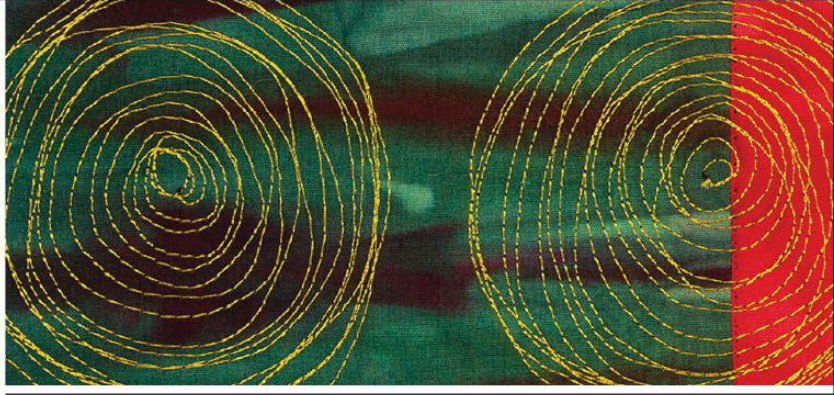

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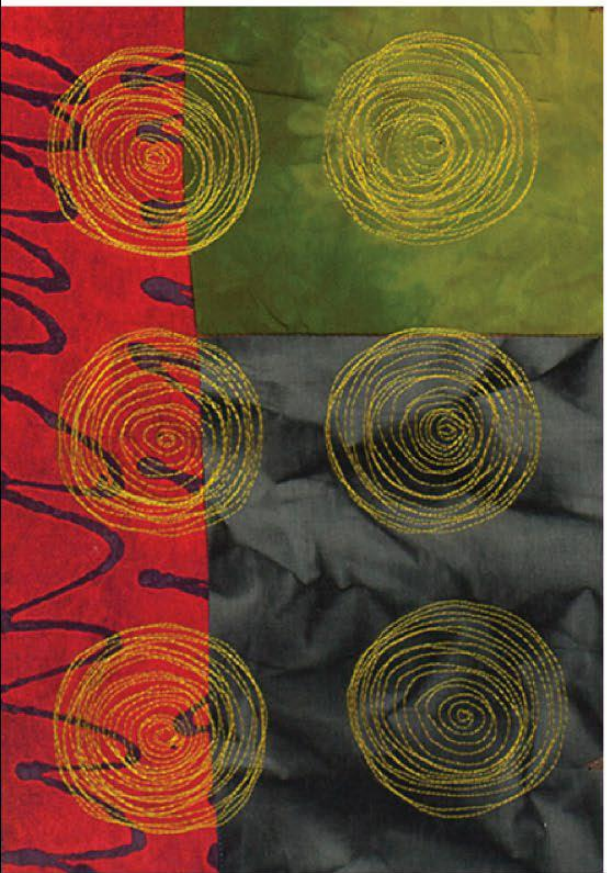

The Law of Journalism and Mass Communication

Seventh Edition

The Law of Journalism and Mass Communication

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The Law of Journalism and Mass Communication

Seventh Edition

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PREFACE

This book is intended and designed primarily to serve those planning to work in journalism, public relations, advertising or marketing in new, social or traditional media. Our goal is to offer a truly readable overview of the laws of journalism and mass communication that situates the most significant aspects of that law within the social and political contexts that give them meaning. We focus sharply on the legal issues related to gathering and disseminating information in today's multimedia age that we believe are most relevant to professional communicators.

Our unique approach to "The Law of Journalism and Mass Communication" developed in response to the way we teach and the way we believe people learn. We see the law as the shifting product of specific decisions at distinct times in particular places. As such, the law is best understood when we see and feel its effects on real people in routine conflicts and through the actions of our government as well as our friends, neighbors and families.

Our hope is that "The Law of Journalism and Mass Communication" is both approachable and interesting, grounded in the traditions and rules of law but also chockfull of fresh facts and new examples that bring the law to life today. We incorporate the latest court and legislative rulings and turn attention toward the events outside of courts and beyond the judiciary to illustrate how the law works in the real world for people living their lives each day. If we have succeeded, you will find this volume both educational and interesting.

FEATURES

In this seventh edition of "The Law of Journalism and Mass Communication," readers will discover a wealth of new content—from the U.S. Supreme Court, federal and state courts, Congress, executive agencies, federal and state policymakers and advisory groups, and media organizations and allies. Readers also will discover more than 40 new photographs and dozens of new charts, graphs and tables to illustrate key trends or issues. More tightly focused breakout boxes in **International Law**, **Points of Law** and **Real World Law** highlight contemporary examples of the law in action or emphasize central concepts of law as well as intersections with international law and policy. They serve to supplement the principal discussion and to underscore important tests, breathe life into the facts and widen the lens through which we view the law.

A photograph and quotation open each chapter to illustrate and comment on a specific area of the law. A **Suppose . . .** hypothetical scenario engages readers with a question presented to the courts on the chapter's legal topic. The **Suppose** case is discussed in the chapter

and resolved in one of the two case excerpts at the chapter's close. These two **Cases for Study** allow readers to engage directly with significant, often landmark, decisions to build upon the legal analysis and commentary of each chapter of "The Law of Journalism and Mass Communication." A timeline with photographs of Landmark Cases in Context accompanies each chapter to situate the law within the flow of history. Definitions in the text's margins and in a glossary at the back establish shared understanding of the specialized language of the law.

ORGANIZATION AND COVERAGE

We have refreshed the look, feel and flow of many of the chapters in this edition to provide a clearer path through sometimes fast-expanding areas of the law and to offer new examples to guide better understanding of legal complexities. Among the more notable changes in this seventh edition of "The Law of Journalism and Mass Communication," readers will find an increased emphasis in each chapter on the historical, theoretical and constitutional foundations of the legal topic as a point of departure for examination of legal evolutions, alterations and current challenges. The authors believe this grounding is especially beneficial in areas of rapid legal change. It helps readers navigate the abundance of legal decisions and details to concentrate on the core concepts and principles that endure and embody the rule of law. We hope these alterations aid comprehension and retention of the material as they facilitate classroom activities, creativity and discussion.

This edition has also moved **Emerging Law** out of breakout boxes and into the penultimate section of the chapter text, right before the **Cases for Study.** Like many of the changes we have made throughout the development of this text, this alteration comes in response to comments from our generous adopters and reviewers. The move provides a more concentrated discussion of nascent legal topics and is simple to bypass for those who wish to focus exclusively on settled law.

Beyond these shared features, each chapter benefits from unique updates that are as timely as possible, including apposite U.S. Supreme Court decisions handed down in mid-2019. More precisely, the first chapter offers revised and expanded discussions of the rule of law, stare decisis, the U.S. Constitution's role in protecting individual rights, judicial review and the personal ideologies of the justices of the U.S. Supreme Court. Chapter 2 offers a new flow and underscores the Constitution's constraint on government as a precondition for the courts' varied interpretations and applications of the core precepts of our system of law.

Building from the foundations of the preceding chapters, the chapter on speech distinctions (3) moves chronologically through the U.S. Supreme Court's evolving definitions of speech categories and their First Amendment protection. New topics here include social media as forums for hate, government (particularly police) punishment of people who show them disrespect, university speech zones and faculty use of obscenity or racial slurs in the classroom. These and other changes highlight how speech categories intended to make the law more clear and predictable are sometimes both imprecise and unstable.

New photographs, new cases and a tighter history section sharpen the chapter on libel and emotional distress (4). In particular, the discussion of actual malice has been shortened and refreshed, and the discussion of limited public figures has been revised for better clarity. The subsequent chapter (5) on defenses and privileges in libel presents a new case excerpt and new court decisions throughout to enhance coverage of anti-SLAPP litigation, fair report privilege and rhetorical hyperbole. The #MeToo movement and court trends toward earlier determinations of actual malice are among the new and emerging issues.

A crisper privacy chapter (6) provides a new summary of constitutional privacy and presents electronic privacy and U.S. Supreme Court decisions early on as a basis for new case examples and topics. The chapter offers more details and context around central rulings and examines the Fourth Amendment right to privacy as well as the recent Supreme Court decision in *Carpenter v. United States*, which is excerpted at the chapter's end. Coverage of intrusion, false light, appropriation, private facts and data privacy features new images as well as new cases.

The chapter on information gathering (7) begins with an introduction to access and its constitutional and common law roots. Exploration of the statutory right and limits to access walks through new discussion of the right to record public events, the right of access to police cameras, the privacy of specific places and records, and the protections against covert or online hacking, recording, harassment and fraud. Coverage of access to records and meetings is combined to underline the similarities and differences between them, and a more detailed discussion of the *Press-Enterprise* logic and experience test demonstrates the uncertain outcome of court decisions on access. New case examples refresh the discussion of the Freedom of Information Act.

The case history of access to courts introduces a more detailed exploration of the limits to media access to court proceedings and records (8). A clearer presentation of judicial and juror impartiality and misconduct, especially as related to social media use during trials, suggests the challenges to protecting fair trials. New case examples illustrate the broad conditions under which judges protect juror identities and issue contempt citations, and how rarely they order a change of venue. The chapter includes new treatment of the role of court media and public relations officers.

The electronic media regulation chapter (9) is reorganized to better reflect the contemporary electronic media landscape, especially in light of new technological developments. It features expanded sections on why broadcast is regulated, how the Federal Communications Commission works and what it does. It discusses in detail recent significant—and sometimes controversial—FCC decisions and related cases in the areas of net neutrality, media ownership rules, modernizing the FCC, revitalizing AM radio and updating children's television programming rules.

A more detailed explanation of early obscenity cases introduces primary concepts still relevant in obscenity law today (10). New case examples demonstrate how to apply community versus national standards and what the term "patently offensive" means when determining obscenity online and on social media. The **Emerging Law** section discusses a new federal law designed to stop human sex trafficking that may undermine Section 230 immunity for websites and internet service providers and impact other areas of media law.

Historically, the U.S. Supreme Court has decided few cases concerning intellectual property. Over the last decade, both Congress and the Supreme Court have engaged with the legal issues raised as new inventions facilitate different ways to create copyrightable works. Filled with new cases and laws, such as the Music Modernization Act, this chapter (11) simplifies this complex area of the law while highlighting important trends. Modern examples of copyright and trademark disputes include films like "Guardians of the Galaxy," television programs like "SpongeBob SquarePants" and the digital remastering of sound recordings from before 1972.

The final chapter (12) on advertising more prominently develops the place of publicity, promotion and marketing under the umbrella of commercial speech. Definitions, constitutional foundations and history of the law of commercial speech introduce the tension between the Commerce Clause and the First Amendment as context for the sometimes murky rulings of the courts. New cases and a greater emphasis on administrative agency rulemaking emphasize the complexity of legal decision making in this area. Attention is given to developments in native advertising, online and social media marketing, battles over food labeling and the legal issues relevant to promotion of businesses and professionals.

In this seventh edition of "The Law of Journalism and Mass Communication," you will discover a new breadth, diversity and dynamism of material intended to provide the tools for direct engagement with the law. As in the past, we have made every effort to ensure that this edition is lively and full of the most recent legal and policy decisions, the cutting-edge research in the field and the social, technological and economic influences upon them that transform the work and the products of professional communicators. Despite all the revisions, updates and new content, we believe this text will feel familiar to our longtime adopters. We hope you will find it in good order. As Aristotle once said, "Good law is good order."

DIGITAL RESOURCES

To supplement this text, we provide a wide range of online materials through a SAGE Edge companion website, located at **edge.sagepub.com/medialaw7e**. The site includes both student learning aids and teaching tools. The following resources have been updated and revised to enhance use of this new edition.

Password-protected **Instructor Resources** include the following:

- A **Microsoft® Word test bank** containing multiple-choice, true/false, short-answer and essay questions for each chapter. The test bank provides you with a diverse range of prewritten options as well as the opportunity for editing any question and/or inserting your own personalized questions to assess students' progress and understanding.
- Editable, chapter-specific Microsoft® **PowerPoint® slides** that offer you complete flexibility to create a multimedia presentation for your course that highlights the content and features you wish to emphasize.

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- Mobile-friendly **eFlashcards** that reinforce understanding of key terms and concepts outlined in the chapters.
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- **Links to professional resources** that guide students to materials that reinforce chapter concepts and facilitate research.
- An archive of **cases in media law** that provides the opportunity to read many of the legal decisions that construct "The Law of Journalism and Mass Communication."

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When we [Americans] talk about the rule of law, we assume that we're talking about a law that promotes freedom, that promotes justice, that promotes equality.

—U.S. Supreme Court Justice Anthony Kennedy[1]

In 2018, Brett Kavanaugh speaks before the Senate Judiciary Committee. The full Senate later confirmed him an associate justice of the U.S. Supreme Court by a vote of 52–48.

Getty Images News

1 THE RULE OF LAW

Law in a Changing Communication Environment

SUPPOSE . . .

. . . it costs a lot to get elected, and people with money can affect election outcomes. In response, the federal government adopts laws that limit contributions to and spending by political candidates.[2] The laws try to balance the right to support candidates and the need to avoid corruption of elections.[3] Big money interests challenge the campaign finance laws in court. After decades of upholding similar laws, the U.S. Supreme Court strikes down a federal[4] ban on certain political advertisements as unconstitutional. Writing in dissent, Justice David Souter argues, "The court (and, I think, the country) loses when important precedent is overruled without good reason."[5]

The following year, a federal district court relied heavily on prior Supreme Court decisions to uphold a law that prohibited a nonprofit organization from running advertisements and airing a film about then-presidential candidate Hillary Clinton.[6] On appeal, the Supreme Court struck down the legal restrictions in *Citizens United v. Federal Election Commission*,[7] unleashing unlimited corporate and union spending on elections[8] and prompting uncertainty about the stability of the Court's decisions.[9] This chapter and the case excerpts that follow explore the relative constancy or uncertainty of the rule of law.

CHAPTER OUTLINE

Body of the Law
- Constitutions
- Statutes
- Common Law
- Equity Law
- Administrative Law
- Executive Orders

Structure of the Judicial System
- Court Jurisdiction
- Trial Courts
- Courts of Appeal
- The U.S. Supreme Court

Processes of the Law
- Civil Suits
- Summary Judgment

Emerging Law

Finding the Law

Reading Case Law
- Briefing Cases
- Analyzing *Marbury v. Madison*

Cases for Study
- *Marbury v. Madison*
- *Citizens United v. Federal Election Commission*

The ancient Greek philosopher Aristotle said people are basically self-interested; they pursue their own interests in preference to the collective good or the cause of justice. However, self-interest is ultimately shortsighted and self-destructive. A lumber company that seeks only to generate the greatest immediate profit ultimately deforests the timberlands it depends on.[10] Astute people therefore recognize that personal interests and short-term goals must sometimes

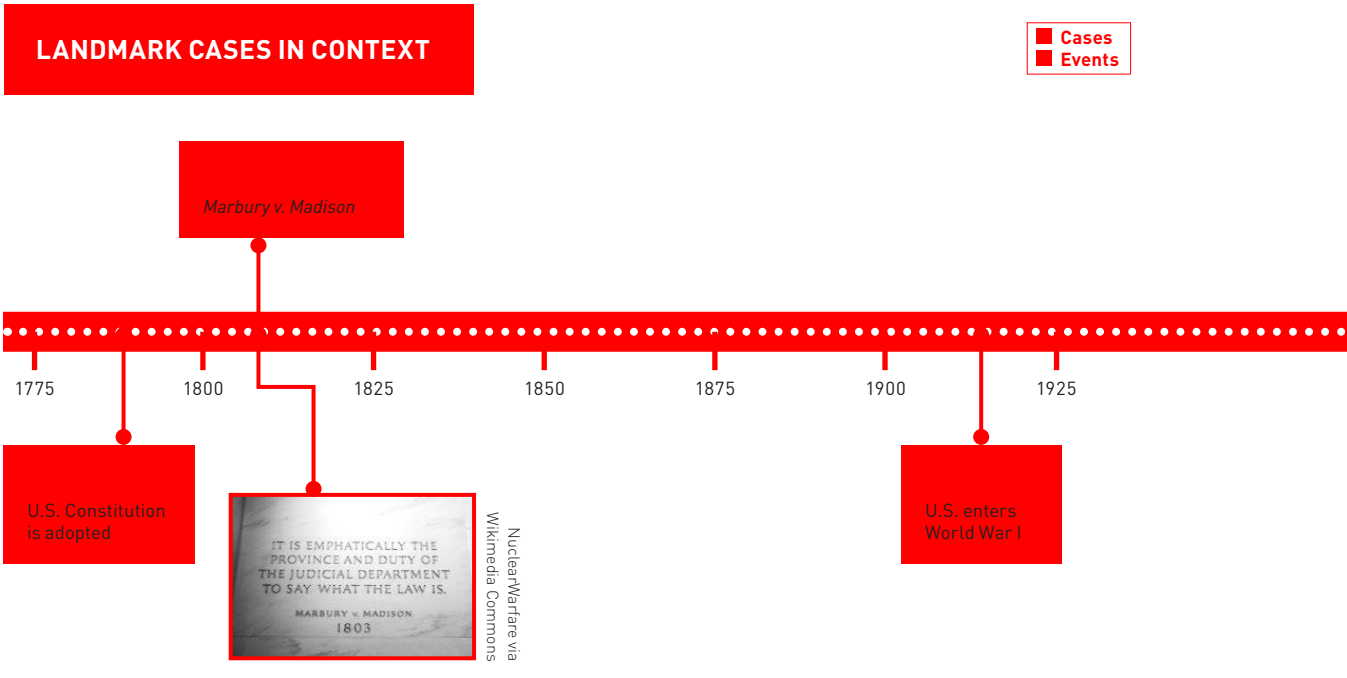
give way to broader or longer-term objectives. Everyone benefits when people adopt a system of rules to promote a balance between gain and loss, between cost and benefit and between personal and universal concerns. Aristotle called this balance the "golden mean." Human interests are served and justice is best achieved when a society adopts a system of law to balance conflicting human objectives and allow people to live together successfully.[11]

rule of law
The legal standards that guide the proper and consistent creation and application of the law.

Belief in the power of law to promote this balance and restrain human injustice is the foundation of the U.S. Constitution and the **rule of law**. The U.S. Supreme Court said the notion that "our government is a government of laws, not of men" is central to our constitutional nature.[12] "Stripped of all technicalities, [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how [government] will use its coercive powers in given circumstances, and to plan . . . on the basis of this knowledge."[13]

In essence, laws establish a contract that governs interactions among residents and between the people and their government. Legal rules establish the boundaries of acceptable behavior and empower government to punish violations. The rule of law limits the power of government because it prohibits government from infringing on the rights and liberties of the people. This system constrains the actions of both the people and the government to enhance liberty, freedom and justice for all.

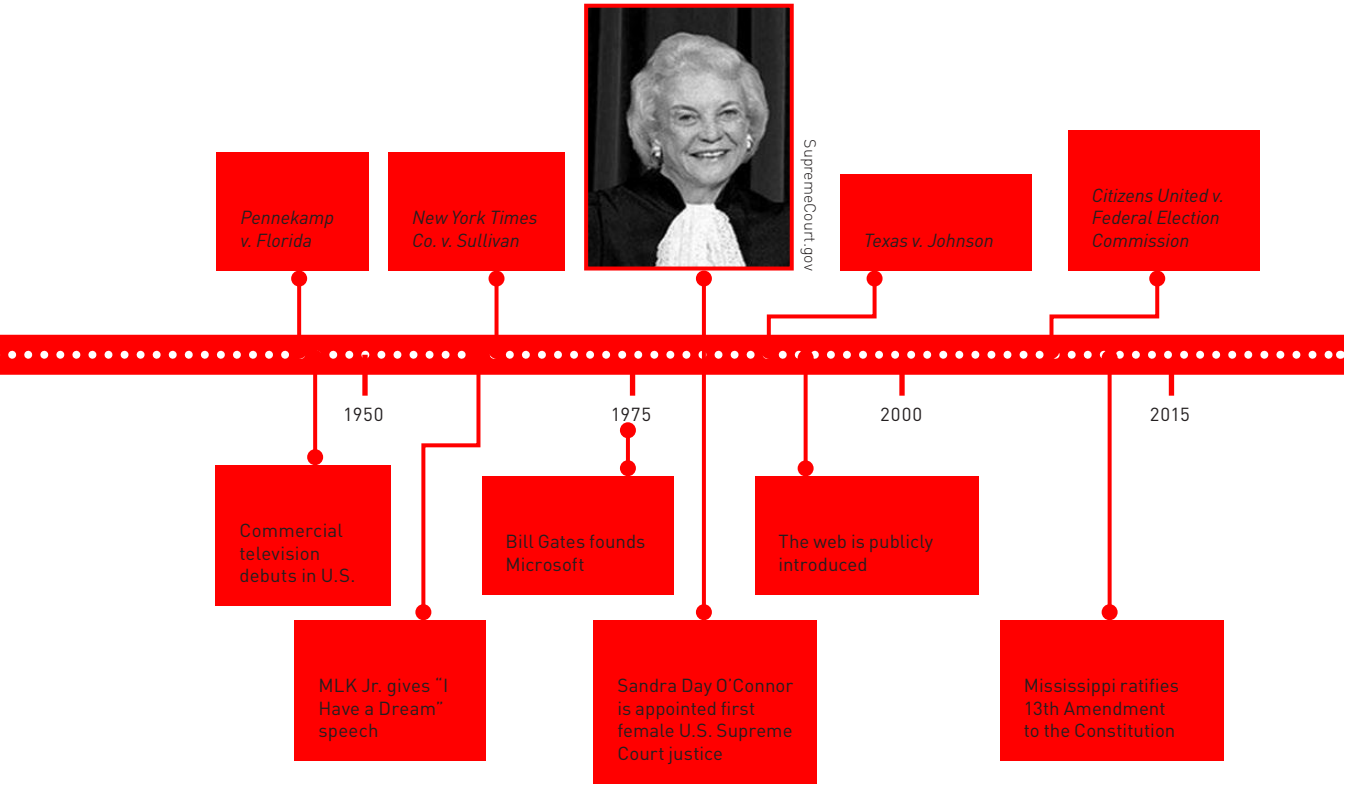
LANDMARK CASES IN CONTEXT



In 1964, as the United States expanded what many then believed was an illegal military action in Vietnam, Harvard legal scholar Lon Fuller articulated what would become a foundational understanding of the rule of law. In Fuller's view, the rule of law was a set of standards that established norms and procedures to encourage consistent, neutral decision making equally for all. Fuller's formal, conceptual definition has been criticized because it does not provide specific guidance to those drafting, interpreting or applying the law.[14] As one legal scholar noted, the rule of law is created through its application. It "cannot be [understood] in the abstract."[15]

For Fuller, the rule of law established eight "desiderata," or desired outcomes, to guide how laws should be created and employed. The rule of law requires laws to be (1) general and not discriminatory; (2) widely known and disseminated; (3) forward-looking in their application rather than retroactive; (4) clear and specific; (5) self-consistent and complementary of each other; (6) capable of being obeyed; (7) relatively stable over time; and (8) applied and enforced in ways that reflect their underlying intent.

As a mechanism for ordering human behavior, the law functions best when it makes clear, comprehensible and consistent distinctions between legal and illegal behavior. People can only obey laws that they know about and understand. Good laws must be publicly disseminated and sufficiently clear and precise to properly inform citizens of when and how the laws apply (as well as when they do not).



The World Justice Project has articulated four foundations of the rule of law based on internationally accepted universal standards. Accordingly, a system of the rule of law exists when:

1. All individuals and private entities are accountable under the law.
2. The laws are fair, clear, public and stable.
3. The processes by which the laws are enacted, administered and enforced are open, robust and timely for all.
4. Those who apply the law are competent, ethical, independent, neutral and diverse.[i]

Many argue that any movement toward a universal rule of law is a form of imperialism that tramples the unique priorities of individual nations and limits the freedom of different peoples to create distinct, culturally appropriate systems of law.[ii]

vague laws
Laws that fail to define their terms or use language so general that it fails to inform citizens or judges with certainty what the laws permit or punish.

Vague laws fail to define their terms or are unclear. They are unacceptable because people may avoid participating in legal activities out of uncertainty over whether their actions are illegal. This tramples people's freedom. In 2018, the U.S. Supreme Court by a vote of 5–4 struck down a provision of the Immigration and Nationality Act[16] as unconstitutionally vague.[17] The law practically required the deportation of any immigrant convicted of an "aggravated felony" or "crime of violence." The Court reasoned that applying the provision's imprecise language "necessarily devolves into guesswork and intuition, invites arbitrary enforcement, and fails to provide fair notice,"[18] all of which violate the basic tenets of due process. These core elements of due process, Justice Neil M. Gorsuch wrote in concurrence, are foundational to the Constitution's original meaning and basic to the rule of law.[19]

An international index ranks the United States 19th among 113 countries in how citizens experience the rule of law.[iii] The World Justice Project report put the United States behind the Nordic countries, Estonia, the Czech Republic and Japan but well ahead of Afghanistan, Cambodia and Venezuela.

The study found relative weaknesses in the U.S. respect for core human rights, protection of personal and property security, cost of access to civil justice, and the timeliness and impartiality of criminal justice.

Clear laws define their terms and detail their application in order to limit government officials' **discretion**. Clear laws advance the rule of law by reducing the ability of officials to apply legal rules differently to their friends and foes. "True freedom requires the rule of law and justice, and a judicial system in which the rights of some are not secured by the denial of rights to others," one observer noted.[20]

discretion
The authority to determine the proper outcome.

Good laws accomplish their objectives with minimum infringement on the freedoms and liberties of the people. Well-tailored laws advance specific government interests or prevent particular harms without punishing activities that pose no risk to society. A law that sought to limit noisy disturbances of residential neighborhoods at night, for example, would be poorly tailored and **overbroad** if it prohibited all discussion out of doors, anywhere at any time.

overbroad laws
A principle that directs courts to find laws unconstitutional if they restrict more legal activity than necessary.

The rule of law requires the law to be internally consistent, logical and relatively stable. To ensure slow evolution rather than rapid revolution of legal rules, judges in U.S. courts interpret and apply laws based upon the **precedents** established by other court rulings. Precedent, or **stare decisis**, is the legal principle that tells courts to stand by what courts have decided previously. As the U.S. Supreme Court has written, "[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."[21] The principle holds that subsequent court decisions should adhere to the example and reasoning of earlier decisions in similar factual situations. Reliance on precedent is the heart of the common law (discussed later) and encourages predictable application of the law.

precedent
The outcome of a previous case that establishes a rule of law for courts within the same jurisdiction to follow to determine cases with similar issues.

stare decisis
The doctrine that courts follow precedent; the basis of common law, it literally means to stand by the previous decision.

Although the application of prior rulings promotes the rule of law by increasing the consistency and uniformity of legal decision making,[22] it does not always happen. Sometimes precedents are unclear or seem to conflict. Then the rule of law can be ambiguous.[23] Especially where constitutional values are at issue, courts may "not allow principles of stare decisis to block correction of error," the California Supreme Court said.[24]

In 2010, for example, a "bitterly divided" U.S. Supreme Court ruled 5–4 in *Citizens United v. Federal Election Commission* (the case mentioned at the beginning and excerpted at the end of this chapter) that certain federal limits on campaign finance violated the Constitution. Observers noted that the decision made "sweeping changes in federal election law"[25] and "represented a sharp doctrinal shift."[26] Some said the Court had ignored binding precedent. Others argued that "the central principle which critics of this ruling find most offensive . . . has been affirmed by decades of Supreme Court jurisprudence."[27] Thus, the conflict centered less on *whether* to apply precedent and more on *which* precedents to apply.

Debate over the role that stare decisis plays in Supreme Court decision making arose again during the 2017–'18 term, when many said the Court had overruled four well-established precedents.[28] In *Janus v. American Federation of State, County, and Municipal Employees*,[29] for example, the Court overturned its 30-year-old holding in *Abood v. Detroit Board of Education*[30] when it held that laws forcing public employees to pay fees to their designated union violated their First Amendment right to freedom from compelled speech (see Chapter 2).

BODY OF THE LAW

The laws of the United States have grown in number and complexity as American society has become increasingly diverse and complicated. Many forms of communication and the laws that govern them today did not exist in the 1800s. Technology has been a driving force for change in the law of journalism and mass communication. U.S. law also has developed in response to social, political, philosophical and economic changes. Employment and advertising laws, for example, emerged and multiplied as the nation's workforce shifted and the power of corporations grew. Legislatures create new laws to reflect evolving understandings of individual rights, liberties and responsibilities. Even well-established legal concepts, such as libel—harm to another's reputation—have evolved to reflect new realities of the role of communication in society and the power of mass media to harm individuals.

The laws of journalism and mass communication generally originate from six sources.

Constitutions

Statutes

Common Law

Equity Law

Administrative Law

Executive Orders

Constitutions

constitutional law
The set of laws that establish the nature, functions and limits of government.

Constitutional law establishes the nature, functions and limits of government. The U.S. Constitution, the fundamental law of the United States, was framed in 1787 and ratified in 1789. Each of the states also has a constitution. These constitutions define the structure of government and delegate and limit government power to protect certain fundamental human rights. "Constitutions are checks upon the hasty action of the majority," said President William Howard Taft in 1911. "They are self-imposed restraints of a whole people upon a majority of them to secure sober action and a respect for the rights of the minority."[31]

Given the legacy of British religious oppression and the revolution against the Crown that formed this country, it should not be surprising that the U.S. Constitution protects individual liberties sometimes at the expense of much larger groups. The First Amendment, for example, generally protects an individual's right to speak very offensively, while laws in other countries are far more likely to punish hate speech, name-calling, denial of the Holocaust, criticism of government officials, anti-religious speech and much more.

political questions
Questions not subject to judicial review because they fall into areas properly handled by another branch of government.

The U.S. Constitution establishes the character of government, organizes the federal government, and provides a minimum level of individual rights and privileges throughout the country. It creates three separate and coequal branches of government—the executive, the legislative and the judicial—and designates the functions and responsibilities of each. The executive branch oversees government and administers, or executes, laws. The legislative branch enacts laws, and the judicial branch interprets laws and resolves legal conflicts.

Separation of government into branches provides checks and balances within government to support the rule of law. For example, "restrictions derived from the separation of powers doctrine prevent the judicial branch from deciding **political questions** . . . that revolve

around policy choices and value determinations" because the Constitution gives the legislative and executive branches express authority to make political decisions.[32]

The **Supremacy Clause** of the Constitution establishes the Constitution as the supreme law of the land and resolves conflicts among laws by establishing that all state laws must give way to federal law, and state or federal laws that conflict with the Constitution are invalid. In a similar way, some federal laws preempt state laws, which in turn may preempt city statutes.

As the bedrock of the law, the Constitution is relatively difficult to change. There are two ways to amend the Constitution. The first and only method actually used is for both chambers of Congress to pass a proposed constitutional amendment by a two-thirds vote in each. The second method is for two-thirds of the state legislatures to vote for a Constitutional Convention, which then proposes one or more amendments. All amendments to the Constitution also must be ratified by three-fourths of the state legislatures. When Mississippi recently became the last state to ban slavery by ratifying the 13th Amendment to the Constitution, the vote was only symbolic. The needed three-fourths of states ratified the amendment in 1865.[33]

POINTS OF LAW

THE THREE BRANCHES OF FEDERAL GOVERNMENT

The president, the cabinet and the administrative agencies execute laws.

The Senate and the House of Representatives pass laws.

The three levels of courts review laws and adjudicate disputes.

In many ways, state constitutions are distinct and independent from the U.S. Constitution they mirror. Under the principle of **federalism**, states are related to, yet independent of, the federal government and each other. Federalism encourages experimentation and variety in government. Each state has freedom to structure its unique form of government and to craft state constitutional protections that exceed the rights granted by the U.S. Constitution. For example, the U.S. Constitution says nothing about municipalities; states create and determine the authority of cities or towns. While the federal right to privacy exists only through the U.S. Supreme Court's interpretation of the protections afforded by the First Amendment to the Constitution, Washington state's constitution contains an explicit privacy clause that protects individuals from disturbances of their private affairs.[34]

Congress has approved only 33 of the thousands of proposed amendments to the U.S. Constitution, and the states have ratified only 27 of these. The first 10 amendments to the Constitution, which form the Bill of Rights, were ratified in 1791 after several states called for increased constitutional protection of individual liberties. In fewer than 500 words, the Bill of Rights expressly guarantees fundamental rights and limits government power. For example, the First Amendment (see Chapter 2) prevents government from abridging the people's right to speak and worship freely. State constitutions are amended by a direct vote of the people.

Statutes

The U.S. Constitution explicitly delegates the power to enact statutory laws to the popularly elected legislative branch of government. City, county, state and federal legislative bodies enact **statutory law**. Like constitutions, statutes are written down; both types of law are called **black-letter law**.

Supremacy Clause
Article IV, Part 2 of the U.S. Constitution establishes that federal law takes precedence over, or supersedes, state laws.

federalism
A principle according to which the states are related to yet independent of each other and are related to yet independent of the federal government.

statutory law
Written law formally enacted by city, county, state and federal legislative bodies.

black-letter law
Formally enacted, written law that is available in legal reporters or other documents.

It may seem strange, but U.S. courts do not have a certain and fixed method for dealing with international laws. Judges and academics have debated the topic for decades because the Constitution does not clearly establish how foreign laws should be applied in cases decided in the United States. Once a rather theoretical question, exploding global commerce and communications give this topic increased urgency and impact.

The Constitution delegates exclusive power over war and foreign relations to the Congress and the president.[iv] The Constitution's Supremacy Clause establishes three sources of law: the Constitution itself, "laws made in pursuance" to the Constitution and "Treaties."[v] Because laws can be adopted only through action of the U.S. Senate or state legislatures, some argue that U.S. courts need not recognize the law of other nations.[vi]

Others claim that the Constitution's establishment of the courts[vii] implicitly conveys the responsibility to incorporate international law as enforceable common law when they generally and consistently rely upon it to guide decisions.[viii] Thus, if courts use international law, it binds. But what if some U.S. states do and others do not?

The resulting uncertainty can create inconsistency in the application of the law and undermine the rule of law.

Legislatures make laws to respond to—or predict and attempt to prevent—social problems. Statutory law may be very specific to define the legal limits of particular activities. All criminal laws are statutes, for example. Statutes also establish the rules of copyright, broadcasting, advertising and access to government meetings and information. Statutes are formally adopted through a public process and are meant to be clear and stable. They are written down in statute books and codified, which means they are compiled into topics by codes, and anyone can find and read them in public repository libraries.

construction
The process by which courts and administrative agencies determine the proper meaning and application of laws, rules and regulations.

Laws are not inflexible. Even the U.S. Constitution—the foundational contract between the U.S. government and the people—can be changed through amendment. Other laws—statutes, regulations and rules—may be repealed or amended by the federal, state and local bodies that adopted them, and they may be interpreted or invalidated by the courts. In its landmark 1803 ruling in *Marbury v. Madison* (excerpted at the end of this chapter), the Supreme Court established the courts' power to interpret laws. The Court held that "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule."[35]

strict construction
Courts' narrow interpretation and application of a law based on the literal meaning of its language. Especially applied in interpreting the Constitution.

When the language of a statute is unclear, imprecise or ambiguous, courts determine the law's meaning and application through a process called statutory **construction**. Statutes may be difficult to interpret because they fail to define key terms. For example, if the word "meeting" is not defined in an open-meetings law, it is unclear whether the law applies to virtual meetings online.[36] When a statute suggests more than one meaning, courts generally look to the law's preamble, or statement of purpose, for guidance on how the legislature intended the law to apply. Courts may use legislative committee reports, debates and public statements to guide their statutory interpretation.

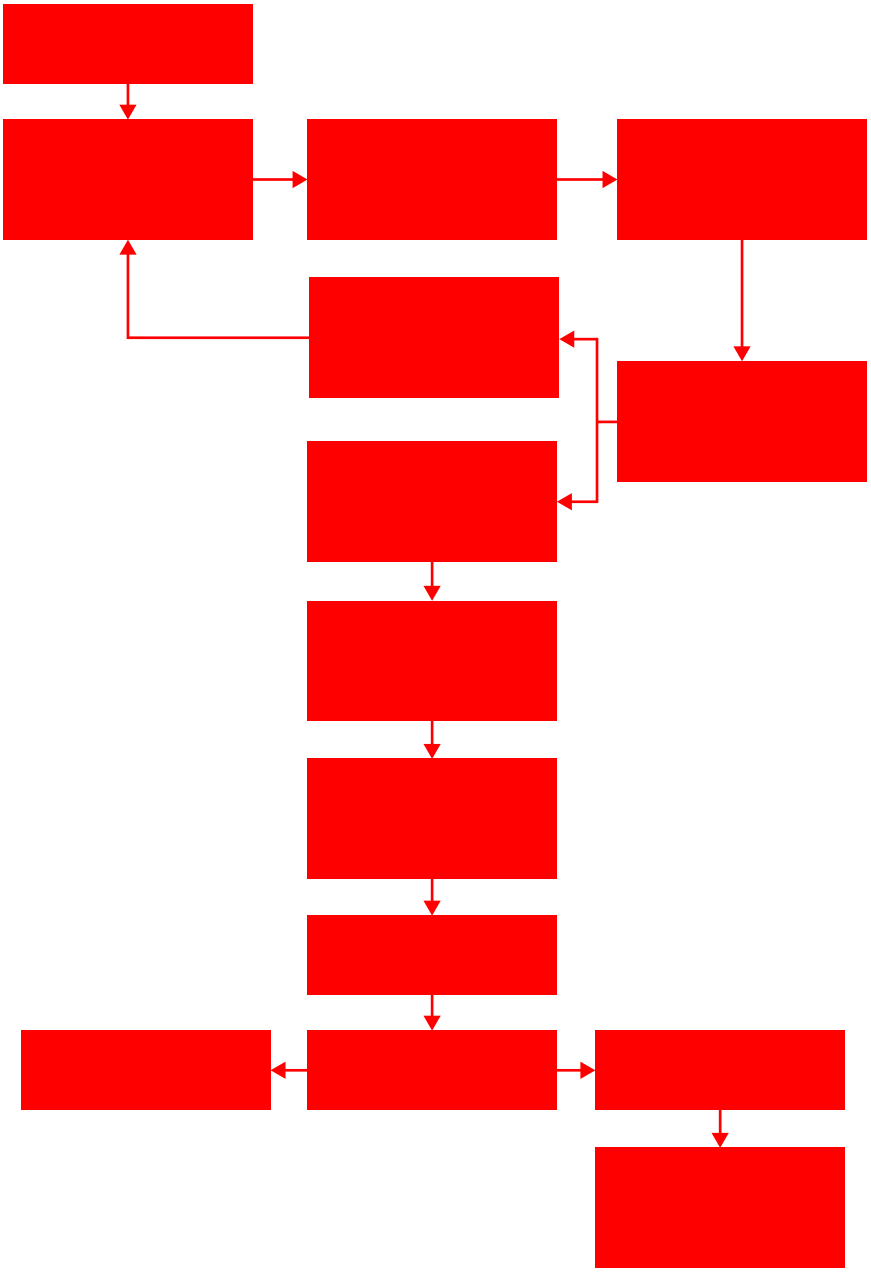
facial meaning
The plain and straightforward meaning.

Courts tend to engage in **strict construction**, which narrowly defines laws to their literal meaning and clearly stated intent. The effort to interpret laws according to the "plain meaning" of the words—the **facial meaning** of the law—limits any tendency courts might have to

rewrite laws through creative or expansive interpretation. This **deference** to legislative intent reflects courts' recognition that the power to write laws lies with the publicly elected legislature. The power of courts to engage in statutory **construction** is inherently nondemocratic because judges in many states are not elected.

deference
The judicial practice of interpreting statutes and rules by relying heavily on the judgments and intentions of the administrative experts and legislative agencies that enacted the laws.

FIGURE 1.1 ■ How a Bill Becomes a Law



Chip Somodevilla/Getty Images

In 2019, the 116th U.S. Congress seated its most diverse group of new members.

Courts may invalidate state statutes that conflict with federal laws, or city statutes that conflict with either state or federal law. However, courts try to interpret the plain meaning of a statute to avoid conflicts with other laws, including the Constitution. Courts review the constitutionality of a statute only as a last resort. When engaging in constitutional review, courts generally attempt to preserve any portions of the law that can be upheld without violating the general intent of the statute. For example, the U.S. Supreme Court struck down the Communications Decency Act[37] without undermining the balance of the comprehensive Telecommunications Act of 1996 (see Chapter 9).

judicial review
The power of the courts to determine the meaning of the Constitution and to decide whether laws violate the Constitution.

In what some call "one of the greatest legal events" in U.S. history,[38] the Supreme Court in *Marbury v. Madison*[39] established the Court's power of **judicial review**—that is, the power to strike down laws the Court finds to be in conflict with the Constitution. The Court said the constitutional system of checks and balances implicitly provided the judicial branch with authority to limit the power of the legislative branch and to bar it from enacting unconstitutional laws. The Court acknowledged that the Constitution gave the legislative branch the power to make laws, but Article III empowered the judicial branch to determine whether the actions of other branches of government were unconstitutional.

In *Marbury*, the Court gave itself the authority to limit the power of Congress to enact laws. As the final arbiters of law in the United States, the courts must ensure that actions of the legislative and executive branches conform to the U.S. Constitution, *Marbury* held. "Why courts should have this ultimate power . . . in a democratic order remains the largest and most difficult issue of constitutional law," according to one scholar.[40]

Judicial review allows all courts to examine government actions to determine their constitutionality. However, courts other than the U.S. Supreme Court rarely use this power. If a

state supreme court determined that a statute was constitutional under its state constitution, the decision could be appealed to the U.S. Supreme Court, which could decide that the law did not meet the standards set by the U.S. Constitution.

Historically, the Supreme Court has used its power of judicial review sparingly and rarely struck down laws as unconstitutional. For more than half a century after *Marbury*, the Court did not use its power as chief interpreter of the Constitution. As a general rule, the Court will defer to the lawmaking authority of the executive and legislative branches of government by interpreting laws in ways that do not conflict with the Constitution. Nonetheless, it has invalidated numerous acts of Congress.

Common Law

The **common law** is judge-made law. Judges create the common law when they rely on legal custom, tradition and prior court decisions to guide their decisions in pending cases. Common law often arises in situations not covered expressly by statutes when judges base their ruling on precedent and legal **doctrines** established in similar cases. For example, under common law, judges may treat print publishers and online distributors of threatening communications differently (see Chapter 3).

common law
Judge-made law composed of the principles and traditions established through court rulings; precedent-based law.

doctrines
Principles or theories of law that shape judicial decision making (e.g., the doctrine of content neutrality).

The common law is not written down in one place. It consists of a vast body of legal principles created from hundreds of years of dispute resolution that reaches past the founding of this country back to England. For centuries prior to the settlement of the American colonies, English courts "discovered" the doctrines people had used throughout time to resolve disagreements. Judges then applied these "common" laws to guide court decisions. The resulting decisions, and the reasoning that supported them, was known as English common law. It became the foundation of U.S. common law.

Eventually, common law grew beyond the problem-solving principles of the common people. Today, U.S. common law rests on the presumption that prior court rulings, or precedent, should guide future courts. The essence of precedent, stare decisis, is that courts should follow each other's guidance. Once a higher court has established a principle relevant to a certain set of facts, fairness requires lower courts to try to apply the same principle to similar facts. This establishes consistency and stability in the law.

Under the rule of stare decisis, the decision of a higher court, such as the U.S. Supreme Court, establishes a precedent that binds lower court rulings. A binding precedent of the U.S. Supreme Court constrains all lower federal courts throughout the country, and the decisions of

REAL WORLD LAW

PRECEDENT IS A CORNERSTONE OF THE RULE OF LAW

In a 2018 dissenting opinion, Justice Elena Kagan wrote:

> The idea that today's Court should stand by yesterday's decisions is a foundation stone of the rule of law. It promotes the evenhanded, predictable and consistent development of legal doctrine. It fosters respect for and reliance on judicial decisions. And it contributes to the actual and perceived integrity of the judicial process by ensuring that decisions are founded in the law rather than in the proclivities of individuals.[ix]

each circuit court of appeals bind the district courts in that circuit. Similarly, lower state courts must follow the precedents of their own state appellate and supreme courts. However, courts from different and coequal jurisdictions do not establish binding precedent upon their peers. Courts in Rhode Island are not bound to follow precedents established in Wyoming, and federal district courts are not bound to apply precedents established by appellate courts in other federal circuits. In fact, different federal appellate courts sometimes hand down directly conflicting decisions. To avoid such conflicts, however, courts often look to each other's decisions for guidance.

Applying precedent is not clear cut. After all, the common law must be discovered through research in the thousands of court decisions collected into centuries of volumes, called court reporters. Sometimes, multiple lines of precedent seem to converge and suggest different outcomes.[41] Then a court must choose.

Even when stare decisis is clear and its power most direct, lower courts may decide not to adhere to precedent. At the risk of the judges' credibility, courts may simply ignore precedent. Courts also may depart from precedent with good reason. Courts examining a new but similar question may decide to **modify precedent**—that is, to alter the precedent to respond to changed realities. Thus, the U.S. Supreme Court might find that contemporary attitudes and practices no longer support a 20-year-old precedent permitting government to maintain the secrecy of computer compilations of public records.[42]

modify precedent
To change rather than follow or reject precedent.

Courts also may **distinguish from precedent** by asserting that factual differences between the current case and the precedent case outweigh similarities. For example, the Supreme Court 40-plus years ago distinguished between newspapers and broadcasters in terms of any right of public access.[43] The Court said the public has a right to demand that broadcasters provide diverse content on issues of public importance because broadcasters use the public airwaves. The Court did not apply that reasoning when it later considered virtually the same question as applied to newspapers. Newspapers, the Court said, are independent members of the press with a protected right to control their content. The Supreme Court similarly has said "common-sense distinctions" differentiate advertising, which the courts call commercial speech, from other varieties of speech.[44]

distinguish from precedent
To justify an outcome in a case by asserting that differences between that case and preceding cases outweigh any similarities.

Finally, courts very occasionally will **overturn precedent** outright and reject the fundamental premise of an earlier decision. This is a radical step and generally occurs only to remedy past errors or to reflect a fundamental rethinking of the law. In the Supreme Court's recent decision in *Janus*, the Court overruled a 30-year-old Court precedent that had required public employees to pay their "fair share" of union dues even if the employees chose not to join the union.[45] The Court said *Abood* had been poorly reasoned, produced inconsistent outcomes and violated nonmembers' right to be free from government-compelled subsidies of private speech on matters of public concern.

overturn precedent
To reject the fundamental premise of a precedent.

Equity Law

Equity law is a second form of law made by judges when they apply general principles of ethics and fairness to determine the proper remedy for a legal harm. When a court orders someone to stop using your trademark in addition to paying fines that cover the costs of actual damages caused, the order recognizes that continued use might force you out of business or associate

equity law
Law created by judges to decide cases based on fairness and ethics and also to determine the proper remedy.

you with products of lesser quality. Such a ruling represents the application of equity law to achieve a just result.

Equity law is intended to provide fair remedies for various harms that are not addressed in other forms of law or because fairness will not be achieved fully or at all through the rigid application of strict rules. No specific, black-letter laws dictate equity. Rather, judges use their conscience and discretion to decide what is fair and issue decrees to ensure that justice is achieved. Thus, restraining orders that require paparazzi to stay a certain distance away from celebrities are a form of equity law. An injunction in 1971 that temporarily prevented The New York Times and The Washington Post from publishing stories based on the Pentagon Papers was another form of equity relief. While the law of equity is related to common law, the rules of equity law are more flexible and are not governed by precedent.

Administrative Law

Constitutions and legislatures delegate authority to executives and to specialized executive branch agencies to make the decisions and create the rules that form **administrative law**. Administrative agencies, such as the Federal Election Commission or the Federal Trade Commission, create the rules, regulations, orders and decisions that execute, or carry out, laws enacted by Congress.

administrative law
The orders, rules and regulations promulgated by executive branch administrative agencies to carry out their delegated duties.

Administrative law may represent the largest proportion of contemporary law in the United States. An alphabet soup of state and federal administrative agencies—such as the Federal Communications Commission, which oversees interstate electronic communication—provides both legislative and judicial functions. These agencies adopt orders, rules and regulations with the force of law to implement the laws enacted by Congress and signed by the president.

The authority, or even the existence, of administrative agencies can change. Legislatures may adopt or amend laws to revise the responsibilities of administrative agencies. Thus, when Congress adopted the Telecommunications Act of 1996, it substantially revised the responsibilities of the FCC, originally authorized by the Communications Act of 1934.

Administrative agencies enforce the administrative rules they adopt. They conduct hearings in which they interpret their rules, grant relief, resolve disputes and levy fines or penalties. Courts generally have the power to hear appeals to the decisions of administrative agencies after agency appeal procedures are exhausted. Then courts engage in regulatory construction and judicial review. Courts generally defer to the judgment of expert administrative agencies and void agency rules and actions only when the agency clearly has exceeded its authority, violated its rules and procedures, or provided no evidence to support its ruling.

In 2015, however, the U.S. Supreme Court refused to defer to administrative interpretations of the meaning of the Affordable Care Act's precise terms.[46] The Court said the "task to determine the correct reading" of the law fell to the Court itself when, as in this case, Congress did not intend to delegate the authority to "fill in the statutory gaps" to the administrative agency.[47] Carefully parsing the meaning of the key phrases in the contested section of the law and "bearing in mind . . . that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme,"[48] the Court affirmed the ruling of the Fourth Circuit Court of Appeals and found the law constitutional.[49]

Many saw the Court's reasoning in *King v. Burwell*, the Affordable Care Act case, as signaling a movement away from deference to administrative agency judgments. Some said the Court's shift reinforced the rule of law by counterbalancing any tendency for the new administrative agency leaders appointed by each incoming president to alter the interpretation of administrative laws.[50]

Executive Orders

executive orders Orders from a government executive, such as the president, a governor or a mayor, that have the force of law.

Government executives, such as the president, may issue **executive orders** to create another source of law. Both President Barack Obama and President Donald Trump have used executive orders to achieve policy objectives when Congress failed to act. Their executive orders prompted frequent outcry from political opponents and protests that each was circumventing the express authority of Congress, in violation of the rule of law.

Executive Orders of Recent U.S. Presidents

	Time Period	Total	No./Yr.	Exec. Order No.
William J. Clinton	**Total**	**364**	**46**	**12834–13197**
	Term I	200	50	12834–13033
	Term II	164	41	13034–13197
George W. Bush	**Total**	**291**	**36**	**13198–13488**
	Term I	173	43	13198–13370
	Term II	118	30	13371–13488
Barack Obama	**Total**	**276**	**35**	**13489–13764**
	Term I	147	37	13489–13635
	Term II	129	32	13636–13764
Donald J. Trump (2017–part 2018)	**Total**	**85**	**51**	**13765–13849**
Combined Annual AVERAGE		**39**		

Source: Washington–Trump, The American Presidency Project, presidency.proxied.lsit.ucsb.edu/data/orders.php.

The president, governors and mayors do not have unlimited power to issue executive orders. The Supreme Court long has held that executive orders must fall within the inherent powers of the executive to have the force of law.[51] The Court has said executive orders must arise from the president's explicit power under Article II, Section 2 of the Constitution, his role as commander in chief, or his responsibility to ensure that laws are properly executed. If the delegation of power to the executive is not clear, the authority to issue executive orders falls into what Justice

Robert H. Jackson once called a "zone of twilight" ambiguity.[52] However, the limits to the power to issue executive orders are largely informal and primarily a matter of self-restraint and tradition.[53]

Early in 2019, for example, the American Civil Liberties Union and 16 states filed separate lawsuits in federal court in California challenging President Trump's executive order declaring a national emergency to build a wall along the southern border.[54] The ACLU argued that the executive order unconstitutionally usurped the authority of Congress to control spending. In announcing the executive order, President Trump predicted the lawsuits and said, "We'll win in the Supreme Court."

Some executive orders are routine. For example, each president of the United States issues orders that determine what types of records will be open and which classified as secret, how long they will remain secret and who has access to them. Changes in these rules not only affect the operations of the executive agencies that create the documents; they also affect the ability of citizens to oversee and review the actions of their government (see Chapter 7).

STRUCTURE OF THE JUDICIAL SYSTEM

A basic understanding of the structure of the court system in the United States is fundamental to an appreciation of the functioning of the law. Trial courts, or federal district courts, do fact-finding, apply the law and settle disputes. Courts of appeal, including federal circuit courts and supreme courts in each system, review how lower courts applied the law. Through their judgments, courts can hand down equitable remedies, reshape laws or even throw out laws as unconstitutional.

Court Jurisdiction

An independent court system operates in each state, the District of Columbia and the federal government. The military and the U.S. territories, such as Puerto Rico, also have court systems.

Each of these court systems operates under the authority of the relevant constitution. For example, the U.S. Constitution requires the establishment of the Supreme Court of the United States and authorizes Congress to establish other courts it deems necessary to the proper functioning of the federal judiciary. **Jurisdiction** refers to a court's authority to hear a case. Every court has its own jurisdiction—that is, its own geographic or topical area of responsibility and authority.

jurisdiction The geographic or topical area of responsibility and authority of a court.

In 2017, the U.S. Supreme Court reiterated its recognition of two types of court jurisdiction: general and specific.[55] Typically, the site or location of general jurisdiction is an individual's home or a corporation's headquarters. Given general jurisdiction, a court may hear any claim against that defendant. To be heard in a forum of specific jurisdiction, a suit must relate to the defendant's contacts with that forum. In libel, for example, the standard has been that any court in any locale where the alleged libel could be seen or heard would have jurisdiction.[56] A court may dismiss a lawsuit outside of its jurisdiction.

New technologies present new challenges to the determination of jurisdiction. Consider online libel. Given that statements published online are potentially seen anywhere, any court might claim jurisdiction (see Chapter 5). Then the plaintiff might initiate the lawsuit in any court and would likely file the suit in the court expected to render a favorable decision.

POINTS OF LAW

THREE-PART TEST FOR SPECIFIC COURT JURISDICTION[x]

The defendant purposefully conducted activities in the jurisdiction of the court.

The plaintiff's claim arose out of the defendant's activities within that jurisdiction.

It is constitutionally reasonable for the court to exercise jurisdiction.

In a broad ruling that could limit **forum shopping**, the practice of seeking the most favorable court to hear your case, the U.S. Supreme Court held that unless there is a substantial link between the forum of the court and the source of injury, a company may only be sued "at home."[57] Following a detailed discussion of jurisdiction, the Court unanimously held that a national newspaper's "home" is in one of only two places: where the company is incorporated or the main location of its business.[58]

As access to the internet becomes accepted as an essential public utility,[59] nations struggle individually and collectively to determine who has legal jurisdiction over international online disputes.[60] The U.S. Supreme Court test to establish specific jurisdiction often applies to such online disputes and requires courts to find that (1) the defendant intentionally acted inside the jurisdiction of the court, (2) the plaintiff's claim arose from that activity, and (3) it is reasonable for the court to exercise jurisdiction.[61]

forum shopping A practice whereby the plaintiff chooses a court in which to sue because he or she believes the court will rule in the plaintiff's favor.

The U.S. Constitution spells out the areas of jurisdiction of the federal courts. Within their geographic regions, federal courts exercise authority over cases that relate to interstate or international controversies or that interpret and apply federal laws, treaties or the U.S. Constitution. Thus, federal courts hear cases involving copyright laws. The federal courts also decide cases in which the federal government is a party, such as when the states bring suit against presidential directives extending protections for undocumented immigrants.[62] Cases involving controversies between states, between citizens of different states or between a state and a citizen of another state also are heard in federal courts. Thus, a libel suit brought by a resident of Pennsylvania against a newspaper in California would be heard in federal court.

Trial Courts

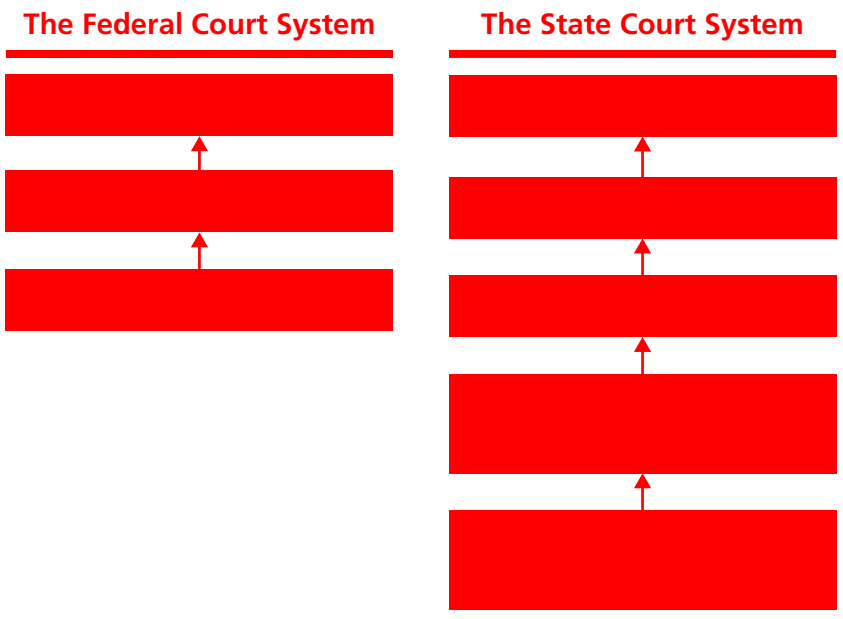
The state, federal and specialized court systems in the United States are organized similarly; most court systems have three tiers. At the lowest level, trial courts are the courts where nearly all cases begin. Each state contains at least one of the nation's 94 trial-level federal courts, which are called district courts. Trial courts reach decisions by finding facts and applying existing law to them. They are the only courts to use juries. They do not establish precedents. Some judges view the routine media coverage of legal actions taking place in trial courts as a threat to the fairness of trials (see Chapter 8). Some judges also fear that media coverage will cast their court in disrepute and reduce public trust in the judicial system.

Courts of Appeal

Anyone who loses a case at trial may appeal the decision. However, courts of appeal generally do not make findings of fact or receive new evidence in the case. Only in rare cases do courts of appeal review case facts **de novo**, a phrase meaning "new" or "over again." Instead,

de novo Literally, "new" or "over again." On appeal, the court may review the facts de novo rather than simply reviewing the legal posture and process of the case.

FIGURE 1.2 ■ Comparing the Federal and State Court Systems



appellate courts review the legal process of the lower court. Courts of appeal examine the procedures and tests used by the lower court to determine whether **due process** was carried out—that is, whether the proper law was applied and whether the judicial process was fair and appropriate.

Decisions in appellate courts are based primarily on detailed written arguments, or briefs, and on short oral arguments from the attorneys representing each side of the case. Individuals and organizations that are not parties to the case, called **amicus curiae** ("friends of the court"), may receive court permission to submit a brief called an **amicus brief**.

Most court systems have two levels of appellate courts: the intermediate courts of appeal and the supreme court. In the federal court system, there are 13 intermediate-level appellate courts, called circuit courts. A panel of three judges hears all except the most important cases in the federal circuit courts of appeal. Only rarely do all the judges of the circuit court sit **en banc** to hear an appeal. *En banc* literally means "on the bench" but is used to mean "in full court." Twelve of the federal circuits represent geographic regions. For example, the U.S. Court of Appeals for the Ninth Circuit bears responsibility for the entire West Coast, Hawaii and Alaska, and the U.S. Court of Appeals for the D.C. Circuit covers the District of Columbia. The 13th circuit, the U.S. Court of Appeals for the Federal Circuit, handles specialized appeals. In addition, separate, specialized federal courts handle cases dealing with the armed forces, international trade or veterans' claims, among other things.

due process
Fair legal proceedings. Due process is guaranteed by the Fifth and 14th Amendments to the U.S. Constitution.

amicus brief
A submission to the court from **amicus curiae**, or "friends of the court," which are interested individuals or organizations that are parties in the case.

en banc
Literally, "on the bench" but now meaning "in full court." The judges of a circuit court of appeals will sit en banc to decide important or controversial cases.

affirm
To ratify, uphold or approve a lower court ruling.

overrule
To reverse the ruling of a lower court.

concurring opinion
A separate opinion of a minority of the court or a single judge or justice agreeing with the majority opinion but applying different reasoning or legal principles.

dissenting opinion
A separate opinion of a minority of the court or a single judge or justice disagreeing with the result reached by the majority and challenging the majority's reasoning or the legal basis of the decision.

Courts of appeal may **affirm** the decision of the lower court with a majority opinion, which means they ratify or uphold the prior ruling and leave it intact. They also may **overrule** the lower court, reversing the previous decision. Any single judge or minority of the court may write a **concurring opinion** agreeing with the result reached by the court opinion but presenting different reasoning, legal principles or issues. Judges who disagree with the opinion of the court may write a **dissenting opinion**, critiquing the majority's reasoning or judgment and providing the basis for the divergent conclusion.

TABLE 1.1 ■ Comparing Federal and State Courts

The federal government, and each state government, has its own court system.

The Federal Court System
Structure
Article III of the Constitution invests the judicial power of the United States in the federal court system. Article III, Section 1 creates the U.S. Supreme Court and gives Congress authority to create lower federal courts. Congress has established 13 U.S. Courts of Appeals, 94 U.S. District Courts, the U.S. Court of Claims, and the U.S. Court of International Trade. U.S. Bankruptcy Courts handle bankruptcy cases. Magistrate Judges handle some District Court matters. Parties may appeal a decision of a U.S. District Court, the U.S. Court of Claims, and/or the U.S. Court of International Trade to a U.S. Court of Appeals. A party may ask the U.S. Supreme Court to review a decision of the U.S. Court of Appeals, but the Supreme Court usually is under no obligation to do so.
Selection of Judges
The Constitution states that federal judges are to be nominated by the President and confirmed by the Senate. They hold office during good behavior, typically, for life. Congressional impeachment proceedings may remove federal judges for misbehavior.
Types of Cases Heard
Cases that deal with the constitutionality of a law; Cases involving the laws and treaties of the U.S.; Legal issues related to ambassadors and public ministers; Disputes between two or more states; Admiralty law; Bankruptcy; and Habeas corpus issues.

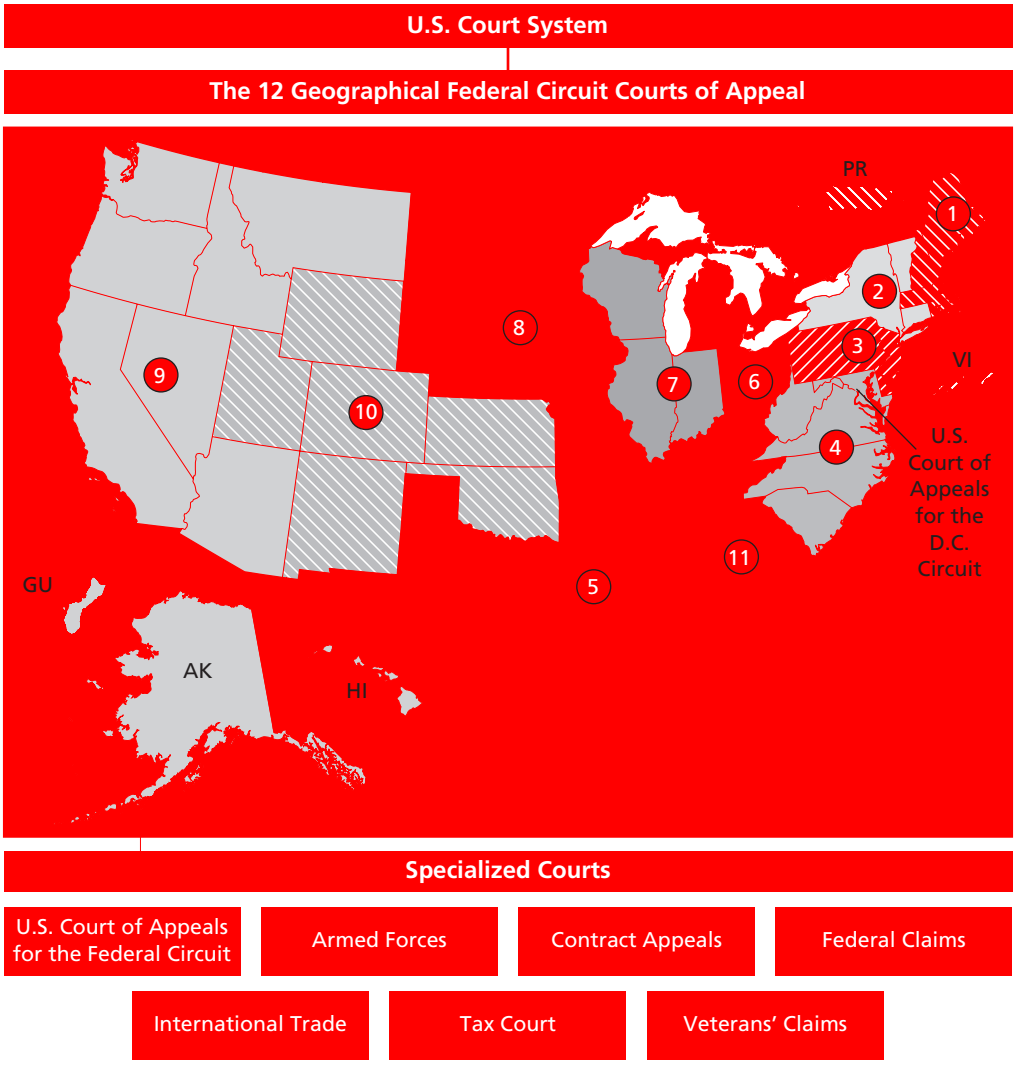
The Federal Court System (Continued)
Article I Courts
Congress created several Article I, or legislative courts, that do not have full judicial power. Article I courts are: U.S. Court of Appeals for Veterans Claims U.S. Court of Appeals for the Armed Forces U.S. Tax Court

The State Court System
Structure
The Constitution and laws of each state establish the state courts. Most states have a Supreme Court, an intermediate Court of Appeals, and state trial courts, sometimes referred to as Circuit or District Courts. States usually have courts that handle specific legal matters, e.g., probate court (wills and estates); juvenile court; family court; etc. Parties dissatisfied with the decision of the trial court may take their case to the intermediate Court of Appeals. Parties have the option to ask the highest state court to hear the case. Only certain cases are eligible for review by the U.S. Supreme Court.
Selection of Judges
State court judges are selected in a variety of ways, including election, appointment for a given number of years, appointment for life, and combinations of these methods, e.g., appointment followed by election.
Types of Cases Heard
Most criminal cases, probate (involving wills and estates) Most contract cases, tort cases (personal injuries), family law (marriages, divorces, adoptions), etc. State courts are the final arbiters of state laws and constitutions. Their interpretation of federal law or the U.S. Constitution may be appealed to the U.S. Supreme Court.
Article I Courts
N/A

Source: United States Courts, www.uscourts.gov/about-federal-courts/court-role-and-structure; www.uscourts.gov/aboutfederal-courts/court-role-and-structure/comparing-federal-state-courts.

Majority decisions issued by courts of appeal establish precedent for lower courts within their jurisdiction. Their rulings also may be persuasive outside their jurisdiction. If only a plurality of the judges hearing a case supports the opinion of the lower court, the decision does not establish binding precedent. Similarly, dissenting and concurring opinions do not have the force of law, but they often influence subsequent court reasoning.

FIGURE 1.3 ■ U.S. Circuit Courts of Appeal



Courts of appeal also **remand**, or send back, decisions to the lower court to establish a more detailed record of facts or to reconsider the case. A decision to remand a case may not be appealed. Courts of appeal often remand cases when they believe that the lower court did not fully explore issues in the case and needs to develop a more complete record of evidence as the basis for its decision.

A circuit court of appeals decision must be signed by at least two of the three sitting judges and is final. The losing party may ask the court to reconsider the case or may request a rehearing en banc. Such requests are rarely granted. Losing parties also may appeal the verdict of any intermediate court of appeals to the highest court in the state or to the U.S. Supreme Court.

Gina Ferazzi/Getty Images

The U.S. Court of Appeals for the Ninth Circuit sits en banc in 2014 to hear the appeal in *Garcia v. Google*, which involves a demand that Google remove a video from its site.

The U.S. Supreme Court

Established in 1789, the Supreme Court of the United States functions primarily as an appellate court, although the Constitution establishes the Court's **original jurisdiction** in a few specific areas. In general, Congress has granted lower federal courts jurisdiction in these same areas, so almost no suits begin in the U.S. Supreme Court. Instead, the Court hears cases on appeal from all other federal courts, federal regulatory agencies and state supreme courts.

Cases come before the Court either on direct appeal from the lower court or through the Court's grant of a **writ of certiorari**. Certain federal laws, such as the Bipartisan Campaign Reform Act,[63] guarantee a direct right of appeal to the U.S. Supreme Court. More often, the Court grants a writ of certiorari for compelling reasons, such as when a case poses a novel or pressing legal question. The Court often grants certiorari to cases in which different U.S. circuit courts of appeal have issued conflicting opinions. The Court may consider whether an issue is ripe for consideration, meaning that the case presents a real and present controversy rather than a hypothetical concern. In addition, the Court may reject some petitions as **moot** because the controversy is no longer "live." Mootness may be an issue, for example, when a student who has challenged school policy graduates before the case is resolved. The Court sometimes accepts cases that appear to be moot if it believes the problem is likely to arise again.

The Court's Makeup. The chief justice of the United States and eight associate justices make up the Supreme Court. The president nominates and the Senate confirms the chief justice as well as the other eight members of the Court, who sit "during good behavior"[64] for life or until retirement. This gives the president considerable influence over the Court's political ideology.

remand
To send back to the lower court for further action.

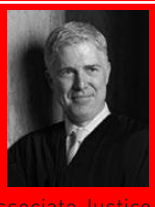
original jurisdiction
The authority to consider a case at its inception, as contrasted with appellate jurisdiction.

writ of certiorari
A petition for review by the Supreme Court of the United States; *certiorari* means "to be informed of."

moot
Term used to describe a case in which the issues presented are no longer "live" or in which the matter in dispute has already been resolved; a case is not moot if it is susceptible to repetition but evades review.

TABLE 1.2 ■ The U.S. Supreme Court at a Glance, 2019

Justice	Born	Nominating President	Year Appointed
 Chief Justice John G. Roberts Jr.	1955	George W. Bush	2005

Justice	Born	Nominating President	Year Appointed
 Associate Justice Clarence Thomas	1948	George H. W. Bush	1991
 Associate Justice Stephen G. Breyer	1938	Bill Clinton	1994
 Associate Justice Sonia Sotomayor	1954	Barack Obama	2009
 Associate Justice Neil M. Gorsuch	1967	Donald Trump	2017

Justice	Born	Nominating President	Year Appointed
 Associate Justice Ruth Bader Ginsburg	1933	Bill Clinton	1993
 Associate Justice Samuel A. Alito Jr.	1950	George W. Bush	2006
 Associate Justice Elena Kagan	1960	Barack Obama	2010
 Associate Justice Brett M. Kavanaugh	1965	Donald Trump	2018

Photos source: SupremeCourt.gov.

After the Senate failed to give President Obama's Supreme Court nominee a confirmation vote, President Trump took office and conservative Neil Gorsuch took the vacant seat in 2017. Combined with Justice Anthony Kennedy's retirement and the 2018 confirmation of Brett Kavanaugh, this shifted the Court toward the conservative end and made Chief Justice John Roberts the swing vote. Most observers argue this will change the direction of American jurisprudence for decades.

Fred Schilling, Collection of the Supreme Court of the United States

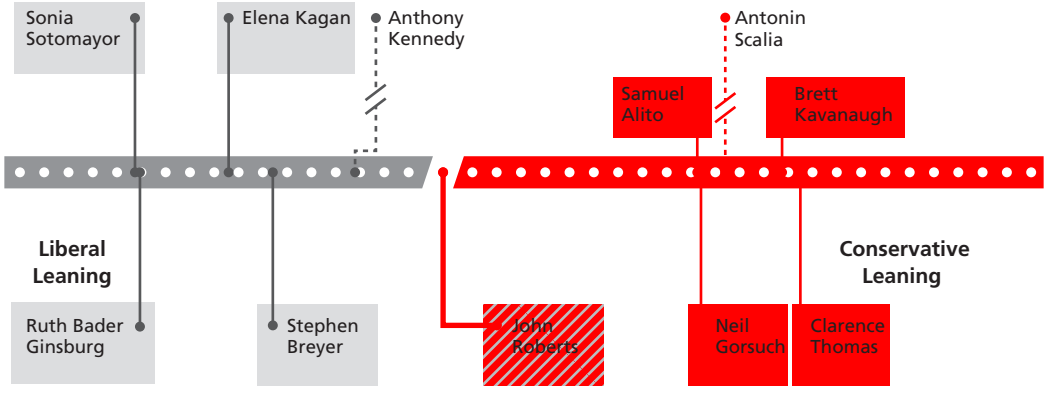
Supreme Court of the United States justices, fall 2018.

In 2019, Justice Sonia Sotomayor was the only true liberal among the sitting justices. She is the first Hispanic/Latina justice and one of the Court's most public facing members. Liberal justices tend to believe that government should play an active role in ensuring individual liberties. They also tend to support regulation of large businesses and corporations and to reduce emphasis on property rights. Justice Sotomayor's former experience as a prosecutor and trial judge often leads her to challenge lawyers on the facts of a case.

As the most senior justice on the court's left wing, Justice Ruth Bader Ginsburg is often in charge of assigning dissents in highly controversial cases. Once at the center of the Court's ideological spectrum, she now is the last civil rights lawyer on the Court.

Justices Elena Kagan and Stephen Breyer are seen as "center-left pragmatists."[65] Justice Kagan is the first justice in decades who did not serve previously as a judge. Her early terms on the Court displayed a willingness to inject a "critical voice that could make the case for liberals within the court and beyond"[66] and an ability to draft unanimous decisions. Justice Breyer

FIGURE 1.4 ■ Changing Ideologies of the Supreme Court



Source: Adapted from data collected by *The Judicial Common Space*.

The World Justice Project's Rule of Law Index identified problematic trends in the judicial selection process in the United States over the last few years. Noting that judicial selection is an essential bulwark of the rule of law, particularly as related to judicial independence and accountability, the report highlighted significant differences in the U.S. process and that of most Western democratic nations.

While the United States allows almost anyone to become a judge, other countries require judges to meet certain standards for age, legal education and legal experience. In addition, most countries allow executives to appoint judges only from a list created by an independent body, which is not the case in the United States. This raises questions of judicial independence. Finally, very few countries allow public election of judges, while most states elect at least some judges. Elections make judges more accountable but also affect judicial outcomes, according to studies.

"Independence versus accountability is that tension that just runs throughout the judicial process. . . . But obviously the more independent you make the judges then in a certain sense the less accountable they can be."[xi]

tends to emphasize legal history and intent as well as substantive due process in rulings that prior to 2017 often determined the Court's majority.

Chief Justice John Roberts now is the justice closest to the center of the Court. A conservative, the chief justice tries to develop agreement across the Court by encouraging narrow rulings.

Justices Samuel Alito, Clarence Thomas, Brett Kavanaugh and Neil Gorsuch create a staunch conservative bloc in the Court.[67] Conservative justices, in general, want to reduce the role of the federal government, including the Supreme Court. They tend to favor a narrow, or close, reading of the Constitution that relies more heavily on original intent than on contemporary realities. These justices have propelled the Court's rightward shift on business, campaign finance and race.[68]

The demographics of the Supreme Court have important symbolic significance even if they do not directly influence the Court's rulings. In 2016, however, Justice Sonia Sotomayor said the Court could use more diversity. "I, for one, do think there is a disadvantage from having (five) Catholics, three Jews, everyone from an Ivy League school. . . . A different perspective can permit you to more fully understand the arguments that are before you and help you articulate your position in a way that everyone will understand."[69]

Throughout history, U.S. Supreme Court justices have been predominantly married, male, white and Protestant; only four women (3.5 percent) and two African-Americans have served on the nation's highest court. Today, the Court is more diverse than in the past. Three female justices (one Hispanic) and one African-American justice sit on the current Court, but the Court that is the final arbiter of the law in this country does not reflect the diversity of the U.S. population. Court membership overrepresents certain educational backgrounds and religious faiths. Four of the sitting justices graduated from Yale Law School and four from Harvard, which Justice Ruth Bader Ginsburg attended although she graduated from

REAL WORLD LAW

SCALIA SAID RULES, HISTORY SHOULD GUIDE COURT INTERPRETATIONS

After serving almost 30 years on the Court, Justice Antonin Scalia was one of the longest-seated justices in the Supreme Court's history when he died in 2016.[xii] His views shaped many areas of contemporary mass communication law as well as the rule of law.

Justice Scalia relied on originalism and clear rules to constrain the discretion of judges. Originalists argue that the Constitution's meaning should be determined by how the text was understood at the time it was adopted, "a historical criterion that is conceptually . . . separate from the preferences of the judge himself,"[xiii] Justice Scalia said. He argued that the Supreme Court should "curb—even reverse—the tendency of judges to imbue authoritative texts with their own policy preferences."

Clearly delineated and consistently applied rules are necessary, he said, to "provide greater certainty in the law and hence greater predictability and greater respect for the rule of law."[xiv] Concrete rules are preferable to multipart tests or balancing, he said, because "when . . . I adopt a general rule . . . I not only constrain lower courts, I constrain myself as well."[xv] The predictability of clear rules helps "enhance the legitimacy of decisions . . . [and] embolden the decision maker to resist the will of a hostile majority," one observer said.[xvi]

Columbia Law School. While 24 percent of the U.S. population is Roman Catholic, four members of the Court (45 percent), including the chief justice, profess to this faith.[70] Another third of the Court's current justices are Jewish, which is more than 20 times the percentage of Jews in the U.S. population.[71] No Supreme Court justice has self-identified as other than heterosexual and cisgender.

Granting Review. Petitioners may ask the Supreme Court for a writ of certiorari if the court of appeals or the highest state court denies them a hearing or issues a verdict against them. Writs are granted at the discretion of the Court. All seated justices consider a writ, which is granted only if at least four justices vote to hear the case. This is called the rule of four.

Neither the decision to grant nor the decision to deny a writ of certiorari indicates anything about the Court's opinion regarding the merits of the lower court's ruling. Denial of certiorari generally means that the justices do not think the issue is sufficiently important or timely to decide. In recent years, an average of 8,200 petitions have been filed with the Court, which grants fewer than 1 percent of them.[72] Approximately one-fourth of the petitions filed are accompanied by the required fee of $150. The vast majority of petitions are filed without the fee—often by prisoners who cannot pay the required filing fee.

Reaching Decisions. Once the Court agrees to hear a case, the parties file written briefs outlining the facts and legal issues in the case and summarizing their legal arguments. The justices review the briefs prior to oral argument in the case, which generally lasts one hour. The justices may sit silently during oral argument, or they may pepper the attorneys with questions.

"Our overworked Supreme Court" by Joseph Ferdinand Keppler. Published by Keppler & Schwarzmann, December 9, 1885, via SupremeCourt.gov

This 1885 lithograph shows "Our Overworked Supreme Court."

Following oral argument, the justices meet in a private, closed conference to take an initial vote on the outcome. Discussion begins with the chief justice and proceeds around the table in order of descending seniority of the associate justices. Then voting proceeds from the most junior member of the Court and ends with the chief justice. The chief justice or the most senior justice in the majority determines who will draft the majority opinion.

A majority of the justices must agree on a point of law for the Court to establish binding precedent. Draft opinions are circulated among the justices, and negotiations may attempt to shift votes. It may take months for the Court to achieve a final decision, which is then announced on decision day.

per curiam opinion
An unsigned opinion by the Court as a whole.

memorandum order
An order announcing the vote of the Supreme Court without providing an opinion.

originalists
Supreme Court justices who interpret the Constitution according to the perceived intent of its framers.

textualists
Judges—in particular, Supreme Court justices—who rely exclusively on a careful reading of legal texts to determine the meaning of the law.

Two other options exist for the Supreme Court. It may issue a **per curiam opinion**, which is an unsigned opinion by the Court as a whole. Although a single justice may draft the opinion, that authorship is not made public. Per curiam opinions often do not include the same thorough discussion of the issues found in signed opinions. The Supreme Court also may resolve a case by issuing a **memorandum order**. A memorandum order simply announces the vote of the Court without providing an opinion. This quick and easy method to dispense with a case has become more common with the Court's growing tendency to issue fewer signed opinions.

The ideological leanings of the individual justices, and of the Court as a whole, come into play in the choice of cases granted review and the ultimate decisions of the Court.[73] The U.S. Supreme Court relies on a wide range of sources to guide its interpretation of the Constitution. **Originalists** and **textualists** seek the meaning of the Constitution primarily in its explicit text, the historical context in which the document developed and the recorded history of its deliberation and original meaning. Some justices look beyond the text to discover how best to apply the Constitution today. Their interpretation relies more expressly on deep-seated personal and societal values, ethical and legal concepts and the evolving interests of a shifting society. The Court's reasoning at times also builds on international standards, treaties or conventions, such as the Universal Declaration of Human Rights, or the decisions of courts outside the United States as well as state and other federal courts. On occasion, such as when the Court discovered a right to privacy embedded in the First Amendment, the justices refer to the views and insights of legal scholars.[74]

PROCESSES OF THE LAW

Although each court or case follows a somewhat idiosyncratic path, similar patterns of judicial process emerge. In a criminal matter, the case starts when a government agency investigates a

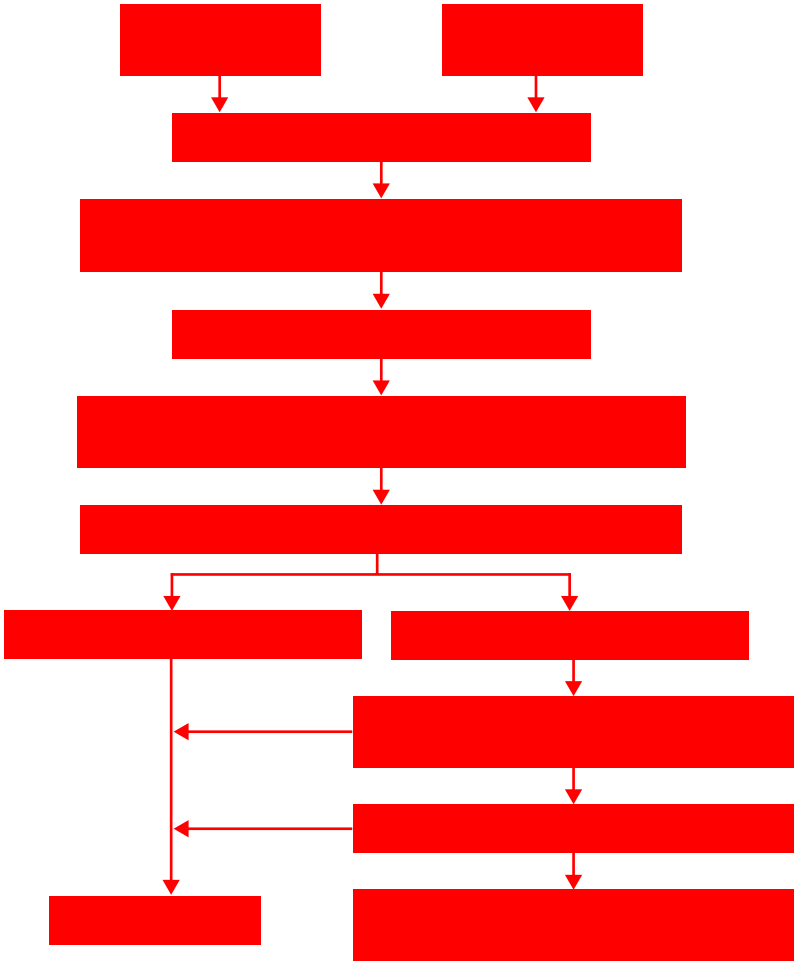
possible crime. After gathering evidence, the government arrests someone for a crime, such as distributing false and misleading advertising through the internet. The standard of evidence needed for an arrest or to issue a search warrant is known as **probable cause**, which is more than mere suspicion.

The case then goes before a **grand jury** or a judge. Unlike trial juries (also called petit juries), grand juries do not determine guilt. Grand juries hear the state's evidence and determine whether that evidence establishes probable cause to believe that a crime has been committed. A grand jury may be convened on the county, state or federal level. If the case proceeds without a grand jury, the judge makes a probable cause determination at a preliminary hearing. If the state fails to establish probable cause, the case may not proceed. If probable cause is found, the person is indicted.

probable cause
The standard of evidence needed for an arrest or to issue a search warrant. More than mere suspicion, it is a showing through reasonably trustworthy information that a crime has been or is being committed.

grand jury
A group summoned to hear the state's evidence in criminal cases and decide whether a crime was committed and whether charges should be filed; grand juries do not determine guilt.

FIGURE 1.5 ■ The Process of an Appeal



Then the case moves to a court arraignment, where the defendant is formally charged and pleads guilty or not guilty. A plea bargain may be arranged in which the defendant pleads guilty to reduced charges or an agreed-upon sentence. Plea bargains account for almost 95 percent of all felony convictions in the United States.[75] If a not-guilty plea is entered, the case usually proceeds to trial. The judge may set bail.

Proof beyond a reasonable doubt is required to establish guilt in a criminal trial. A guilty verdict prompts a sentencing hearing. A criminal sentence may include jail or prison time and a fine or fines.

plaintiff
The party who files a complaint; the one who sues.

defendant
The party accused of violating a law, or the party being sued in a civil lawsuit.

tort
A private or civil wrong for which a court can provide remedy in the form of damages.

strict liability
Liability without fault; liability for any and all harms, foreseeable or unforeseen, which result from a product or an action.

motion to dismiss
A request to a court to reject a complaint because it does not state a claim that can be remedied by law or is legally lacking in some other way.

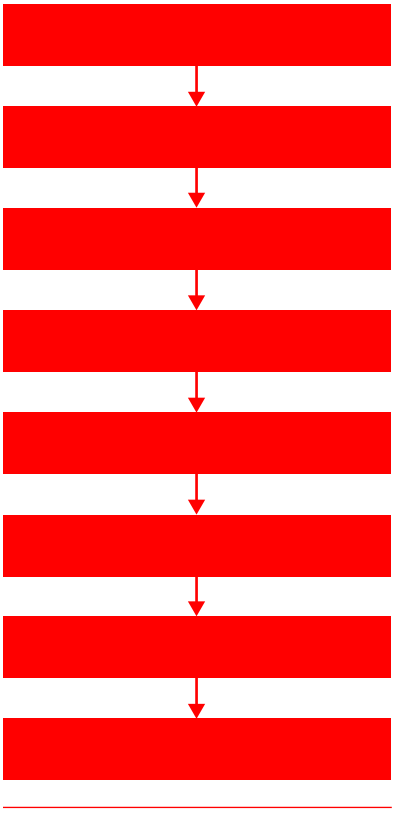
summary judgment
The resolution of a legal dispute without a full trial when a judge determines that undisputed evidence is legally sufficient to render judgment.

demurrer
A request that a court dismiss a case on the grounds that although the claims are true, they are insufficient to warrant a judgment against the defendant.

Civil Suits

Civil cases generally involve two private individuals or organizations asking the courts to settle a conflict. The person who files a civil complaint or sues is the **plaintiff**. The person responding to the suit is the **defendant**. The civil injury one person or organization inflicts on another is called a **tort**. Tort law provides the means for the injured party to establish fault and receive compensation.

FIGURE 1.6 ■ The Path of Civil Lawsuits



Many communication lawsuits are civil suits in which the plaintiff must prove his or her case by the preponderance of evidence. This standard of proof is lower than in criminal cases.

Civil suits begin when the plaintiff files a pleading with the clerk of court. To receive a damage award, a plaintiff generally must show that the harm occurred, that the defendant caused the harm and that the defendant was at fault, meaning the defendant acted either negligently or with malicious intent. Under a **strict liability** standard, the plaintiff does not need to demonstrate fault on the part of the defendant in order to win the suit. Strict liability applies in cases involving inherently dangerous products or activities. Under strict liability, the individual who produced the product or took the action is liable for all resulting harms.

At a court hearing, the defendant may answer the complaint by filing a countersuit, by denying the charge, by filing a **motion to dismiss** or by filing a motion for **summary judgment** (see next page). A motion to dismiss, or **demurrer**, asks a court to reject a complaint because it is legally insufficient. For example, a defendant may admit that it distributed