court,

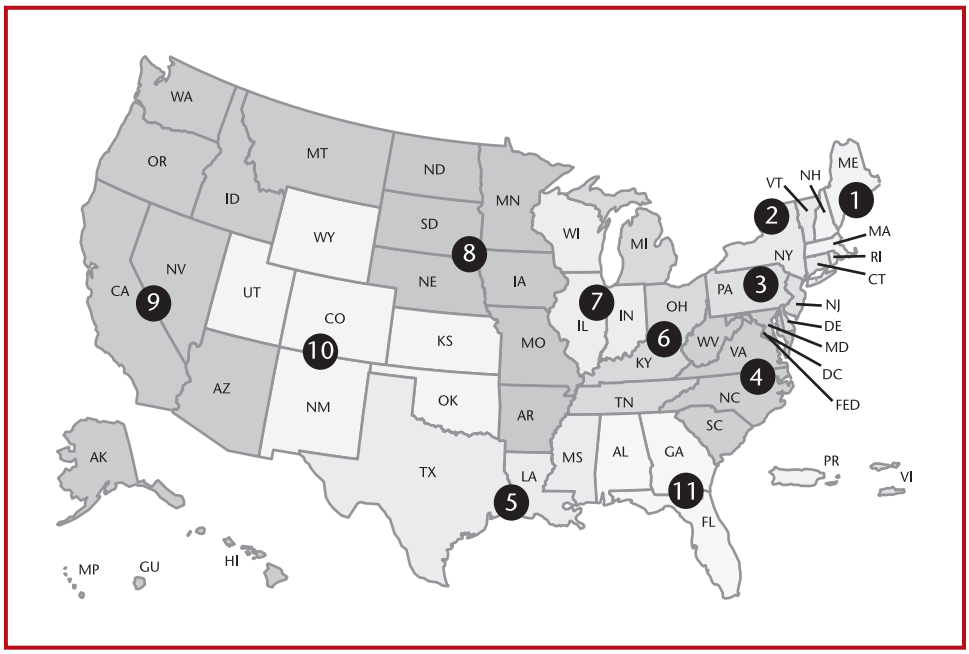


Figure 1–4: GEOGRAPHICAL BOUNDARIES OF THE UNITED STATES COURTS OF APPEALS

* The procedure appellate courts use to consider and decide appeals is described in Chapter 2.

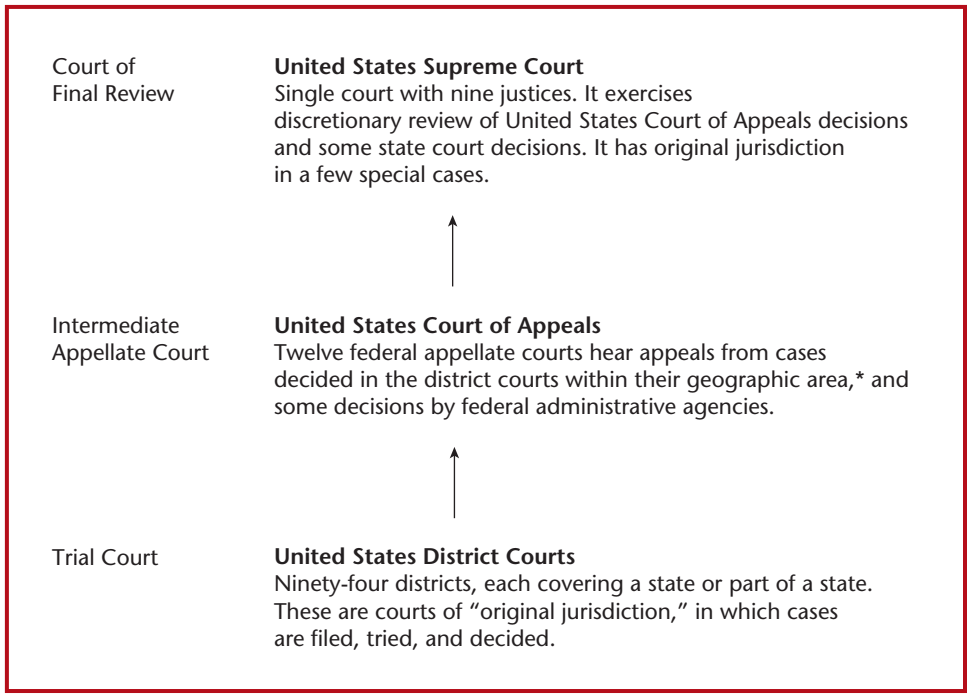


Figure 1–5: THE THREE LEVELS OF THE FEDERAL COURT SYSTEM

as the highest court of Iowa, would be the highest court that could review and determine its meaning. However, when issues of federal law are litigated in a state court case, the losing party may ask the United States Supreme Court to review the state court's decisions on those federal issues. 28 U.S.C. § 1257.

Suppose, for example, that parties litigate a case in an Iowa state court in which the plaintiff seeks to enforce rights under a federal statute. (As we will see, cases involving federal law can usually be litigated in state courts.) The Iowa court holds the federal statute unconstitutional, and the Iowa Supreme Court affirms that holding. The party who lost this case may ask the United States Supreme Court to review the state court's ruling on the constitutionality of the federal statute. This power of the United States Supreme Court to review issues of federal law, whether litigated initially in a state or a federal court, allows the Supreme Court to provide definitive rulings on issues of federal law. Once it does, its rulings will bind all American courts, state and federal.

* The one exception is the United States Court of Appeals for the Federal Circuit. It hears appeals in a potpourri of specialized federal cases (such as patent and trademark cases) from all of the federal district courts and from certain federal agencies as well.

The United States Supreme Court

The Supreme Court, which sits in this imposing edifice in Washington, D.C., is created by Article III of the Constitution. As the highest court of the federal court system, it reviews cases that come to it from lower federal courts throughout the nation. It also has jurisdiction to review cases decided in state courts when those cases raise issues of federal law. Justice Robert Jackson once said of the Court, "we are not final because we are infallible, but we are infallible only because we are final."

Frank Santzen, Collection of the Supreme Court of the United States

The Supreme Court hears oral arguments in the courtroom pictured here. Note the nine chairs behind the "bench" for the nine Justices who sit on the Court.

V. The Subject Matter Jurisdiction of State Courts: General Principles

Subject matter jurisdiction refers to the power of a court to hear disputes of a particular type. For example, not every court can hear a tort case arising from a car accident or a claim for breach of contract. To choose a proper court, a lawyer needs to know which courts have subject matter jurisdiction over the type of claim she wishes to bring.

Suppose you practice law in Massachusetts and a new client, Corey, comes into your office. Corey explains that he is originally from New Hampshire and is currently a student in Boston. He was out one night in Boston and got into a fight with a bartender at a bar called Barristers. Corey claims that the bartender started the fight and that, as a result of the fracas, Corey suffered a broken leg. Corey wants to sue the bartender, who lives in New Hampshire, as well as Barristers, Inc., the corporation that owns the bar, for his injuries.

You learn that Barristers is incorporated in Delaware, has its corporate headquarters in Rhode Island, and owns nine Barristers bars in Massachusetts, one in

Rhode Island, and one in Maine. Corey has a credible story, and you would like to take his case. You prepare a complaint (the pleading that initiates the suit) alleging that the bartender committed a tort by battering Corey. In order to decide where to bring the action, you will have to decide which courts (state or federal) have subject matter jurisdiction over Corey's battery case.

Although the structure of the federal and state court systems is somewhat similar, the subject matter jurisdiction of the courts in the two systems is dramatically different. State courts have broad subject matter jurisdiction over most, though not all, types of cases. But the federal courts are courts of limited subject matter jurisdiction, meaning that they can only hear a narrow range of cases.

For example, federal courts do not have general authority to hear the types of cases you study in your first year of law school, such as contracts, torts, and property cases.* Nor can they hear other categories of cases, such as domestic relations cases, settlement of estates, and state administrative appeals. All of these types of cases, which comprise the great majority of disputes adjudicated every year, are usually left to the state courts.

The extent to which state courts handle the nation's judicial business is illustrated by comparing the number of federal judges to the number of state judges in any state. In 2016, Colorado, for example, had fewer than twenty-five federal district judges and magistrate judges,** but over five hundred state trial judges. Maryland had fewer than thirty federal judges and magistrate judges, but more than three hundred state trial judges. Clearly, the state courts continue to handle the lion's share of litigation today.

The most common subject matter jurisdiction issue in state courts is determining *which* court within the state system has authority to hear a particular dispute. While every state has a trial court with broad jurisdiction, many also have specialized courts that exercise exclusive jurisdiction over certain types of cases. For example, in Massachusetts, the Probate and Family Court has exclusive subject matter jurisdiction over divorce cases, which means you can only file for divorce in that court. Mass. Gen. Laws ch. 208, § 3. A lawyer bringing a case must figure out which court within the state's court system has subject matter jurisdiction over that type of case.

VI. The Subject Matter Jurisdiction of Federal Courts: General Principles

The basic course in Civil Procedure focuses on the subject matter jurisdiction of the federal courts. This may seem a curious choice, since most litigation is conducted in the state courts. On the other hand, we need to study some system

* Federal courts may hear most such cases if the parties are from different states, under the federal diversity jurisdiction, which we analyze in Chapter 3.

** Magistrate judges are federal judicial officers who handle many pretrial matters in federal litigation. Their decisions are usually subject to review by the district judge. They are not "Article III judges," because they are appointed for a term rather than during good behavior as required in Article III, Section 1.

to illustrate general principles of subject matter jurisdiction. No matter what state you practice law in, there will be a federal court there, exercising the same subject matter jurisdiction as all other federal courts. So it makes sense to use federal courts as an example. In addition, studying federal subject matter jurisdiction sheds a lot of light, by contrast, on the nature of state court jurisdiction.

It is helpful to start by asking why the federal courts have limited (as opposed to general) subject matter jurisdiction. As mentioned earlier, state courts existed before the Constitution was drafted. No one at the Constitutional Convention advocated doing away with state courts. Indeed, the Framers assumed that the vast bulk of judicial business would continue to be handled by the courts of the individual states after adoption of the Constitution.

However, the Framers concluded that federal courts should have the power to hear certain types of cases that implicate national interests. In Article III, Section 2 of the Constitution, the Framers provided that the federal judicial power "shall extend to" these categories of disputes. The wisdom with which they defined the federal jurisdiction is reflected by the fact that the categories of jurisdiction granted in Article III remain essentially intact after more than two hundred years.

> **Article III, Section 2, par. 1.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

This one short paragraph defines the constitutional scope of the federal courts' subject matter jurisdiction. If a case falls within this list, Congress may (but need not) authorize a federal court to hear it. If it does not—and most types of disputes do not—then the federal courts "lack subject matter jurisdiction" to entertain the case.

Of the nine types of cases listed in Article III, Section 2, two give rise to the vast majority of cases litigated in federal courts today: cases "arising under this Constitution [or] the Laws of the United States" (the *federal question jurisdiction*) and cases between "Citizens of different States" (the *diversity jurisdiction*). Our study of federal subject matter jurisdiction will concentrate on these two categories. Several others, however, are also important, including cases between citizens of a state and foreign citizens, cases involving maritime activities ("Cases of admiralty and maritime jurisdiction"), and cases to which the United States—that is, the federal government—is a party.

As noted above, however, the Constitution leaves it to Congress to decide how much of the Article III subject matter jurisdiction to grant to the lower federal courts. For a federal trial court to hear a case, the type of case must be within the Article III grant, *and* Congress must also authorize the court by statute to exercise jurisdiction over that type of case.

Notes and Questions: Federal Subject Matter Jurisdiction

Q **1. Why these categories?** Consider each type of case listed in Article III, Section 2. Why did the Framers authorize federal courts to hear those cases? In what way does each implicate an important national interest?

A

A few of the categories are obvious. The grant of jurisdiction for cases "arising under this Constitution [or] the Laws of the United States" permits federal courts, created by and owing allegiance to the national government, to interpret and apply federal law. The Framers recognized that the new national government could be undermined if it relied solely on state courts to enforce and interpret laws made by the federal government. They also recognized the need for the United States Supreme Court to exercise final authority over the meaning of federal law by reviewing cases that raise federal issues.*

Several categories of jurisdiction in Article III, Section 2 involve cases in which local courts might be biased against out-of-state litigants. For example, the Framers probably created diversity jurisdiction out of concern that state courts might favor the local litigant in a case between an in-state citizen and an out-of-state citizen. Similar concerns led to the provision for federal jurisdiction over cases between two or more states and those between a citizen of a state and a foreign citizen. Although federal judges will almost always be from the state in which they sit, they are appointed during good behavior (basically, life tenure), which insulates them somewhat from local biases. State court judges are elected in many states, leaving them more sensitive to popular opinion and arguably more likely to favor local citizens.

The other categories in Article III, Section 2 involve cases in which the federal government has a direct interest (cases to which the federal government is a party) and cases with a potential impact on foreign relations, such as maritime cases and those involving ambassadors and foreign ministers.

Q **2. The authority of state courts to hear cases within federal court jurisdiction.** If a plaintiff wishes to bring a case that falls within some category in Article III, Section 2, must she sue in federal court or can she choose a state court instead?

A

Article III, Section 2 provides that the federal judicial power "shall extend to" the cases listed there. It does not declare that *only a federal court* may hear these categories of cases. The Supreme Court has construed Article III, Section 2 to authorize jurisdiction over the listed categories of cases in the federal courts, *but not to withdraw jurisdiction over such cases from the state courts. Claflin v. Houseman,* 93 U.S. 130, 136 (1876). Thus, generally speaking,

* Remember that Article III, Section 2 defines the constitutional scope of the subject matter jurisdiction of all federal courts, including the Supreme Court.

a case that could be brought in federal court may also be brought in state court. In such cases, the plaintiff determines (as least initially) which court system will hear the case by filing in the court she prefers.

However, there is an important exception to this principle of *concurrent jurisdiction*. While state courts usually have concurrent jurisdiction over cases within the Article III grant, Congress may, in conferring jurisdiction over a particular category of federal cases, provide that those cases may only be heard in federal court. *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, 478 (1981). Some federal statutes provide for such *exclusive federal jurisdiction*. For example, 28 U.S.C. § 1333 provides that the federal district courts "shall have original jurisdiction, exclusive of the courts of the States" in admiralty and maritime cases. Similarly, 28 U.S.C. § 1338 provides for exclusive federal jurisdiction in patent and copyright cases.

Q **3. Corey's options in a diversity case.** Assume that Corey and Barristers are citizens of different states. In which court systems could Corey file his tort action against Barristers?

A If Corey and Barristers are diverse—citizens of different states—Corey could file the action in federal court, assuming he meets the statutory amount-in-controversy requirement for diversity cases. And because state courts have broad jurisdiction to hear common law claims such as battery claims, he could file it in a state court as well. Below, at note 6, we consider some of the tactical considerations his lawyer might take into account in choosing between the state and federal systems.

Q **4. What is a "law of the United States"?** Harris, a citizen of Wisconsin, wishes to sue Panil, also a citizen of Wisconsin, for violation of a Wisconsin statute, the Wisconsin Employment Discharge Act. Can she bring this case in federal court?

A No. This case doesn't fit into any of the Article III, Section 2 categories. The parties are not diverse. And the claim arises under a Wisconsin statute. That is a law of ***one of*** the states of the Union, but not a law of "the United States," which refers to federal laws made by Congress, regulations promulgated by federal agencies, or in some cases, common law rulings of federal judges.

Q **5. Federal claims in state court.** Assume that Harris wishes to sue Panil under the Federal Age Discrimination in Employment Act (ADEA), a federal statute. However, for tactical reasons, she would like to bring the action in state court. May she do so?

A The fact that a case *could* be brought in federal court does not mean that it has to be. For the most part the jurisdiction is concurrent, that is, the plaintiff has the choice to bring it in federal court or in state court. Congress has not made federal jurisdiction in federal ADEA cases exclusive, so Harris could sue in state court.

However, we will see in Chapter 5 that if a plaintiff brings a case in state court that could have been filed in federal court, the defendant may be able

to *remove* it to federal court. That way, if either party wants a federal court to hear a case within federal jurisdiction, the federal court will do so.

6. Tactical considerations in choosing state or federal court. Due to this principle of concurrent jurisdiction, a lawyer will frequently have the choice to file a case in either state or federal court. When that is true, how should she decide which court to choose? Why might she prefer one system over the other for a particular case?

Naturally, a lawyer will choose the court that she believes offers strategic advantages for her case. Scholars refer to such tactical maneuvering—with a hint of disdain—as *forum shopping*. Lawyers, however, will not hesitate to choose between two courts that have proper jurisdiction based on the best interests of their clients.

There are many differences in the practice of state and federal systems that could influence counsel's decision to file a particular suit in state or federal court. Here are a few such considerations.

Convenience. In some parts of the country, the federal court may sit quite far from where the lawyer and client reside. In those circumstances, it might be easier to litigate the case in state court. For example, the state trial court for Lipscomb County sits in Lipscomb, Texas. The federal court for the Northern District of Texas (which includes Lipscomb County) sits in Amarillo. A lawyer from Lipscomb who files in the Lipscomb County court can walk across the street to argue a motion; if she files in the Federal District Court for the Northern District of Texas, she would have to travel 149 miles to argue the same motion.

Familiarity. Frequently, lawyers choose one system over the other because they litigate there frequently and are familiar with the details of practice in that court. A lawyer who regularly files cases in state court in Lipscomb County will tend to choose that court unless there is some clear countervailing reason to sue in federal court.

Jury pools. Federal and state courts usually draw their juries from different geographic areas. State juries are usually selected by county, whereas the federal jury will likely be drawn from a broader geographic area. A civil rights plaintiff in Boston, for example, might prefer the diverse and perhaps more liberal urban jury she would draw in a Suffolk County court to the largely suburban jury she would likely draw in the Federal District Court for the District of Massachusetts.

Speed. An important factor may be the speed with which the system processes cases. A lawyer with a badly injured client may want to get the case to judgment as soon as possible. In a particular state, one system may have a smaller backlog of cases than the other. Although there are exceptions, federal courts have the reputation of resolving cases more quickly than state courts.

Case assignment to one judge. In many federal courts, cases are assigned to a particular judge when they are filed, and that judge will handle the case from start to finish. By contrast, in some state court systems, cases are not assigned. The parties might litigate a motion to dismiss in front of Judge A, argue subsequent discovery motions in front of Judge B, and end up trying the case in

front of Judge C, none of whom have any previous acquaintance with the file. If a case involves complex issues, having a judge assigned to handle all phases of the litigation may be preferable.

A plaintiff may also prefer litigating before a federal judge in cases that seek a decision that may prove politically unpopular (such as certain civil rights cases), since life tenure provides federal judges a measure of insulation from majoritarian pressures.

Attorney control. A major trend in the last twenty years is toward more judicial management of cases. Judges, especially in the federal system, hold scheduling conferences and pretrial conferences and set strict deadlines for completion of pretrial tasks. State courts may be more free-wheeling, leaving more control to attorneys in scheduling litigation.

Out-of-state litigants. An out-of-state litigant may prefer to litigate in federal court. Federal judges' life tenure insulates them to some extent from local political pressures. State court judges are frequently elected, and thus, more accountable to local citizens. Since they are human, this may affect their decision making in a case against an out-of-state litigant, consciously or unconsciously. The Framers were sufficiently concerned about the possibility of bias against out-of-state citizens that they created diversity jurisdiction to allay such concerns.

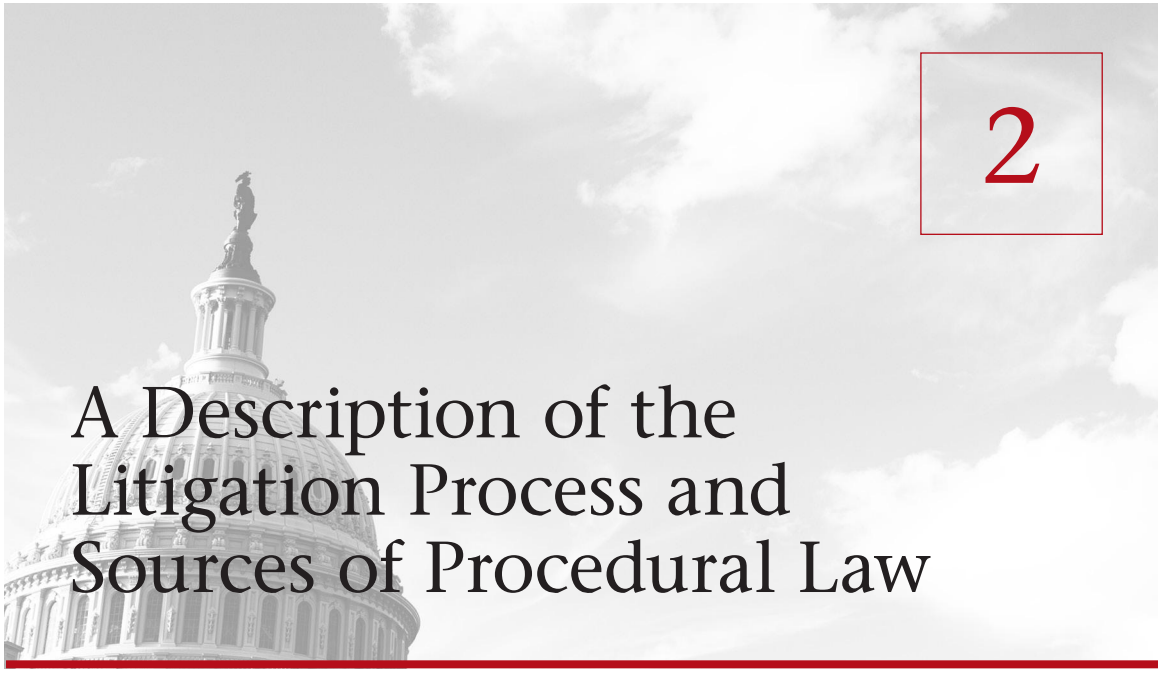
Expertise. Judges in one system or the other may have more experience dealing with a particular type of case. If a case involves sophisticated federal law issues that federal judges regularly handle, the plaintiff's counsel may prefer to file in federal court. For example, federal courts will have more experience hearing cases under federal antidiscrimination laws or cases under the federal civil rights laws. State courts, on the other hand, may have greater expertise in land use or zoning cases.

Other factors. Many other factors may influence the decision. The rules of evidence may differ in state and federal court. The rules of discovery—the process for compelling production of evidence from other parties and witnesses—may differ. The court's power to order parties to appear in the action may differ. One system may use larger juries than the other or allow non-unanimous verdicts.

This list of factors that lawyers consider in choosing between the two systems is certainly not comprehensive, but it highlights the fact that the two systems differ in many practical respects. When a lawyer has a choice, because either system has jurisdiction to hear the case she is bringing, she will consider these and other factors in deciding where to file her case.

VII. American Courts: Summary of Basic Principles

- Every American state has its own court system. The structure of a state court system, and the types of cases that each court within that state may hear, are generally established by statutes enacted by the state legislature.
- Most cases are litigated in state courts. Every state has trial courts with very broad subject matter jurisdiction over most types of common disputes. Most states also have several specialized trial courts, such as probate courts or housing courts, that only hear limited types of cases.
- Each state has an appellate court at the apex of the system, frequently called the state supreme court. Many state court systems also have intermediate appellate courts, which hear most appeals from the trial courts.
- The United States Constitution provides for a separate federal court system. Article III, Section 1 of the Constitution creates the United States Supreme Court, and authorizes Congress to create other federal courts "below" the Supreme Court. Congress has created federal trial courts, called United States District Courts, and intermediate appellate courts, called United States Courts of Appeals, as well as a few specialized courts.
- The United States Supreme Court is the court of last resort in the federal court system. It also may review cases decided by state appellate courts, if those cases present issues of federal law.
- The categories of cases that federal courts may hear under Article III, Section 2 (their subject matter jurisdiction) are quite narrow. These include cases arising under federal law, cases between citizens of different states, cases between citizens and aliens, cases in which the United States is a party, admiralty and maritime cases, and several other narrow types of cases.
- State courts have concurrent jurisdiction over most cases that federal courts are authorized to hear. If both federal and state courts have subject matter jurisdiction over a case, the plaintiff may file in either system.
- There is an exception to this concurrent jurisdiction principle. Congress may provide that federal jurisdiction over a particular type of case is "exclusive of the courts of the states." It has done so for some types of cases, including patent and copyright cases.



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A Description of the Litigation Process and Sources of Procedural Law

I. Introduction

This chapter provides a look at the Civil Procedure forest before we focus on the trees. It describes the process of a typical case from commencement to final judgment. This overview should give you a sense of how individual topics we study in the course relate to the overall course of litigation.

The second part of the chapter describes sources of law—constitutional provisions, statutes and rules—that govern aspects of civil procedure. An introduction to the sources of law that govern procedural issues and the hierarchical relations among them will help you to understand the materials throughout the book.

II. A Description of the Process of a Civil Case

Only a small subset of disputes turn into lawsuits. The parties resolve most disputes informally or just "deal with it" without involving lawyers or courts. Even where aggrieved parties seek legal advice, they do not usually end up in litigation. With the help of counsel they resolve their disputes through informal