1 FOUNDATIONS OF LAW IN THE UNITED STATES

CHAPTER GOALS AND OBJECTIVES

In this chapter, readers will learn that . . .

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

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

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

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

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

Patrick Lantrip/Daily Memphian via AP

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

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

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

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

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

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

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

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

DEFINITION OF LAW

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

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

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

SOURCES OF LAW IN THE UNITED STATES

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

Constitutions

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

Acts of Legislative Bodies

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

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

Decisions of Quasi-Legislative and Quasi-Judicial Bodies

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

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

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

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

Orders and Rulings of Political Executives

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

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

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

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

Judicial Decisions

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

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

TYPES OF LAW

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

Codified (or Code) Law

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

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

Statutory Law and Common Law

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

Civil Law and Criminal Law

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

Equity

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

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Private Law

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

Public Law

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

Administrative Law

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

Constitutional Law

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

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State Law and Federal Law

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

FUNCTIONS OF LAW

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

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

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

Providing Order and Predictability in Society

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

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

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

Resolving Disputes

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

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

Protecting Individuals and Property

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

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

Providing for the General Welfare

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

Protecting Individual Liberties

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

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

THE UNITED STATES AND THE RULE OF LAW

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

The Revolutionary War

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

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

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

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John Brown at Harpers Ferry

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

The Civil Rights Movement

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

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

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

> If I had been a Negro living in Birmingham or Little Rock or Plaquemines Parish, Louisiana, I hope I would have disobeyed the state laws that said that I might not enter the public waiting room in the bus station reserved for "Whites." I hope I would have insisted upon going into parks and swimming pools and schools which state or city law reserved for "Whites." I hope I would have had the courage to disobey, although the segregation ordinances were presumably law until they were declared unconstitutional.[26]

More recently, we note the action of a forty-nine-year-old Kentucky county clerk, Kim Davis, who refused to issue marriage licenses to same-sex couples based on her beliefs as an Apostolic Christian. In September 2015, a federal judge temporarily jailed her for contempt of court because of her refusal to obey his orders to issue the contested marriage licenses. Davis was eventually sued for her inaction and in 2024 was ordered by the courts to pay over $360,000 in compensation and damages for refusing to follow the law.[27]

We should also note that in today's world, civil disobedience to morally offensive statutes is not limited to the United States. For example, in 2007, former Pope Benedict XVI told a group of Catholic pharmacists that they have a moral right to use "conscientious objection" to avoid dispensing emergency contraception or euthanasia drugs, and that they should also inform patients of the ethical implications of using such drugs. "Pharmacists must seek to raise people's awareness so that all human beings are protected from conception to natural death, and so that medicines truly play a therapeutic role," Benedict said. He added that conscientious objector status would "enable them not to collaborate directly or indirectly in supplying products that have clearly immoral purposes such as, for example, abortion or euthanasia."[28] Civil disobedience does not need a divine call. Ample illustrations exist of the wholesale avoidance of laws that were thought to be economically harmful and unfair or that were seen as beyond the rightful authority of the state to enact.

Examples of Civil Disobedience in the United States

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

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During the Prohibition era, from 1919 to 1933, many Americans refused to obey a law they regarded as unfair and more than the legitimate bounds of state authority. Not only did the laws prohibiting the production and sale of alcohol prove to be ineffective and unenforceable, but Americans also seemed to relish flouting the law. The statistics on Prohibition enforcement reveal how the laws were honored in the breach. In 1921, the government seized a total of 95,933 illicit distilleries, stills, still worms, and fermenters; this number rose to 172,537 by 1925, and it jumped to 282,122 by 1930.[29] By 1932, President Herbert Hoover, who had originally supported Prohibition, began to talk about "the futility of the whole business."[30] More recently, the "Occupy movement" was a focus of civil disobedience in the United States (and elsewhere in the world). Beginning in September 2011, literally tens of thousands of Americans "camped out" in public places such as parks or in private and public buildings to protest what they believed are severe inequalities in our economic and social systems. There were almost eight thousand arrests in 122 different cities resulting from these acts of civil disobedience.[31] In many states, it is against the law to engage in certain sexual activities, such as fornication and adultery. "Fornication" is voluntary sexual intercourse between two unmarried persons, while "adultery" is voluntary sexual intercourse between a married person and someone other than his or her lawful spouse. Indeed, at the present time, it is illegal in the state of Mississippi for couples to live together without being married.[32] An identical law was repealed in Michigan only in 2023,[33] while a court in North Carolina overturned that state's law banning cohabitation in 2006, though it has never been officially repealed by the legislature.[34] The fact that laws like these are seldom obeyed or enforced is a secret to no one. Although most Americans still approve of forbidding sexual practices and acts that they find personally distasteful, few have much enthusiasm for putting police officers in bedrooms or for strictly enforcing laws that touch on very personal issues.

Concluding Thoughts on the United States and the Rule of Law

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

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A LITIGIOUS SOCIETY

Like the law, judges are viewed ambivalently by Americans. In general, judges are held in inordinately high esteem, and most Americans would be proud if a son or daughter achieved this position. Yet, Americans can be quick to condemn judges whose rulings go against deeply held values or whose decisions are not in the best interests of their pocketbooks.[35] Whether this is hypocrisy or merely the complex and ambivalent nature of humankind is perhaps in the eye of the beholder.

The raw statistics reveal that Americans readily look to the courts to redress their grievances. The over 380,000 cases that are filed in the federal courts each year[36] are dwarfed by the 13.7 million civil suits filed in the courts of the fifty states and the District of Columbia.[37] That works out to approximately one new lawsuit for every twenty-three people in America.[38] Although some of these suits deal with relatively minor matters, at least three-fourths deal with substantive legal issues. The financial cost of these lawsuits is staggering: though firm statistics are not regularly compiled on such matters, one pro-business interest group estimated in 2022 that the annual bill for such litigation is around $443 billion (at least half of which likely represents legal fees and expenses).[39] Furthermore, the number of lawyers in the United States is comparatively quite large: 1,331,290 as of January 1, 2023, according to the American Bar Association—more per capita than most other countries.[40] And the figure is growing. Over the past decade or so, the number of attorneys nationwide has risen by more than 63,000—an increase of 5 percent from 2013 to 2023.[41] As one expert once noted:

> Ours is a law-drenched age. Because we are constantly inventing new and better ways of bumping into one another, we seek an orderly means of dulling the blows and repairing the damage. Of all the known methods of redressing grievances and settling disputes—pitched battle, rioting, dueling, mediating, flipping a coin, suing—only the latter has steadily won the day in these United States.
>
> Though litigation has not routed all other forms of fight, it is gaining public favor as the legitimate and most effective means of seeking and winning one's just deserts.
>
> The impulse to sue is so widespread that "litigation has become the nation's secular religion," and a growing array of procedural rules and substantive provisions is daily gaining its adherents.[42]

It is useful to see Americans' love affair with lawsuits in some type of comparative perspective. Cross-national comparisons reveal that while the United States is a litigious society, citizens in many other industrialized nations are even more litigious. For example, in the United States in 2011, for every 1,000 people, some 74.5 lawsuits were filed. However, in Germany the number was 123.2; in Sweden it was 111.2; in Israel it was 96.8; and in Austria it was 95.9. So, contrary to much popular belief, America is not the most litigious nation in the world.[43]

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

> [Americans] sue doctors over misfortunes that no doctor could prevent. They sue their school officials for disciplining their children for cheating. They sue their local governments when they slip and fall on the sidewalk, get hit by drunken drivers, get struck by lightning on city golf courses—and even when they get attacked by a goose in a park (that one brought the injured plaintiff $10,000). They sue their ministers for failing to prevent suicides. They sue their Little League coaches for not putting their children on the all-star team. They sue their wardens when they get hurt playing basketball in prison. They sue when their injuries are severe but self-inflicted, and when their hurts are trivial and when they have not suffered at all.[44]

While such suits may be frivolous, they still require the time and efforts of the jurists who must at least consider their merits in the seventeen thousand courthouses throughout the United States.

Despite this plethora of less than monumental lawsuits, the judicial system appears to be fighting those who attempt to use the courts to advance frivolous causes. Rule 11 of the Federal Rules of Civil Procedure forbids the filing of worthless petitions, and this was made stronger in 1983, when US trial judges were given the authority to impose sanctions for the filing of frivolous suits. (Critics of the rule have charged that it has had a chilling effect on civil rights suits, but law school studies have largely refuted that claim.)[45] In 1991, the US Supreme Court handed down two key decisions that reaffirmed the imposition of large fines on those filing specious lawsuits—sending a strong message to the legal community that violations of Rule 11 will be taken seriously.[46] More recently, in May 2018, the Supreme Court handed down a very important ruling that held that companies can require their employees to settle employment disputes through *individual arbitration* rather than filing class actions in federal court.[47] This decision affects as many as twenty-five million workers.[48]

Furthermore, the individual states are also electing to combat those who inundate their legal tribunals with worthless petitions.[49] The American Tort Reform Association now has a nationwide network of state-based liability reform coalitions backed by 135,000 grassroots supporters, and it claims "an unparalleled track record of legislative success."[50] But as with many things in the judiciary, the matter of human judgment is all-important: what is frivolous to one person might be deadly serious to another.

Although a burst of litigation has been evident in the United States during the past several decades, Americans have always been litigious people. As early as 1835, the highly perceptive French observer Alexis de Tocqueville noted that "there is

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hardly a **political question** in the United States which does not sooner or later turn into a judicial one."[51] As one contemporary scholar has said, "To express amazement at American litigiousness is akin to professing astonishment at learning that the roots of most Americans lie in other lands. We have been a litigious nation as we have been an immigrant one. Indeed, the two are related."[52] This scholar goes on to argue that US history was made by diverse groups who wanted to live according to their own customs but found themselves drawn haphazardly into a larger political community. As these groups bumped into one another and the edges became frayed, disputes resulted. But given a strong common law legal tradition, such disputes were channeled, for the most part, into the courtroom rather than onto the battlefield. Many reasons can be cited as to why Americans have been and continue to be highly litigious, and it is beyond the scope of this chapter to examine them all systematically. Suffice it to say that in the United States, the courthouse has been and is the anvil on which a significant portion of personal, societal, and political problems are hammered out.

Although America is a litigious society, this trend may be part of a worldwide phenomenon. For example, class action lawsuits in Europe increased over 120 percent between 2017 and 2022.[53] In India, that country's already woefully overloaded judicial system has seen the backlog of cases double over the past two decades.[54] Even countries that historically made little use of public law courts are seeing increasing use of these tribunals as their citizens gradually deem it appropriate and useful to bring grievances before the courts, which in earlier times would have been borne in silence or at least viewed as unsuitable for a judicial tribunal. A case in point is China, which in 2008 saw a lawsuit on an issue that at one time would have been considered unthinkable: parents sued the government for the death of their children, which resulted from shoddy workmanship on a collapsed schoolhouse. This stemmed from the horrendous earthquake that occurred in western China in May 2008. The quake left eighty-eight thousand people dead or missing, including up to ten thousand schoolchildren, as thousands of classrooms and dormitories collapsed across the quake zone. The government conceded that in the rush to build schools during the Chinese economic boom, poor workmanship or faulty planning might have contributed to the school's collapse during the quake.[55] In the past, to bring a lawsuit against the Chinese government in such an instance would have been unheard of at best and an act of treason at worst. The lawsuit was eventually dismissed by a court,[56] but the case itself was evidence of a potentially new phenomenon in a changing China.

These facts suggest that modern life and the increasing use of law courts may go hand in glove. Because America's judicial caseload is so enormous and far-ranging, the courts must be examined to understand fully how the nation is governed and how its resources are allocated. Given the significance of courts in formulating and implementing public policy in the United States, it is important to know who the judges are, what their values are, and what powers and prerogatives they possess. And it is essential to study how decisions are made and how they are implemented if the judicial game is to be understood.

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SUMMARY

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

FURTHER THOUGHT AND DISCUSSION QUESTIONS

1. In the introduction to this chapter, we discussed the case of the Memphis Seven, employees of a Starbucks coffee shop who believed they were fired improperly for trying to join a labor union. On the other hand, the company contended that the workers were dismissed for directly violating clear company policies and, in doing so, had threated health and safety. Which side was right? Is there an inherent conflict between what citizens often want to do and what is allowed under the law? How should such conflicts be resolved in a democracy: by popular vote, by the courts, by legislative action, by decisions of elected executive officials?
2. In the United States today, over 1.2 million people are incarcerated in jail or prison. Is this a sign of the inherent lawlessness of the American people, or is it evidence that the United States is a nation that believes in strict law enforcement?
3. Americans are known internationally for their high numbers filing lawsuits, but many other nations, particularly developing countries, are beginning to close the gap. Is this a sign of progress or regression on their part?
4. How many US citizens would be willing to break the law and risk imprisonment if their economic survival depended on it? If they believed the law were illegal and unjustified? If they felt the law violated a higher moral or religious belief? If they felt the law unfairly violated their individual liberties?

SUGGESTED RESOURCES

Calvi, James V., and Susan Coleman. *American Law and Legal Systems*, 8th ed. Boca Raton, FL: Taylor & Francis, 2017. A systematic discussion of all the major types of law in the United States.

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

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

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

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

Sarat, Austin, and Patricia Ewick, eds. *Studies in Law, Politics, and Society*, Vol. # 23. Bingley, UK: Emerald Books, 2012. A collection of readings on diverse topics such as the purpose of law, the dilemmas inherent in social organization, and the discretionary aspects of the judicial system.

Vago, Steven. *Law and Society*, 11th ed. New York, NY: Routledge, 2018. A good summary of law and society issues in the United States, with an excellent comparative perspective on these issues.

KEY TERMS

Civil law
common law
corpus juris
Crimes
Criminal law
damages
Equity
jurisdiction
law
national security
ordinance-making power
political question
Private law
Public law
Statutory law

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2 THE FEDERAL JUDICIAL SYSTEM

CHAPTER GOALS AND OBJECTIVES

In this chapter, readers will learn that . . .

- Before we can understand the federal judicial system as it is today, we must first learn about its historical development.
- There are three primary levels of the federal judiciary: the Supreme Court, the courts of appeals, and the federal district courts.
- The federal court system has many different actors and institutions that support it: law clerks and magistrate judges. Also, the Administrative Office of the US Courts and the Federal Judicial Center.
- The federal courts make important policy decisions at all levels of the federal judiciary.
- It is important to understand the size and nature of the federal judicial workload.

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

To simplify matters, we discuss the federal courts in this chapter and the state courts in Chapter 3. Because knowledge of the historical events that helped shape the national court system can shed light on the present judicial structure, our discussion of the federal judiciary begins with a description of the court system as it has evolved over more than two centuries. We first examine the three levels of the federal court system in the order in which they were established: the Supreme Court, the courts of appeals, and the district courts. The emphasis in our discussion of each level will be on policy-making roles and decision-making procedures.

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Built in 1935, this edifice is the home of the United States Supreme Court.

Courtesy of the Library of Congress, Prints and Photographs Division

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

THE HISTORICAL CONTEXT

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

The absence of a national judiciary was considered a major weakness of the Articles of Confederation. Both James Madison and Alexander Hamilton, for example, saw the need for a separate judicial branch. Consequently, the delegates gathered at the Constitutional Convention in Philadelphia in 1787 and expressed widespread

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agreement that a national judiciary should be established. A good deal of disagreement arose, however, on the specific form that the judicial branch should take.

The Constitutional Convention and Article III

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

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

The Judiciary Act of 1789

Once the Constitution was ratified, Congress acted quickly to create the federal judiciary. When the new Congress convened in 1789, its first major concern was judicial organization. Discussions of Senate Bill 1 involved many of the same participants and arguments that were involved in the Constitutional Convention's debates on the judiciary. Once again, the question was whether lower federal courts should be created at all or whether federal claims should first be heard in state courts. Attempts to resolve this controversy split Congress into two distinct groups.

One group, which believed that federal law should be adjudicated in the state courts first and by the US Supreme Court only on appeal, expressed the fear that the new government would destroy the rights of the states. The other group of legislators, suspicious of the parochial prejudice of state courts, feared that litigants from other states and other countries would be dealt with unjustly. This latter group naturally favored a judicial system that included lower federal courts. The law that emerged from the debate, the Judiciary Act of 1789, set up a judicial system comprising a Supreme Court, consisting of a chief justice and five associate justices; three circuits with eleven circuit courts (one in each of the judicial districts in states that had ratified the Constitution), each with two justices of the Supreme Court and a district judge; and thirteen district courts, each presided over by one district judge.[1] The power to create inferior federal courts, then, was immediately exercised. Congress created not one but two sets of lower courts.

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THE US SUPREME COURT

A famous jurist once said, "The Supreme Court of the United States is distinctly American in conception and function and owes little to prior judicial institutions."[2] To understand what the framers of the Constitution envisioned for the Court, another American concept must be considered: the federal form of government. The founders provided for both a national government and state governments; the courts of the states were to be bound by federal laws. However, final interpretation of federal laws could not be left to state courts and certainly not to several state tribunals, whose judgments might disagree. Thus, it was decided the Supreme Court must interpret federal legislation. Another of the founders' intentions was for the federal government to act directly on individual citizens as well as on the states. The Supreme Court's function in the federal system may be summarized as follows:

> In the most natural way, as the result of the creation of Federal law under a written constitution conferring limited powers, the Supreme Court of the United States came into being with its unique function. That court maintains the balance between State and Nation through the maintenance of the rights and duties of individuals.[3]

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

> Nothing in the Court's history is more striking than the fact that, while its significant and necessary place in the Federal form of Government has always been recognized by thoughtful and patriotic men, nevertheless, no branch of the Government and no institution under the Constitution has sustained more continuous attack or reached its present position after more vigorous opposition.[4]

The Impact of Chief Justice Marshall

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

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In this decision, Marshall declared Section 13 of the Judiciary Act of 1789 unconstitutional because it granted **original jurisdiction** to the Supreme Court in excess of that specified in Article III of the Constitution. Thus, the Court's power to review and determine the constitutionality of acts of Congress was established. This decision is rightly seen as one of the single most important decisions the Supreme Court has ever handed down. A few years later, the Court also claimed the right of **judicial review** of actions of state legislatures. During Marshall's tenure it overturned more than a dozen state laws on constitutional grounds.[7] Inferior federal and state courts also exercise the power to review the constitutionality of legislation. Judicial review is one of the features that set American courts apart from those in other countries. Judicial scholar Herbert Jacob said that "the United States is the outlier in the extraordinary power that its ordinary courts exercise in reviewing the constitutionality of legislation; France and Germany occupy intermediate positions, and the Japanese courts are the least active."[8] Constitutional challenges to legislation do occur in France and Germany, but ordinary judges sitting in ordinary courts do not exercise these powers. In Japan, the Supreme Court, although possessing the power of constitutional review, rarely exercises it. Judicial review in the United Kingdom is basically of administrative actions.[9]

The Supreme Court as a Policymaker

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

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

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

An excellent example of US Supreme Court policymaking may be found in the area of racial equality. Public school racial segregation was contested in the famous *Brown v. Board of Education* case of 1954.[13] Parents of Black schoolchildren made the case that state laws requiring or permitting segregation deprived them of equal protection of

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the laws under the Fourteenth Amendment. The Supreme Court ruled that separate educational facilities are inherently unequal, and therefore, segregation constitutes a denial of equal protection. In the *Brown* decision, the Court overturned the separate-but-equal doctrine and established a policy of desegregated public schools.

In an average year, the Court decides, with signed opinions, approximately sixty-five to seventy-five cases.[14] Thousands of other cases are disposed of without full treatment. Thus, the Court deals at length with a very select set of policy issues that have varied throughout its history.

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

The Supreme Court, however, differs from legislative and executive policymakers. Especially important is the fact that the Court has no self-starting device. In other words, the justices must wait for cases to be appealed to them; there can be no judicial policymaking if there is no litigation. The president and members of Congress have no such constraints. Moreover, even the most assertive Supreme Court is limited to some extent by the actions of other policymakers, such as lower court judges, Congress, and the president. The Court also depends on others to implement its decisions (more on that in Chapter 14).

The Supreme Court at Work

As we discuss in greater detail in Chapter 4, the Supreme Court has both original and **appellate jurisdiction**. Original jurisdiction means that a court has the power to hear a case for the first time; Article III of the Constitution outlines the Court's original jurisdiction. On the other hand, appellate jurisdiction means that a higher court has the authority to review cases originally decided by a lower court.

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

By law, the formal session of the Supreme Court, known as terms, starts on the first Monday in October and ends until the business of the term is completed, customarily in late June or in rare instances early July. The Court's term is divided into sittings, each lasting approximately two weeks, during which the justices meet in open session and hold internal conferences and recesses. During this time, the justices work behind closed doors to consider cases and write opinions. The sixty-five to seventy-five cases per term that receive the Court's full treatment follow a routine pattern, which is described below.

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Case Selection

The Supreme Court generally picks which cases it wants to review and decide. Since 1925, a device known as certiorari has allowed the high court to exercise discretion in deciding which cases it should review. Under this method, a litigant who lost in the courts below may request Supreme Court review of a lower court decision; this is known as a petition for certiorari or a **cert petition**. The litigant seeking review by the Supreme Court will explain in their petition why the Court should review their case. The justices determine whether the request should be granted. In order for a cert petition to be granted at least four justices must decide the case is worthy of review. This is known as the rule of four. If review is granted, the Court issues a **writ of certiorari**, which is an order to the lower court to send up a complete record of the case. When certiorari is denied, the decision of the lower court stands. It should be noted that granting review is extremely rare. For instance, in a typical year the Court receives on average seven thousand cert petitions and the Court grants less than eighty of those petitions for full review. For example, during the twelve-month period ending on September 30, 2023, the Supreme Court granted review to only sixty-eight cases.[15]

Law clerks play an indispensable role in helping justices decide which cases should be heard. At the suggestion of Justice Lewis Powell in 1972, as a way to ease the Court's workload, a majority of the Court's members began to participate in the "certpool": the participating justices pool their clerks, divide up all the cert petition filings, and circulate a single clerk's certiorari memo to all those participating in the pool.[16] The memo summarizes the facts of the case, the questions of law presented, and the recommended course of action—whether the case should be granted a full hearing, denied, or dismissed. To put it another way, law clerks at the Supreme Court play a crucial part in helping the justices decide which cases they will review. Participating in the cert pool is not mandatory, and some justices opt not to be part of the pool. For example, Justices Samuel Alito's and Neil Gorsuch's clerks do not participate in the cert pool.[17] Justice Ketanji Brown Jackson, the Court's newest justice, decided to join the cert pool when she joined the Court.[18]

Written Briefs

If the Supreme Court grants review, the litigants in the case will submit written arguments known as briefs. Per the Supreme Court's rules, the litigant making the appeal, known as the Appellant or Petitioner, must submit their written arguments within forty-five days from when the Court granted the writ of certiorari.[19] Similarly, the Respondent or Appellee has thirty days to file their arguments from receipt of the Appellant brief. The Supreme Court has specific rules governing the written briefs, from page length, formatting, and word limits to the number of copies that must be filed with the Court. Once the briefs have been submitted to the Court, the Clerk of the Court ensures that each justice receives copies of the briefs along with the lower court record. The justices and their law clerks will spend considerable time reviewing

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the lower court opinion and the litigant briefs as they prepare for oral arguments. As should be no surprise to any student of the Supreme Court, the written briefs, along with the lower court opinion, provide an essential roadmap for the justices in determining how the case should be decided.

Law clerks are essential in helping their justices prepare for oral arguments. After the written briefs are submitted, the law clerks carefully read through them and prepare a bench memorandum that outlines the arguments for the Appellant and Respondent, along with providing an overview of the most relevant precedent. Bench memos may also make recommendations on how the case should be decided. And some justices meet with their law clerks to discuss the merits of the case prior to oral argument.

Oral Argument

Oral arguments are the most visible part of the Supreme Court's work because it is the only part of the process that is open to the public. Oral arguments are generally scheduled on Monday through Wednesday during the sittings. The sessions typically run from 10:00 a.m. to noon, and very rarely will be held in the afternoon beginning at 1:00 p.m. Formal arguments are held in a large courtroom that seats just over four hundred people; however, only fifty of those seats are reserved for the general public viewing.[20] At the front of the courtroom is the bench where the justices are seated. When the Court is in session, the chief justice, followed by the eight associate justices (the number since 1869) in order of seniority (length of continuous service on the Court), enters through the purple draperies behind the bench and takes a seat. Seats are arranged according to seniority, with the chief justice in the center, the senior associate justice on the chief justice's right, the second-ranking associate justice on the left, and continuing this pattern in descending order of seniority. Because the procedure is not a trial or the original hearing of a case, no jury is assembled, and no witnesses are called. Instead, the two opposing attorneys present their arguments to the justices. The general practice is to allow thirty minutes for each side, although the Court may decide that additional time is necessary. For example, when the Court heard oral arguments in the same-sex marriage case (*Obergefell v. Hodges*) on April 28, 2015, it allotted two-and-a-half hours. The Court normally hears two cases per day of arguments.

During oral argument the Appellant (or Petitioner) goes first, followed by the Respondent (or Appellee). The Appellant and Respondent attorneys presenting oral arguments are frequently interrupted with probing questions from the justices; however, according to the Supreme Court's *Guide for Counsel*, during the first two minutes of oral argument justices are generally not permitted to ask questions.[21] After the first two minutes the justices, in a free-for-all manner, will question the attorney. Per the *Guide for Counsel*, once the attorney's time has expired, "each Justice will have the opportunity to question that attorney individually. Questioning will proceed in order of seniority."[22]

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The exchange below between Justice Sonia Sotomayor and Lisa Blatt, the attorney defending the school district, in a recent First Amendment student speech case illustrates the back-and-forth dance that happens during oral argument. The *Mahoney Area School District v. B. L.* centers on a high school cheerleader who went on a profanity-laden rant on Snapchat when she did not make the varsity cheer team. She had posted a picture of herself giving the middle finger with a caption that read, "Fuck school fuck softball fuck cheer fuck everything," and all of this occurred off school grounds.[23] When coaches saw screenshots of her Snapchat, she was suspended from the JV cheer team because the school claimed her post violated school and team rules. The student challenged her suspension as a violation of her First Amendment rights. The Third Circuit US Court of Appeals ruled in her favor, which led the school district to appeal the decision to the Supreme Court. In prior school free speech cases, the Court has held that while schoolchildren "do not shed their constitutional rights at the schoolhouse gates," schools may regulate speech that is substantially disruptive to the functioning of the school.[24] During this exchange, Justice Sotomayor wanted to know if the school could regulate cursing at home. The following back-and-forth occurred:

Sotomayor: Let me start with just this case. Can you punish the student for cursing at home—

Blatt: Absolutely—

Sotomayor: —or at her parents' home?

Blatt: —absolutely not, nor could you do that—

Sotomayor: Can you—can you curse—can you punish her for cursing in her conversations as she walks to school?

Blatt: Absolutely not, although, under Respondent's test, I guess you can. But absolutely not.

Sotomayor: All right. Now, if you can't punish them for doing that, you're punishing her here because she went on the Internet and cursed and used a curse word related to what? To her unhappiness with the school and cheering, right?

Blatt: Yes, she berated her coaches, the sport, and other teammates—

Sotomayor: Well—

Blatt: —and that—

Sotomayor: —we could quibble with that, but my point is, I'm told by my law clerks, that among certain populations—a certain large percentage of the population, how much you curse is a badge of honor. That would surprise many parents. However, if it is true, where do we draw the line with respect to it targeting a school? Kids basically talk to their classmates. Most of their conversation is about school. Most of their exchanges have to do with their perceptions of the authoritarian nature of their teachers and others. And why isn't this any different than just that the coach of this team took personal offense?[25]

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As the example above illustrates, oral argument is about the back-and-forth between the justices and attorney and is considered particularly important by both attorneys and justices because it is the only stage in the process that allows such personal exchanges in real time.

The Conference

When the Court is in session there are two conferences scheduled per week, one on Wednesday afternoon and the other on Friday. At the Wednesday conference meeting, the justices discuss the cases argued on Monday. At the longer conference on Friday, they discuss the cases that were argued on Tuesday and Wednesday, plus any other matters that need to be considered. The most important of these other matters are the certiorari petitions along with any emergency petitions that have been filed.

The chief justice administers the conference meetings. This means that the chief justice speaks first, and the rest of the justices speak in order of seniority with the most junior justice speaking last. The Court follows a norm that every justice has a chance to talk before they can speak again. Justices have commented on the unique role the most junior justice position has. At times, the junior justice can be the deciding vote, meaning by the time the tentative vote reaches them, the breakdown is 4–4. Other times, there is a clear majority by the time the most junior justice speaks. Justice Ruth Bader Ginsburg made the following observation about the conference: “Justices who speak later do have one advantage. They have an opportunity to adjust their statements to take account of views expressed earlier by others. To do that effectively one must be both well prepared and a good listener.”[26]

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

Opinion Writing

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

After the conference, the justice who will write the Court’s opinion begins work on an initial draft. Other justices may work on the case by writing alternative opinions. The completed opinion is circulated to justices in both the majority and the minority groups. The writer seeks to persuade justices originally in the minority to change their votes and to keep their majority group intact. A bargaining process ensues, and the wording of the opinion may be changed to satisfy other justices or obtain their support.

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Justice Ginsburg notes this bargaining process is called "Dear [insert the justice's first name]" letters. Justice Ginsburg explains, "In all intra-Court correspondence, we use only first names. 'Dear Ruth' letters not uncommonly read: 'Please consider adding, deleting, dropping, revising to say [thus and so] . . . or 'I will join your opinion if you will take out, put in, alter, or adjust as follows.'"[27]

Sometimes a deep division in the Court makes it difficult to achieve a clear, coherent opinion and may even result in a shift in votes or in another justice's opinion becoming the Court's official ruling. For example, in 1991, the Court heard a school prayer case called *Lee v. Weisman*.[28] In this case a Rhode Island public middle school invited a rabbi to speak and offer a prayer at the graduation ceremonies. During the initial conference vote, a 5–4 majority prevailed upholding prayer at graduation ceremonies. Chief Justice William Rehnquist assigned the majority opinion to Justice Anthony Kennedy. However, by the spring of 1992, and after several attempts to write the opinion, Justice Kennedy came to the position that prayer at public school graduation ceremonies violated the Establishment Clause of the First Amendment. Justice Kennedy "left his chambers and walked down the hall to see Rehnquist. Apologetic and embarrassed, Kennedy delivered the news. In writing the opinion for the majority to allow the prayer, Kennedy had changed his mind about the result. He'd written a decision ruling instead that the prayer was unconstitutional."[29] Kennedy's vote switch meant that Justice Harry Blackmun, the most senior justice in the majority, could reassign the opinion. To maintain this newfound majority, Blackmun strategically kept Kennedy as the majority opinion author. In Blackmun's "Dear Anthony" letter, he wrote, "I have read your draft opinion with interest. As you indicated in your note to me, we have disagreed on the proper approach to the Establishment Clause in the past, but you have done good work in finding common ground in the case. With some changes, it will be an opinion I could join."[30]

In most cases, a single opinion does obtain majority support, and several rulings are often unanimous. However, those who disagree with the **opinion of the Court** are said to dissent. A dissent does not have to be accompanied by a **dissenting opinion**, but usually a justice in the dissent will write one. Whenever more than one justice dissents, each may write an opinion, or all may join in a single opinion. Dissents play an important role in the decision-making process. Political scientists and leading experts on dissenting opinions Pamela Corley, Amy Steigerwalt, and Artemus Ward explain:

> Dissents by their very nature proclaim publicly that important disagreements exist on the Court over the legal question at hand. Dissents highlight the source of these disagreements, allowing justices to spell out precisely how and why they believe their colleagues have erred. They showcase the reality that many legal and policy issues are difficult and complex, lacking clear answers or easy compromises. And dissents ensure that the nature and scope of this disagreement is enshrined in the public record, available to be read by the other justices, lower court judges, members of Congress, and the executive branch, state actors and members of agencies, and the broader public alike.[31]

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On occasion, a justice will agree with the Court's decision but differ in their reason for reaching that conclusion. Such a justice may write what is called a **concurring opinion**. A classic example is Justice Sandra Day O'Connor's concurring opinion in *Lawrence v. Texas* (2003).[32] In that case, the majority relied on the Due Process Clause of the Fourteenth Amendment to declare a Texas statute banning same-sex sodomy unconstitutional. Justice O'Connor agreed with the majority that the statute should be struck down, but she based her conclusion on the Fourteenth Amendment's Equal Protection Clause. As sodomy between opposite-sex partners is not a crime in Texas, the state treats the same conduct differently based solely on the sex of the participants. According to Justice O'Connor, that violates the Equal Protection Clause.

An opinion labeled "concurring and dissenting" agrees with part of a Court ruling but disagrees with other parts. Finally, the Court occasionally issues a **per curiam** opinion—an unsigned opinion that is usually brief. Such opinions are often used when the Court accepts the case for review but gives it less than full treatment. For example, it may decide the case without benefit of oral argument and issue a per curiam opinion to explain the disposition of the case. However, it is important to note that the Court can issue per curiam opinions in bigger cases like *Trump v. Anderson* (the case that decided Donald J. Trump could not be removed from the Colorado ballot).[33]

The "Shadow Docket"

In recent years, scholars have begun to take notice of what has been termed "the shadow docket" of the Supreme Court.[34] This refers to the ever-increasing attempts by presidential administrations to seek emergency relief from the Supreme Court on a variety of measures. Such a tactic allows the administration and often states to try to bypass federal appeals courts by asking the Supreme Court to block or undo a federal district court decision of which the administration disapproves. It also allows the Supreme Court to issue rulings, sometimes controversial ones, without opinions.[35] For instance, during the Trump presidency, his administration requested "emergency relief" forty-one times and the Court granted that relief twenty-eight times. To place this increased use of the shadow docket in perspective, the Bush and Obama administrations made these "emergency relief" requests eight times between the two administrations and the Court granted only four of them.[36] In a 2024 study, political scientist EmiLee Smart found evidence that the increased use of the shadow docket leads to less public support for decisions stemming from this procedure.[37]

THE US COURTS OF APPEALS

The **courts of appeals** have been described as "perhaps the least noticed of the regular constitutional courts."[38] They receive less media coverage than the Supreme Court, in part because their activities are simply not as dramatic. However, one should not

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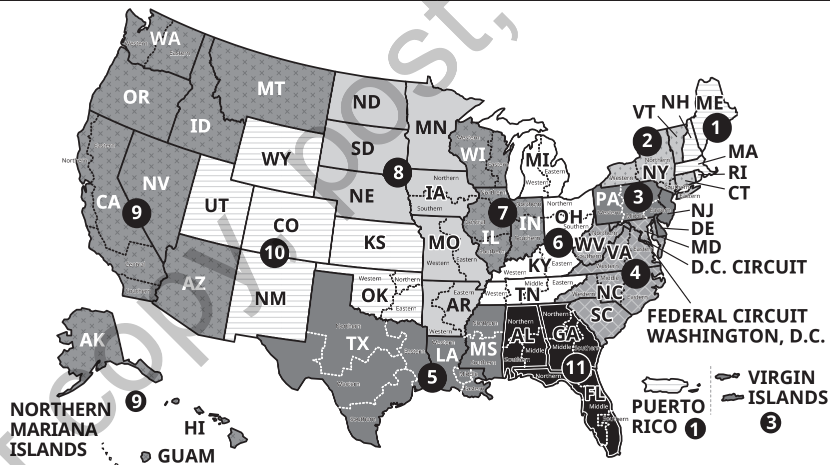
assume that the courts of appeals are unimportant to the judicial system. For example, in its 2022 term, the Supreme Court handed down decisions with full opinions in only sixty-eight cases; this means, as one set of scholars explain, "the courts of appeals have increasingly become in practice the courts of last resort for the vast majority of litigants."[39]

The courts of appeals were officially created in 1891 under the Evarts Act. The law created nine courts of appeals, one for each judicial district. Over time Congress has expanded the number of circuits and courts of appeals.[40] Although these intermediate appellate courts have been headed at one time or another by circuit judges, courts of appeals judges, district judges, and Supreme Court justices, they now are staffed by 179 authorized courts of appeals judges.

The courts of appeals in each of the twelve regional circuits are responsible for reviewing cases appealed from federal district courts (and in some cases from administrative agencies) within the boundaries of the circuit. Figure 2.1 depicts the appellate and district court boundaries and indicates the states contained in each.

FIGURE 2.1 ■ District and Appellate Court Boundaries



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

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

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

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The Review Function of the Courts of Appeals

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

Most of the cases reviewed by the courts of appeals originate in the federal district courts. Litigants disappointed with the lower court decision may appeal the case to the court of appeals of the circuit in which the federal district court is located. The appellate courts have also been given authority to review the decisions of certain administrative agencies. Well over a thousand administrative law judges now perform judicial functions within the executive branch of the federal government. In adjudicating cases, they conduct formal trial-type hearings, make findings of fact and law, apply agency regulations, and issue decisions.[41] This type of case normally enters the federal judicial system at the court of appeals level instead of at the federal district court level.

Because the courts of appeals have no control over which cases are brought to them, they deal with both routine and incredibly important matters. At one end of the spectrum are frivolous appeals or claims that have no substance and little or no chance for success. At the other end of the spectrum are the cases that raise major questions of public policy and evoke strong disagreement. Decisions by the courts of appeals in such cases are likely to establish policy for society, not just for the specific litigants. Civil liberties, reapportionment, religion, and education cases provide good examples of the kinds of disputes that may affect all citizens.

The main purpose of the court of appeals is error correction from the judgement below. Judges in the various circuits are called on to monitor the performance of federal district courts and federal agencies and to supervise their application and interpretation of national and state laws. In doing so, the courts of appeals do not seek out new factual evidence but instead examine the record of the lower court for errors. In the process of correcting errors, the courts of appeals also settle disputes and enforce national law.

The Courts of Appeals as Policymakers

The Supreme Court's role as a policymaker derives from the fact that it interprets the law and Constitution; the same holds true for the courts of appeals. The scope of the courts of appeals' policymaking role takes on added importance because they are the courts of last resort in most cases. A study of three circuits, for example, found that the US Supreme Court reviewed only nineteen of the nearly four thousand decisions of those tribunals.[42] As an example of the impact of circuit court judges, consider a decision in a case involving the Fifth Circuit. After the Supreme Court overturned the *Roe v. Wade* precedent in the *Dobbs v. Jackson Women's Health Organization* (2022) case, many abortion rights opponents have since sought to restrict further abortion access, including access to mifepristone (a medication that can end a pregnancy before the tenth week). A group of doctors opposed to abortion filed a lawsuit in a federal district court in Texas

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challenging the Food and Drug Administration's (FDA) approval of the drug in 2000, along with two more recent FDA decisions that expanded access to this medication. The district court ruled in favor of the doctors and issued a nationwide suspension of FDA approval of the drug. The case was immediately appealed to the Fifth Circuit. The Fifth Circuit three-judge panel affirmed, in *Food and Drug Administration v. Alliance for Hippocratic Medicine*, the district court's ruling to suspend the FDA expanded access approvals. The Supreme Court agreed to review the case and placed the Fifth Circuit's decision on hold pending its decision. On June 13, 2024, the Supreme Court, in a unanimous ruling, dismissed the case because the doctors bringing the suit lacked the right to sue; this is known as standing (more on standing in Chapter 4).[43] While the Supreme Court skirted ruling on the merits of the case, for now, this ruling means that mifepristone will be available in the United States.

A major difference in policymaking by the Supreme Court and by the courts of appeals should be noted. Whereas there is one high court for the entire country, each court of appeals covers only a specific region. Thus, the courts of appeals decisions only apply to the states and districts within the circuit. Still, as evidenced by the recent mifepristone case, they are part of the federal judicial system and "participate in both national and local policy networks, their decisions becoming regional law unless intolerable to the Justices."[44]

The Courts of Appeals at Work

The courts of appeals do not have the same degree of discretion as the Supreme Court to decide whether to accept a case for review. Nevertheless, circuit judges have developed methods for using their time as efficiently as possible. Additionally, the work of the court of appeals shares many similarities with the Supreme Court.

Screening

After the written briefs from the Appellant and Respondent are filed with the circuit court of appeals the judges and their staff screen the cases. During the screening stage, the judges decide whether to give an appeal a full review or to dispose of it in some other way. The docket may be reduced to some extent by consolidating similar claims into single cases, a process that also results in a uniform decision. In deciding which cases can be disposed of without oral argument, the courts of appeals increasingly rely on law clerks or staff attorneys who read petitions and briefs and then submit recommendations to the judges on whether the case should receive oral arguments. As a result, many cases are decided without receiving oral argument. For example, in 2023, 80 percent of the cases were terminated without oral argument.[45]

Three-Judge Panels

Cases given the full treatment (oral argument) are normally considered by panels of three judges rather than by all the judges in the circuit. The three-judge panels are

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generally randomly selected and judges will sit in panel on a rotating basis for each sitting period. This means that several cases can be heard at the same time by different **three-judge panels**, often sitting in different cities throughout the circuit.

Panel assignments are typically made by the clerk of the circuit or the circuit executive, and then the clerk randomly assigns cases to the panel (taking into account any conflicts of interest). Because all the circuits now contain more than three judges, the panels change frequently so that the same three judges do not sit together permanently. Regardless of the method used to determine panel assignments, one fact remains clear: a decision reached by a three-judge panel may not necessarily reflect the views of most of the judges in the circuit.

Oral Argument

Cases that have survived the screening process and have not been settled by the litigants are scheduled for **oral argument**. Attorneys for each side are given a short amount of time (in some cases this can range from ten to fifteen minutes and in some instances up to twenty minutes) to discuss the points made in their written briefs and to answer questions from the three-judge panel. Judicial scholars Jennifer Bowie, Donald R. Songer, and John Szmer interviewed over sixty court of appeals judges. One judge they interviewed explained oral arguments in this way:

> Oral argument is always interesting—it is your chance to see what the attorneys will be arguing and what the perspective of the other judges are, because usually this is your first chance to get an idea of what your colleagues are thinking about the case.[46]

The Conference and Decision

Just like the Supreme Court, court of appeals judges meet for conference following oral arguments. The most senior active judge on the panel is called the presiding judge and runs the conference. The judges discuss the case and take a tentative vote. Generally, the conference follows this typical process as explained by one court of appeals judge:

> We first go around the table junior to senior—everyone indicates how they see the first case, then there may be a good bit of back-and-forth to see if there is a way to reach consensus—it is all collegial. I can't think of a single conference in why any hostility was expressed even when we disagreed.[47]

If the presiding judge is in the majority, they may assign the opinion to themselves or another member of the majority. In one study, scholars found evidence that presiding judges assign majority opinions to themselves, especially in important cases.[48] But the presiding judge may also consider other factors when assigning opinions such as judge expertise.

After the opinion assignment is made, the opinion writer will begin the process of writing the opinion of the court. Once the opinion has been drafted, the opinion

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writer will circulate it to the other panel members for comment. Similar to the Supreme Court, there will be some back-and-forth in the language of the opinion. In a study that interviewed court of appeals judges, one judge commented,

> I have definitely written what you would probably call a "bargaining memo" in response to a draft opinion from a colleague—something like, "If you are willing to change X then I will not dissent."[49]

Once the opinion has been finalized, the court of appeals will make it public. If a judge on the panel disagrees with the majority they can write a dissenting opinion. If any of the panel judges agree with the majority but have different reasons they wish to articulate, they may write a concurring opinion. However, it is necessary to note that separate opinion writing is rare in the court of appeals. Unlike the Supreme Court, most courts of appeals decisions are decided unanimously. Relatedly, because of growing caseloads most opinions in the courts of appeals are issued as unpublished. In 2023, for example, approximately 13 percent of the opinions written were published.[50] This is partly due to the routine clear-cut cases that are appealed to them. Each circuit has rules related to when an opinion should be published. For example, the Fourth Circuit US Court of Appeals *Appellate Procedure Guide* suggests that an opinion should be published if it meets one of the following criteria:

> It establishes, alters, modifies, clarifies, or explains a rule of law within this circuit: or it involves a legal issue of continuing public interest; or it criticizes existing law; or it contains an historical review of a legal rule that is not duplicative; or it resolves a conflict between panels of this court or creates conflict with a decision in another circuit.[51]

It becomes clear from the listed criteria that not every decision will meet the guidelines for opinion publication. When an opinion is published it becomes binding precedent on that circuit (where unpublished opinions are not considered binding precedent).

En Banc Proceedings

Occasionally, different three-judge panels within the same circuit may reach conflicting decisions in similar cases. To resolve such conflicts and to promote circuit unanimity, federal statutes provide for an **en banc** procedure, in which all the circuit's judges sit together on a panel and decide a case. For instance, in the Fourth Circuit Court of Appeals this would mean all fifteen judges would rehear the case if the en banc hearing is granted. The exception to this general rule occurs in the large Ninth Circuit, where assembling all twenty-nine judges becomes too cumbersome. There, en banc panels normally consist of ten judges randomly selected plus the chief judge of the circuit for a total of eleven judges. Interestingly, because of the random selection it is possible for the original three-judge panel members to not be selected to sit on the en banc panel. En banc rehearings rarely happen; when they do, however, the case usually concerns an issue of extraordinary importance. The procedure may be requested by the litigants or

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by the judges of the circuit. A majority of the judges in the circuit must agree to rehear the case en banc (this is different from the Supreme Court, where only four justices—a minority—are required). The circuits themselves have discretion to decide if and how the procedure will be used. Clearly, its use is the exception, not the rule. If the circuit decided to rehear a case en banc, the litigants will submit new written briefs, the court will hold a new oral argument, and issue a new decision.

US DISTRICT COURTS

The US district courts represent the basic point of input for the federal judicial system. Although some cases are later taken to a court of appeals or perhaps even to the Supreme Court, most federal cases never move beyond the US trial courts. In terms of sheer numbers of cases handled, the district courts are the workhorses of the federal judiciary. However, their importance extends beyond simply disposing of many cases.

Current Organization of the District Courts

The practice of respecting state boundaries in establishing district court jurisdictions began in 1789, and it has been periodically reaffirmed by statutes ever since. As the country grew, new district courts were created. Congress eventually began to divide some states into more than one district. California, New York, and Texas have the most, with four each. Other than consistently honoring state lines, the organization of district constituencies appears to follow no rational plan. Size and population vary widely from district to district. Over the years, a court was added for the District of Columbia, and several territories have been served by district courts. US district courts now serve the fifty states, the District of Columbia, Guam, Puerto Rico, the Virgin Islands, and the Northern Mariana Islands. Today, there are ninety-four districts in the federal court system.

Congress often provides further organizational detail by creating divisions within a district. In doing this, the national legislature precisely lists the counties included in a particular division as well as the cities in which court will be held. For instance, the Southern District of California is made up of two divisions composed of San Diego County and Imperial County.[52]

As indicated, the original district courts were each assigned one judge. With the growth in population and litigation, Congress has periodically added judgeships to the districts, bringing the current total to 677. The Southern District of New York, which includes Manhattan and the Bronx, currently has twenty-eight judges and is the largest. On the other end of the spectrum, Vermont and North Dakota represent the smallest number of judges, each with two.

The District Courts as Trial Courts

Congress established the district courts as the trial courts of the federal judicial system and gave them original jurisdiction over virtually all cases. They are the only federal

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courts in which attorneys examine and cross-examine witnesses. The factual record is thus established at this level. Subsequent appeals of the trial court decision will focus on correcting errors, not on reconstructing the facts. The task of determining the facts in a case often falls to a jury, a group of citizens from the community who serve as impartial arbiters of the facts and apply the law to the facts.

The Constitution guarantees the right to a jury trial in criminal cases in the Sixth Amendment and the same right in civil cases in the Seventh Amendment. The right can be waived, however, in which case the judge becomes the arbiter of questions of fact as well as matters of law. Such trials are referred to as **bench trials**. Two types of juries are associated with federal district courts. The **grand jury** is a group of people convened to determine whether probable cause exists to believe that a person has committed the federal crime of which they have been accused. Grand jurors meet periodically to hear charges brought by the US attorney. **Petit jurors** are chosen at random from the community to hear evidence and determine whether a **defendant** in a civil trial has liability or whether a defendant in a criminal trial is guilty or not guilty. Federal rules call for twelve jurors in criminal cases but permit fewer in civil cases. The federal district courts generally use six-person juries in civil cases. We discuss juries in greater detail in Chapter 10.

Norm Enforcement by the District Courts

Some students of the judiciary make a distinction between norm enforcement and policymaking by the courts.[53] Trial courts are viewed as engaging primarily in norm enforcement, whereas appellate courts are seen as having greater opportunity to make policy.

Norm enforcement is closely tied to the administration of justice because all nations develop standards considered essential to a just and orderly society. Societal norms are embodied in statutes, administrative regulations, prior court decisions, and community traditions. Criminal statutes, for example, incorporate concepts of acceptable and unacceptable behavior into law. A judge deciding a case concerning an alleged violation of that law is basically practicing norm enforcement. Because cases of this type rarely allow the judge to escape the strict restraints of legal and procedural requirements, they have little chance to make new law or develop new policy. In civil cases, too, judges are often confined to norm enforcement; opportunities for policymaking are infrequent. Rather, such litigation generally arises from a private dispute whose outcome is of interest only to the parties in the suit.

Policymaking by the District Courts

The district courts also play a policymaking role. One leading judicial scholar explains how this function differs from norm enforcement:

> When they make policy, the courts do not exercise more discretion than when they enforce community norms. The difference lies in the intended impact of

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the decision. Policy decisions are intended to be guideposts for future actions; norm-enforcement decisions are aimed at the case at hand.[54]

The discretion that a federal trial judge exercises should not be overlooked, however. As Americans have become more litigation-conscious, disputes that were once resolved informally are now more likely to be decided in a court of law. The courts find themselves increasingly involved in domains once considered private. What does this mean for the federal district courts? According to one study, "These new areas of judicial involvement tend to be relatively free of clear, precise appellate court and legislative guidelines; and as a consequence the opportunity for trial court jurists to write on a clean slate, that is, to make policy, is formidable."[55] In other words, when the guidelines are not well established, district judges have a great deal of discretion to set policy.

A recent decision by US District Court Judge Robert Hinkle, a President Clinton appointee in the Northern District of Florida, is a case in point. In 2023, the Florida legislature passed a law signed by Governor Ron DeSantis that bans doctors and nurses from providing gender-affirming care, including prescribing any medications such as puberty blockers, sex reassignment, and hormone therapy, among other restrictions to minors. Four families sued the state in federal court over the new law, arguing the law violates the Equal Protection Clause of the US Constitution. On June 11, 2024, Judge Hinkle ruled the Florida ban is unconstitutional. He wrote in the decision, "Whether based on morals, religion, unmoored hatred, or anything else, prohibiting or impeding a person from conforming to the person's gender identity rather than the person's natal sex is not a legitimate state interest."[56] He further argued that while a state has an interest in safeguarding health care for minors, prohibiting gender-affirming care "across the board" for all minors instead of regulating the care does not serve a legitimate state purpose.[57] While the decision is likely to be appealed, it is nonetheless of monumental policy significance.

Three-Judge District Courts

From time to time, Congress has passed legislation permitting certain types of cases to be heard before a **three-judge district court** rather than a single trial judge. Such courts are created on an ad hoc basis and must include at least one judge from the federal district court and at least one judge from the court of appeals. Appeals of decisions of three-judge district courts go directly to the Supreme Court.

At one time, Congress provided that private citizens challenging the constitutionality of state or federal statutes and seeking injunctions to prohibit their further enforcement could bring the case before a three-judge district court. That is what happened in the famous abortion case of *Roe v. Wade* (1973).[58] Jane Roe (a pseudonym), a single, pregnant woman, challenged the constitutionality of the Texas antiabortion statute and sought an injunction to prohibit further enforcement of the law. The case was initially heard by a three-judge court consisting of District Judges Sarah T. Hughes

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and W. N. Taylor and Fifth Circuit Court of Appeals Judge Irving L. Goldberg. The three-judge district court held the Texas abortion statute invalid but declined to issue an injunction against its enforcement on the ground that a federal intrusion into the state's affairs was not warranted. Roe then appealed the denial of the injunction directly to the Supreme Court. For the most part today, three-judge district court panels are used for apportionment cases.

CONSTITUTIONAL COURTS, LEGISLATIVE COURTS, AND COURTS OF SPECIALIZED JURISDICTION

The Judiciary Act of 1789 established the three levels of the federal court system in existence today. Periodically, however, Congress has exercised its power, based on Article III and Article I of the Constitution, to create other federal courts. Courts established under Article III are known as constitutional courts, and those courts created under Article I are called legislative courts. The former handles the bulk of litigation in the system, and for this reason, they will remain the focus of this discussion. The Supreme Court, courts of appeals, and federal district courts are constitutional courts or Article III courts. The Administrative Procedure Act (APA) was passed in 1946, with the goal of ensuring fairness and due process in executive agency actions or proceedings involving rulemaking and adjudications. To meet these goals, the APA created the position of administrative law judge (ALJ) within the federal government. Originally called hearing examiners, the ALJs are employees of federal agencies who function like trial judges in the executive branch. These judges and courts are often referred to as Article I courts or judges.

The two types of courts may be further distinguished by their functions. Legislative courts, unlike their constitutional counterparts, often have administrative and quasi-legislative as well as judicial duties. Another difference is that legislative courts are often created to help administer a specific congressional statute. For example, more than two hundred immigration judges in more than fifty immigration courts throughout the United States adjudicate cases pursuant to the Immigration Reform and Control Act of 1986 and the Immigration Act of 1990. Their decisions are appealable to the Board of Immigration Appeals, a fifteen-member administrative body housed in the US Department of Justice. All board decisions are subject to review in the federal courts.[59]

Finally, the constitutional and legislative courts vary in their degree of independence from the other two branches of government. Article III (constitutional court) judges serve during a period of good behavior or what amounts to life tenure. Because Article I (legislative court) judges have no constitutional guarantee of good-behavior tenure, Congress may set specific terms of office for them. Judges of Article III courts are also constitutionally protected from salary reductions while in office. Those who serve as judges of legislative courts have no such protection. Bankruptcy courts provide

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a good example. The bankruptcy judges are appointed for fourteen-year terms by the court of appeals for the circuit in which the district is located and have their salaries set by Congress.

ADMINISTRATIVE AND STAFF SUPPORT IN THE FEDERAL JUDICIARY

The daily operation of federal courts requires a myriad of personnel. Although judges are the most visible actors in the judicial system, a large supporting cast is also needed to perform the tasks for which judges are unskilled or unsuited, or for which they simply do not have adequate time. Some members of the support team, such as law clerks, may work specifically for one judge. Others—for example, US **magistrate** judges—work for a particular court. Still others may be employees of an agency serving the entire judicial system, such as the Administrative Office of the United States Courts.

United States Magistrate Judges

To help federal district judges deal with increased workloads, Congress passed the Federal Magistrates Act in 1968. This legislation created the office of US magistrate to replace the US commissioners, who had performed limited duties for the federal trial courts for several years. In 1990, with passage of the Judicial Improvements Act, their title was changed to US magistrate judge. Magistrate judges are formally appointed by the judges of the district court for eight-year terms, although they can be removed for "compelling cause" before the term expires.

The magistrate judge system constitutes a structure that responds to each district court's specific needs and circumstances. Within guidelines set by the Federal Magistrates Acts of 1968, 1976, and 1979, the judges in each district court establish the duties and responsibilities of their magistrate judges. Of most significance, the 1979 legislation permits a magistrate judge, with the consent of the involved parties, to conduct all proceedings in a nonjury civil matter; to enter a judgment in the case; and to conduct a trial of persons accused of **misdemeanors** (less serious offenses than felonies) committed within the district, provided the defendants consent.

In other words, Congress has given federal district judges the authority to expand the scope of magistrate judges' participation in the judicial process. Because each district has its own needs, a magistrate judge's specific duties may vary from one district to the next and from one judge to another. The decision to delegate responsibilities to a magistrate judge is still made by the district judge, so that a magistrate judge's participation in the processing of cases may be narrower than that permitted by statute.

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Law Clerks

Several thousand law clerks now work for federal judges, bankruptcy judges, and US magistrate judges.[60] In addition to the law clerks hired by individual judges, all appellate courts and some district courts hire staff law clerks who serve the entire court.

A law clerk's duties vary according to the preferences of the judge for whom they work. They also vary according to the type of court. Law clerks for federal district judges often serve primarily as research assistants, spending a good deal of time examining the various motions filed in civil and criminal cases. They review each motion, noting the issues and the positions of the parties involved, then research important points raised in the motions and prepare written memoranda for the judges. Because their work is devoted to the earliest stages of the litigation process, law clerks may have a substantial amount of contact with attorneys and witnesses. Law clerks at this level may also be involved in the initial drafting of opinions. As one federal district judge said, "I even allow my law clerks to write memorandum opinions. I first tell him what I want and then he writes it up. Sometimes I sign it without changing a word."[61] At the appellate level, the law clerk becomes involved in a case first by researching the issues of law and fact presented by an appeal. Saving the judge's time is important. Consider the courts of appeals. As we have discussed earlier in this chapter these courts do not have the same discretion that the US Supreme Court has to accept or reject a case. Nevertheless, the courts of appeals now use certain screening devices to differentiate between cases that can be handled quickly and those that require more time and effort. Law clerks are an integral part of this screening process.

Beginning around 1960, some courts of appeals began to use staff law clerks who work for the entire court as opposed to a particular judge. They began to be used primarily because of the rapid increase in the number of pro se matters (generally speaking, those involving indigents) coming before the courts of appeals. Today, some district courts also have pro se law clerks for handling prisoner petitions. In some circuits, the staff law clerks deal only with pro se matters; in others, they review nearly all the cases on the court's docket. As a result of their review, a truncated process may be followed—that is, no oral argument or full briefing is made.

As cases are scheduled for oral argument, law clerks assist the judges in preparing for them. Intensive analysis of the record by judges before oral argument is not always possible. Judges seldom have time to do more than scan pertinent portions of the record called to their attention by law clerks. As one judicial scholar aptly noted, "To prepare for oral argument, all but a handful of circuit judges rely upon bench memoranda prepared by their law clerks, plus their own notes from reading briefs."[62] Once a decision has been reached by an appellate court, the law clerk frequently participates in writing the order that accompanies the decision. The clerk's participation generally consists of drafting a preliminary opinion or order pursuant to the judge's directions. A law clerk may also be asked to edit or check citations in an opinion written by the judge.

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Because the work of the law clerk for a Supreme Court justice roughly parallels that of a clerk in the other appellate courts, all aspects of their responsibility do not need to be restated here. However, a few important points about Supreme Court law clerks deserve mention. Once the justices have voted to hear a case, the law clerks, like their counterparts in the courts of appeals, prepare bench memoranda that the justices may use during oral argument. Finally, law clerks for Supreme Court justices, like those who serve courts of appeals judges, help to draft opinions.

Administrative Office of the US Courts

The administration of the federal judicial system is managed by the Administrative Office of the US Courts, which essentially functions as "the judiciary's housekeeping agency."[63] Since its creation in 1939, it has handled everything from distributing supplies and negotiating with other government agencies for court accommodations in federal buildings to maintaining judicial personnel records and collecting data on cases in the federal courts.

The Administrative Office also serves a staff function for the Judicial Conference of the United States, the central administrative policymaking organization of the federal judicial system. In addition to providing statistical information to the conference's many committees, the Administrative Office acts as a reception center and clearinghouse for information and proposals directed to the Judicial Conference.

Closely related to this staff function is the Administrative Office's role as liaison for both the federal judicial system and the Judicial Conference. The Administrative Office serves as advocate for the judiciary in its dealings with Congress, the executive branch, professional groups, and the public. Especially important is its representative role before Congress, where, along with concerned judges, it presents the judiciary's budget proposals, requests for additional judgeships, suggestions for changes in court rules, and other key measures.

The Federal Judicial Center

The Federal Judicial Center, created in 1967, is the federal courts' agency for continuing education and research. Its duties fall generally into three categories: (1) conducting substantial research support for the federal courts, (2) making recommendations to improve the administration and management of the federal courts, and (3) developing educational and training programs for personnel of the judicial branch.

Since the inception of the Federal Judicial Center, judges have benefited from its orientation sessions and educational programs. In recent years, magistrate judges, bankruptcy judges, and administrative personnel have also been the recipients of educational programs. The Federal Judicial Center's extensive use of videos and satellite technology enables it to reach large numbers of people.

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FEDERAL COURT WORKLOAD

Table 2.1 shows the number of civil and criminal cases entering the federal district courts during the twelve-month periods ending September 30, 2020, through September 30, 2023. The number of civil cases varied over the time period of this table, but the total number of such cases is over 130,000 higher in 2020 than in 2023. Criminal cases, also, have generally decreased over time, from over 74,000 cases in 2020 to 66,000 cases in 2023.[64]

TABLE 2.1 ■ Cases Filed in US District Courts during Recent, Twelve-Month Periods Ending September 30, 2020, through September 30, 2023: By Case Type

	2020	2021	2022	2023
Civil	470,581	344,567	274,771	339,731
Criminal	73,879	74,465	68,482	66,157

Source: Compiled from data available online at https://www.uscourts.gov/us-district-courts-judicial-business-2023 (accessed June 6, 2024).

Table 2.2 provides figures on the total number of appeals commenced in the courts of appeals from 2020 to 2023. The number of appellate court cases has generally declined in recent years, from over 48,000 cases in 2020 to just under 40,000 cases in 2023. Not surprisingly, the bulk of the appeals come from the district courts and federal administrative agencies.[65] In Table 2.3, we look at caseload data for the US Supreme Court. The total number of cases on the Court's docket has steadily declined from a high of 7,622 in 2018 to a low of 4,878 in 2022. The decline may be attributed to the general decline in the number of pauper's petitions, that is, those brought by indigent people for whom the filing fee and requirement of multiple copies are waived by the Court. For example, there were 2,353 less pauper petitions filed in the 2022 term than the 2018 term.

TABLE 2.2 ■ Appeals Filed in US Courts of Appeals during Recent, Selected Twelve-Month Periods Ending September 30, 2020, through September 30, 2023

2020	2021	2022	2023
48,190	44,546	41,839	39,987

Source: Compiled from data available online at https://www.uscourts.gov/us-courts-appeals-judicial-business-2023 (accessed June 6, 2024).

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TABLE 2.3 ■ Cases on the Docket, Argued, and Disposed of by Full Opinions in the US Supreme Court, October Terms 2018 through 2022

Cases	2018	2019	2020	2021	2022
Paid	1,915	1,818	2,137	1,996	1,529
Pauper	5,702	4,706	3,982	3,796	3,349
Original	9	10	10	5	4
Argued	73	73	72	79	68
Disposed of by Full Opinions	69	69	69	63	66

Source: Compiled from data available online at https://www.uscourts.gov/sites/default/files/data_tables/supcourt_a1_0930.2023.pdf (accessed June 6, 2024).

The key point to remember about the workload of the Supreme Court is that the justices themselves have discretion to decide which cases merit their full attention. As a result, the number of cases argued before the Court may fluctuate from session to session. In the 2022 term, sixty-eight cases were argued, but only sixty-six were disposed of by full opinions.

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A final word about the workload of the federal courts deserves mention before concluding our discussion. That deals with the fact that only Congress can create new judge positions for specific circuits and districts to help alleviate heavy workloads. Efforts to do that, however, have run into political resistance in recent years. The result is a major backlog of civil cases piling up in some of the nation's federal trial courts but, as the data illustrate in Table 2.1, the district court civil and criminal case load has been trending downward in recent years.

However, while numbers are trending downward in the Article III courts the same can't be said for some Article I courts. In particular, there has been a massive backlog of immigration cases. A 2017 study concluded that, "The massive backlog of immigration cases is a real problem. Since 2011, the number of pending cases has doubled to more than 600,000, bogging down lawyers and miring immigrants in an average of nearly two years of uncertainty before their fate is decided."[66] According to the pending immigration case backlog data, by December 2020, the number doubled again to a massive 1,290,766 cases and by May 2024 that number skyrocketed to over 3.5 million.[67] In the United States, wait times average 762 days. For example, in the nation's two largest states, California and Texas, respective wait times are 840 and 794 days.[68] In an effort to address the backlog, the Biden administration hired just over 300 new immigration judges and in their latest budget request asked for funding for 150 more judges.

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SUMMARY

In this chapter, we offered a brief historical review of the development of the federal judiciary. A perennial concern has existed since preconstitutional times for independent court systems.

We focused on the three basic levels created by the Judiciary Act of 1789, noting, however, that Congress has periodically created both constitutional and legislative courts. The bulk of federal litigation is handled by US district courts, courts of appeals, and the Supreme Court.

We also briefly examined the role of magistrate judges and law clerks associated with the federal judiciary, noting the crucial roles they play in the work of the federal judiciary.

Finally, we looked at administrative assistance for the federal courts as this relates to the Administrative Office of the US Courts and the Federal Judicial Center. We concluded our discussion with a brief look at the workload of each of the three levels of the federal judiciary.

FURTHER THOUGHT AND DISCUSSION QUESTIONS

1. Should federal courts have policymaking powers?
2. How can a democracy justify the fact that federal judges appointed for life possess the power to nullify federal and state laws that were enacted by elected representatives?
3. Since Article III judges are appointed for life and are independent of one another, what guarantees exist that justice is consistently and equitably dispensed?

SUGGESTED RESOURCES

Administrative Office of the US Courts website. Available online at www.us-courts.gov/adminoff.html. A useful site for caseload data compiled for each level of the federal judiciary.

Barrow, Deborah J., and Thomas G. Walker. *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform*. New Haven, CT: Yale University Press, 1988. An excellent study of the politics involved in the splitting of the Fifth Circuit Court of Appeals.

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Baum, Lawrence. *The Supreme Court*, 15th ed. Washington, DC: CQ Press, 2023. A brief look at all aspects of the US Supreme Court.

Bowie, Jennifer, Donald R. Songer, and John Szmer. *The View from the Bench and Chambers: Examining Judicial Process and Decision Making on the U.S. Courts of Appeals.* Charlottesville, VA: University of Virginia Press, 2014. A thorough study of the US courts of appeals that includes the perspectives of the judges.

Burrows, Vanessa K. "Administrative Law Judges: An Overview." *Congressional Research Service* (April 13, 2010). Available online at www.crs.gov. A good introduction to administrative law judges in the federal government.

Federal Administrative Law Judges Conference Website. Available online at www.faljc.org. Provides useful information about administrative law judges in the federal government.

Federal Judicial Center Website. Available online at www.fjc.gov. The website of the federal courts' continuing education and research agency.

Federal Judiciary Website. Available online at www.uscourts.gov. The single most important source of information about all aspects of the federal judiciary. Provides links to individual district courts, courts of appeals, and bankruptcy courts, as well as to other useful Internet sites.

Legal Information Institute Website. Available online at www.law.cornell.edu. An excellent source of information about all aspects of the US Supreme Court, including recent and historical decisions.

Oyez Website. Available online at www.oyez.org. Another useful site for recent and historical Supreme Court decisions; it also is the most complete source for all of the Court's oral argument and opinion announcement audio since the installation of a recording system in October 1955.

Rowland, C. K., and Robert A. Carp. *Politics and Judgment in Federal District Courts*. Lawrence, KS: University Press of Kansas, 1996. A thorough study of the various factors that influence the decisions of federal district judges.

US Supreme Court Website. Available online at www.supremecourtus.gov. Provides information about all aspects of the nation's highest court.

Vladeck, Stephen. *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic*. New York, NY: Basic Books, 2023. A thorough and excellent overview of the shadow docket and its consequences.

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KEY TERMS

appellate jurisdiction
bench trials
cert petition
concurring opinion
defendant
dissenting opinion
grand jury
judgments
judicial review
magistrate
misdemeanors
opinion of the Court
oral argument
original jurisdiction
three-judge district court
writ of certiorari

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