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ENGLISH FOR LAW:

AMERICAN LEGAL SYSTEM

Textbook

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Учебное пособие рекомендуется студентам, которые хотят расширить свой кругозор и углубить свои знания в профессиональном поле.

В учебнике «American legal law» подробно раскрывается содержание американской правовой системы в 14 главах. Право США в качестве основных источников включает: обычаи и традиции. Законодательство в широком смысле называют статутным и прецедентным право, создаваемое судами.

В США существует фактически 51 система права (по одной на каждый штат и одна – федеральная). Несмотря на большое значение федерального законодательства, граждане и юристы в первую очередь пользуются правом штатов. Юрисдикция судов каждого штата осуществляется вне зависимости от юрисдикции другого штата. Решения, принятые судами одного штата, могут совершенно отличаться от решений судов другого штата по одному и тому же делу.

Книга «American legal system» раскрывает все стороны американской правовой системы, ее исторические корни, этапы ее формирования, содержание и структуру, характеризует роль судей, дает характеристики разнообразных судов на федеральном уровне и уровне штатов.

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П Р Е Д И С Л О В И Е

Право США в качестве основных источников включает: обычаи и традиции.

Законодательство в широком смысле называют статутным и прецедентным право, создаваемое судами. Для американского, как и для английского юриста, право – это, прежде всего судебная практика. Нормы закона входят в систему права лишь после того, как будут неоднократно истолкованы судьями. В американских судах ссылаются не на законы, а на судебные решения, в которых они были применены.

Однако, Верховный суд США и апелляционные суды штатов не считают себя, безусловно связанными своими прошлыми решениями. Американские судьи в своих решениях не соблюдают так строго правило прецедента, как их английские коллеги.

По их мнению, жесткость прецедента создает излишнюю сложность в принятии взвешенных решений.

Существенное отличие права США от английского обусловлено федеральной структурой США. В пределах своей компетенции, которая достаточно значима, штаты создают своё законодательство и свои многочисленные прецеденты.

В США существует фактически 51 система права (по одной на каждый штат и одна – федеральная). Несмотря на большое значение федерального законодательства, граждане и юристы в первую очередь пользуются правом штатов.

Юрисдикция судов каждого штата осуществляется вне зависимости от юрисдикции другого штата. Решения, принятые судами одного штата, могут совершенно отличаться от решений судов другого штата по одному и тому же делу.

Нередки случаи принятия совершенно противоположных решений судами разных штатов по аналогичным делам. Ежегодно в США публикуется более 300 томов судебных прецедентов.

Законодательства штатов значительно отличаются друг от друга. Отличаются меры уголовного наказания за одно и то же преступление, устанавливается режим общности или раздельности имущества супругов и так далее. Подобные явления делают правовую систему США очень сложной и запутанной.

Одна из самых важных особенностей правовой системы США состоит в контроле судов за конституционностью законов.

Верховный суд США, Верховные суды штатов могут признать тот или иной закон неконституционным. Судебные органы федерации и штатов осуществляют также контроль за конституционностью актов применения общего права.

Любое судебное решение может быть аннулировано в случае признания его противоречащим конституционной норме. Этот правовой институт весьма важен как средство заставить судебные инстанции уважать основные принципы права и обеспечить тем самым единство правовой системы США.

В правовой системе США законодательство более значимо и весомо, чем в английском статутном праве. Существующая уже более 200 лет Федеральная конституция и более молодые конституции штатов играют важную роль в регулировании жизни общества. Каждый штат имеет большое количество своих собственных законов, так как обладает широкой законодательной компетенцией и активно её использует.

Еще одной отличительной особенностью законодательства США является наличие в ней кодексов, ранее неизвестных в английском праве.

В своих кодексах американские законодатели стремились воспроизвести прежние нормы, созданные путем судебной практики, объединить прецеденты, сделать их основой законодательства. Важным фактором, обусловившим качественно новую роль судебных решений в США можно назвать то факт, что Конституция США имеет прямое действие и в отличие от английских судов, американские, при толковании отдельных казусов, обращаются к её тексту.

Судебную систему возглавляет Верховный суд США, деятельность которого наполняется глубоким политическим содержанием. Верховный суд в процессе своей судебной деятельности осуществляет функцию конституционного надзора и может решать не только судьбу дела на основании закона, но и судьбу закона (его соответствие Конституции).

Отличительными чертами своеобразной правовой системы США, сложившейся благодаря многочисленным факторам (историческим и географическим) являются:

• качественное преобразование общего права, права справедливости и полное обновление статутного права (кодификация), заимствованных из английской правовой системы;

• наделение судебной власти большими полномочиями, в том числе функцией контроля за законодательным процессом (Верховный суд США);

• наличие огромного массива законодательств, связанное с федеративным строением государства;

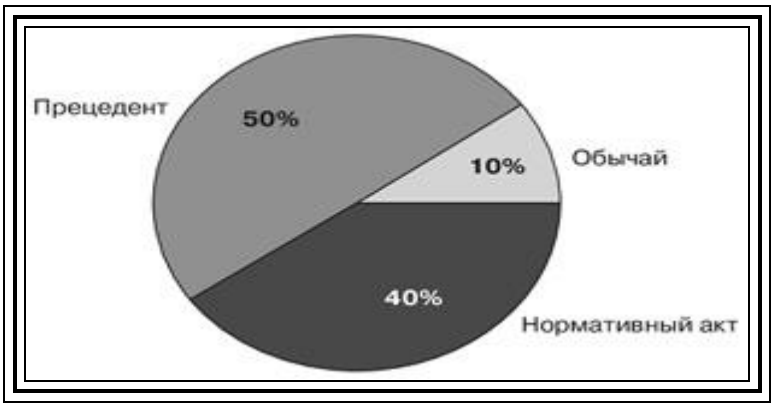
• своеобразие правовых систем различных штатов и их относительная правовая автономия;

• наличие Конституции в качестве источника права и фактора, определяющего правосознание граждан;

• выборность как законодательной, так и исполнительной власти и их отчетность перед гражданами государства;

• относительная стабильность и созидательная способность правовой системы.

Книга «American legal system» раскрывает все стороны американской правовой системы, ее исторические корни, этапы ее формирования, содержание и структуру, характеризует роль судей, дает характеристики разнообразных судов на федеральном уровне и уровне штатов.



CHAPTER I. AMERICAN LAW

INTRODUCTION

The law of the USA comprises many levels of codified and uncodified forms of law, of which the most important is the USA Constitution, the foundation of the federal government of the USA.

The Constitution sets out the boundaries of federal law, which consists of acts of Congress, treaties ratified by the Senate, regulations promulgated by the executive branch, and case law originating from the federal judiciary. The USA Code is the official compilation and codification of general and permanent federal statutory law.

Federal law and treaties, so long as they are in accordance with the Constitution, as well as the Constitution itself, preempt conflicting state and territorial laws in the 50 U.S. states and in the territories. However, the scope of federal preemption is limited because the scope of federal power is not universal.

In the dual-sovereign system of American federalism (actually tripartite because of the presence of Indian reservations), states are the plenary sovereigns, each with their own constitution, while the federal sovereign possesses only the limited supreme authority enumerated in the Constitution. Indeed, states may grant their citizens broader rights than the federal Constitution as long as they do not infringe on any federal constitutional rights.

Thus, most U.S. law (especially the actual "living law" of contract, tort, property, criminal, and family law experienced by the majority of citizens on a day-to-day basis) consists primarily of state law, which can and does vary greatly from one state to the next.

At both the federal and state levels, the law of the USA is largely derived from the common law system of English law, which was in force at the time of the Revolutionary War. However, American law has diverged greatly from its English ancestor both in terms of substance and procedure, and has incorporated a number of civil law innovations.

In the USA, the law is derived from five sources: constitutional law, statutory law, treaties, administrative regulations, and the common law (includes case law).

Where Congress enacts a statute that conflicts with the Constitution, the Supreme Court may find that law unconstitutional and declare it invalid. Notably, a statute does not disappear automatically merely because it has been found unconstitutional; it must be deleted by a subsequent statute. Many federal and state statutes have remained on the books for decades after they were ruled to be unconstitutional. However, under the principle of *stare decisis*, no sensible lower court will enforce an unconstitutional statute, and any court that does so will be reversed by the Supreme Court. Conversely, any court that refuses to enforce a constitutional statute (where such constitutionality has been expressly established in prior cases) will risk reversal by the Supreme Court.

Active vocabulary

Constitution, unconstitutional, to declare, to establish, notably, to find, to be deleted, civil law innovations, constitutional law, statutory law, treaties, administrative regulations, tcommon law, to reverse, statute, principle of *stare decisis*.

LEGAL HISTORY

Legal history or the history of law is the study of how law has evolved and why it has changed. Legal history is closely connected with the development of civilizations and is set in the wider context of social history. Among certain jurists and historians of legal process it has been seen as the recording of the evolution of laws and the technical explanation of how these laws have evolved with the view of better understanding the origins of various legal concepts, some consider it as a branch of intellectual history.

20th century historians have viewed legal history in a more contextualized manner more in line with the thinking of social historians. They have looked at legal institutions as complex systems of rules, players and symbols and have seen these elements interact with society to change, adapt, resist or promote certain aspects of civil society.

Such legal historians have tended to analyze case histories from the parameters of social science inquiry, using statistical methods, analyzing class distinctions among litigants, petitioners and other players in various legal processes. By analyzing case outcomes, transaction costs, number of settled cases they have begun an analysis of legal institutions, practices, procedures and briefs that give us a more complex picture of law and society than the study of jurisprudence, case law and civil codes can achieve.

Legal history is a discipline that examines events of the past that pertain to all facets of the law. It includes analysis of particular laws, legal institutions, individuals who operate in the legal system, and the effect of law on society.

U.S. legal history is a relatively new subtopic that began to grow dramatically in the 1960s. Before the 1960s, legal history was confined mostly to biographies of famous lawyers and judges and to technical analysis of particular areas of Substantive Law. In general, it was an afterthought. Political historians referred to important U.S. Supreme Court cases, but there was little in-depth analysis of topics such as Criminal Law, the law of Slavery, or the development of the state and federal court systems. The study of U.S. legal history began with the work of James Willard Hurst.

In 1950, Hurst published *The Growth of American Law: The Law Makers*, which examined many types of historical sources in order to fashion a history of U.S. law.

J.Hurst went beyond the work of judges and courts to find material about the law in constitutional conventions, legislatures, administrative agencies, and the bar.

Among his many other works, Hurst explored the relationship of law and the economy in *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915* (1964). In his scholarship, J.Hurst tried to integrate public law (law created by government bodies) with private law (law implemented through public courts to resolve individual disputes). Legal historians who began researching and writing in the 1960s typically emphasized one of these types of law. Lawrence M. Friedman emphasized the work of private law in *A History of American Law*, first published in 1973. In this book Friedman examined, among many topics, the law of contract, real property, and TORT.

Paul L. Murphy focused on public law, writing a series of articles and books relating the U.S. Constitution to the social and cultural pressures of different historical periods.

In *World War I and the Origin of Civil Liberties in the USA* (1979), Murphy analyzed the relationship between the USA' experience in war and developing interest in First Amendment civil liberties.

The field of legal history also benefited from the growth of social history in the 1960s. The issues of gender, race, and class became crucial to historians during the Vietnam War period. Legal historians such as Kermit L. Hall have built on these issues, interweaving legal history with social and cultural history to explain how law is both a reactive mechanism, responding to public problems, and an active mechanism, shaping behavior through its rules and structure.

Hall's *The Magic Mirror: Law in American History* (1989) was the first major work to synthesize twenty years of social and legal history research into an overview of U.S. law, public and private. Legal historians have looked at the role of law in U.S. history in several disparate ways. Hurst and many other historians have seen the law as a means of enhancing political and economic consensus. Their view is that law acts as a neutral party through which conflicting interests work to achieve their own ends.

Other, more radical historians see law as a formal device for perpetuating the domination of the ruling economic class. Their viewpoint emphasizes that law is not the expression of neutral rules but a creature of power and politics.

Therefore, the law has hurt those who lack power – including women, members of racial minorities, and people who are poor.

The consensus and conflict models of legal historical analysis turn on their positions concerning the principle called the Rule of Law. This rule, on which all other legal rules are based, has been a basic principle of Western culture since the 17th century.

It posits that all persons are equal before a neutral and impartial authority, regardless of economic standing, gender, race, family connections, or political connections. Legal historians produce scholarship that goes to the question of whether all persons receive justice.

The field of legal history continues to grow, with historians now exploring every facet of the law. History is no longer defined as just Supreme Court decisions or congressional legislation. Historians examine the inner workings of state courts, frontier law of the 19th century, the role of law in slavery, criminal law, legal bias against homosexuality, and more.

Active vocabulary

Legal, history, the role of law, legal bias, political connections, to hurt, public, private, historians, the ruling economic class, public problems, a creature of power and politics, members of racial minorities, to be hurt by the law.

AMERICAN COMMON LAW

The USA and most Commonwealth countries are heirs to the common law legal tradition of English law. Certain practices traditionally allowed under English common law were expressly outlawed by the Constitution, such as bills of attainder and general search warrants. As common law courts, U.S. courts have inherited the principle of *stare decisis*.

American judges, like common law judges elsewhere, not only apply the law, they also make the law, to the extent that their decisions in the cases before them become precedent for decisions in future cases. The actual substance of English law was formally "received" into the USA in several ways. First, all U.S. states except Louisiana have enacted "reception statutes" which generally state that the common law of England (particularly judge-made law) is the law of the state to the extent that it is not repugnant to domestic law or indigenous conditions. Some reception statutes impose a specific cutoff date for reception, such as the date of a colony's founding, while others are deliberately vague.

Thus, contemporary U.S. courts often cite pre-Revolution cases when discussing the evolution of an ancient judge-made common law principle into its modern form, such as the heightened duty of care traditionally imposed upon common carriers.

Second, a small number of important British statutes in effect at the time of the Revolution have been independently reenacted by U.S. states. Two examples that many lawyers will recognize are the Statute of Frauds (still widely known in the U.S. by that name) and the Statute of 13 Elizabeth (the ancestor of the Uniform Fraudulent Transfer Act). Such English statutes are still regularly cited in contemporary American cases interpreting their modern American descendants.

However, it is important to understand that despite the presence of reception statutes, much of contemporary American common law has diverged significantly from English common law. The reason is that although the courts of the various Commonwealth nations are often influenced by each other's rulings, American courts rarely follow post-Revolution Commonwealth rulings unless there is no American ruling on point, the facts and law at issue are nearly identical, and the reasoning is strongly persuasive.

Early on, American courts, even after the Revolution, often did cite contemporary English cases. This was because appellate decisions from many American courts were not regularly reported until the mid-19th century; lawyers and judges, as creatures of habit, used English legal materials to fill the gap. But citations to English decisions gradually disappeared during the 19th century as American courts developed their own principles to resolve the legal problems of the American people.

The number of published volumes of American reports soared from eighteen in 1810 to over 8,000 by 1910. By 1879 one of the delegates to the California constitutional convention was already complaining: "Now, when we require them to state the reasons for a decision, we do not mean they shall write a hundred pages of detail. We do not mean that they shall include the small cases, and impose on the country all this fine judicial literature, for the Lord knows we have got enough of that already." Today, in the words of Stanford law professor Lawrence Friedman: "American cases rarely cite foreign materials. Courts occasionally cite a British classic or two, a famous old case, or a nod to Blackstone; but current British law almost never gets any mention." Foreign law has never been cited as binding precedent, but as a reflection of the shared values of Anglo-American civilization.

Active vocabulary

Contemporary, courts, common law judges, to outlaw, constitution, domestic law, to require, reasons, decision, to impose, case, to cite, to include, binding precedent.

Task 1. Digest the information briefly in English.

Task 2. Explain the notion on federal law.

Federal law originates with the Constitution, which gives Congress the power to enact statutes for certain limited purposes like regulating interstate commerce. The USA Code is the official compilation and codification of the general and permanent federal statutes. Many statutes give executive branch agencies the power to create regulations, which are published in the Federal Register and codified into the Code of Federal Regulations.

Many lawsuits turn on the meaning of a federal statute or regulation, and judicial interpretations of such meaning carry legal force under the principle of *stare decisis*. During the 18th and 19th centuries, federal law traditionally focused on areas where there was an express grant of power to the federal government in the federal Constitution, like the military, money, foreign affairs (international treaties), tariffs, intellectual property (specifically patents and copyrights), and mail.

Since the start of the 20th century, broad interpretations of the Commerce and Spending Clauses of the Constitution have enabled federal law to expand into areas like aviation, telecommunications, railroads, pharmaceuticals, antitrust, and trademarks.

In some areas, like aviation and railroads, the federal government has developed a comprehensive scheme that preempts virtually all state law, while in others, like family law, a relatively small number of federal statutes (generally covering interstate and international situations) interacts with a much larger body of state law. In areas like antitrust, trademark, and employment law, there are powerful laws at both the federal and state levels that coexist with each other. In a handful of areas like insurance, Congress has enacted laws expressly refusing to regulate them as long as the states have laws regulating them.

Task 3. Define the notion on statute.

The USA Code is the codification of federal statutory law. After the President signs a bill into law (Congress enacts it over his veto), it is delivered to the Office of the Federal Register (OFR) of the National Archives and Records Administration (NARA) where it is assigned a law number, and prepared for publication as a slip law. Public laws, but not private laws, are also given legal statutory citation by the OFR.

At the end of each session of Congress, the slip laws are compiled into bound volumes called the USA Statutes at Large, and they are known as session laws.

The Statutes at Large present a chronological arrangement of the laws in the exact order that they have been enacted. Public laws are incorporated into the USA Code, which is a codification of all general and permanent laws of the USA.

The main edition is published every six years by the Office of the Law Revision Counsel of the House of Representatives, and cumulative supplements are published annually. The U.S. Code is arranged by subject matter, and it shows the present status of laws that have been amended on one or more occasions.

Task 4. Analyze the information, which is in the highlight, and use it in practice.

Task 5. Choose the keywords that best convey the gist of the information.

Task 6. Render the score of the information briefly in English.

The Code of Federal Regulations is the codification of federal administrative law.

Congress often enacts statutes that grant broad rulemaking authority to federal agencies. Often, Congress is simply too gridlocked to draft detailed statutes that explain how the agency should react to every possible situation, or Congress believes the agency's technical specialists are best equipped to deal with particular fact situations as they arise.

Therefore, federal agencies are authorized to promulgate regulations.

Under the principle of *Chevron* deference, regulations normally carry the force of law as long as they are based on a reasonable interpretation of the relevant statutes.

Regulations are adopted pursuant to the Administrative Procedure Act. Regulations are first proposed and published in the Federal Register and subject to a public comment period. Eventually, after a period for public comment and revisions based on comments received, a final version is published in the Federal Register.

The regulations are codified and incorporated into the Code of Federal Regulations (CFR) which is published once a year on a rolling schedule.

Besides regulations formally promulgated under the APA, federal agencies also frequently promulgate an enormous amount of forms, manuals, policy statements, letters, and rulings. These documents may be considered by a court as persuasive authority as to how a particular statute or regulation may be interpreted (known as *Skidmore* deference), but are not entitled to *Chevron* deference.

Task 7. Try to understand the notion.

Common law is the part of English law that is derived from custom and judicial precedent rather than statutes. Compare with case law, statute law. Common law is the system of law, which is based on judges' decisions and on custom rather than on written laws.

Task 8. Analyze the information and make up the chart about it.

№	Activity			
	Events	When	Where	Score
1.				

COMMON LAW & CASE LAW & PRECEDENT

Unlike the situation with the states, there is no plenary reception statute at the federal level that continued the common law and thereby granted federal courts the power to formulate legal precedent like their English predecessors. Federal courts are solely creatures of the federal Constitution and the federal Judiciary Acts.

However, it is universally accepted that the Founding Fathers of the USA, by vesting "judicial power" into the Supreme Court and the inferior federal courts in Article Three of the USA Constitution, thereby vested in them the implied judicial power of common law courts to formulate persuasive precedent; this power was widely accepted, understood, and recognized by the Founding Fathers at the time the Constitution was ratified.

Several legal scholars have argued that the federal judicial power to decide "cases or controversies" necessarily includes the power to decide the precedential effect of those cases and controversies. The difficult question is whether federal judicial power extends to formulating binding precedent through strict adherence to the rule of *stare decisis*.

This is where the act of deciding a case becomes a limited form of lawmaking in itself, in that an appellate court's rulings will thereby bind itself and lower courts in future cases (and therefore also impliedly binds all persons within the court's jurisdiction).

Prior to a major change to federal court rules in 2007, about one-fifth of federal appellate cases were published and thereby became binding precedents, while the rest were unpublished and bound only the parties to each case.

As federal judge Alex Kozinski has pointed out, binding precedent as we know it today simply did not exist at the time the Constitution was framed. Judicial decisions were not consistently, accurately, and faithfully reported on both sides of the Atlantic (reporters often simply rewrote or failed to publish decisions which they disliked), and the United Kingdom lacked a coherent court hierarchy prior to the end of the 19th century.

Furthermore, English judges in the 18th century subscribed to now-obsolete natural law theories of law, by which law was believed to have an existence independent of what individual judges said. Judges saw themselves as merely declaring the law which had always theoretically existed, and not as making the law. Therefore, a judge could reject another judge's opinion as simply an incorrect statement of the law, in the way that scientists regularly reject each other's conclusions as incorrect statements of the laws of science.

In turn, according to Kozinski's analysis, the contemporary rule of binding precedent became possible in the U.S. in the nineteenth century only after the creation of a clear court hierarchy (under the Judiciary Acts), and the beginning of regular *verbatim* publication of U.S. appellate decisions by West Publishing.

The rule gradually developed, case-by-case, as an extension of the judiciary's public policy of effective judicial administration (efficiently exercise the judicial power).

The rule of precedent is generally justified today as a matter of public policy, first, as a matter of fundamental fairness, and second, because in the absence of case law, it would be completely unworkable for every minor issue in every legal case to be briefed, argued, and decided from first principles (relevant statutes, constitutional provisions, and underlying public policies), which in turn would create hopeless inefficiency, instability, and unpredictability, and thereby undermine the rule of law. Here is a typical exposition of that public policy in a 2008 majority opinion signed by Associate Justice Stephen Breyer.

Justice Brandeis once observed that "in most matters it is more important that the applicable rule of law be settled than that it be settled right".

To overturn a decision settling one such matter simply because we might believe that decision is no longer "right" would inevitably reflect a willingness to reconsider others.

That willingness could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability. We have not found here any factors that might overcome these considerations. It is now sometimes possible, over time, for a line of precedents to drift from the express language of any underlying statutory or constitutional texts until the courts' decisions establish doctrines that were not considered by the texts' drafters.

This trend has been strongly evident in federal substantive due process and Commerce Clause decisions. Originalists and political conservatives, such as Associate Justice Antonin Scalia have criticized this trend as anti-democratic.

Under the doctrine, there is *no general federal common law*. Although federal courts can create federal common law in the form of case law, such law must be linked one way or another to the interpretation of a particular federal constitutional provision, statute, or regulation (which in turn was enacted as part of the Constitution or after).

Federal courts lack the plenary power possessed by state courts to simply make up law, which the latter are able to do in the absence of constitutional or statutory provisions replacing the common law. Only in a few narrow limited areas, like maritime law, has the Constitution expressly authorized the continuation of English common law at the federal level (in those areas federal courts can continue to make law as they see fit, subject to the limitations of *stare decisis*). The other major implication of the *Erie* doctrine is that federal courts cannot dictate the content of state law when there is no federal issue in a case.

When hearing claims under state law pursuant to diversity jurisdiction, federal trial courts *must* apply the statutory and decisional law of the state in which they sit, as if they were a court of that state, even if they believe that the relevant state law is irrational or just bad public policy. And under *Erie*, deference is one-way only: state courts are not bound by federal interpretations of state law. Although judicial interpretations of federal law from the federal district and intermediate appellate courts hold great persuasive weight, state courts are *not* bound to follow those interpretations.

There is only one federal court that binds all state courts as to the interpretation of federal law and the federal Constitution: the U.S. Supreme Court itself.

Active vocabulary

State law, federal interpretations of state law, to believe, state courts, to lack, Constitution, maritime law, to authorize, federal courts, constitutional texts, decision, to overturn, trends, implication, willingness to reconsider.

Task 1. Render the contents of the message shortly in English.

Task 2. Analyze the information and use it in practice.

Task 3. Transfer the given information from the passages onto a table.

№	Activity			
	Event	When	Where	Score
1.				

STATE LAW

The 50 American states are separate sovereigns, with their own state constitutions, state governments, and state courts. All states have a legislative branch which enacts state statutes, an executive branch that promulgates state regulations pursuant to statutory authorization, and a judicial branch that applies, interprets, and occasionally overturns both state statutes and regulations, as well as local ordinances. They retain plenary power to make laws covering anything not preempted by the federal Constitution, federal statutes, or international treaties ratified by the federal Senate.

Normally, state supreme courts are the final interpreters of state constitutions and state law, unless their interpretation itself presents a federal issue, in which case a decision may be appealed to the U.S. Supreme Court by way of a petition for writ of certiorari.

State laws have dramatically diverged in the centuries since independence, to the extent that the USA cannot be regarded as one legal system as to the majority of types of law traditionally under state control, but must be regarded as 50 *separate* systems of tort, family, property, contract, criminal law, and so on.

Most cases are litigated in state courts and involve claims and defenses under state laws. In a 2012 report, the National Center for State Courts' Court Statistics Project found that state trial courts received 103.5 mln. newly filed cases in 2010, which consisted of 56.3 mln. traffic cases, 20.4 mln. criminal cases, 19.0 mln. civil cases, 5.9 mln. domestic relations cases, and 1.9 mln. juvenile cases. In 2010, state appellate courts received 272,795 new cases. By way of comparison, all federal district courts in 2010 together received only about 282,000 new civil cases, 77,000 new criminal cases, and 1.5 mln. bankruptcy cases, while federal appellate courts received 56,000 new cases.

Active vocabulary

State Supreme Courts, cases, to find, tort law, family law, property law, contract law, criminal law, to involve, claims, to receive, to regard, traditionally, under state control.

Task 1. Analyze the information, which is in the highlight, and use it in practice.

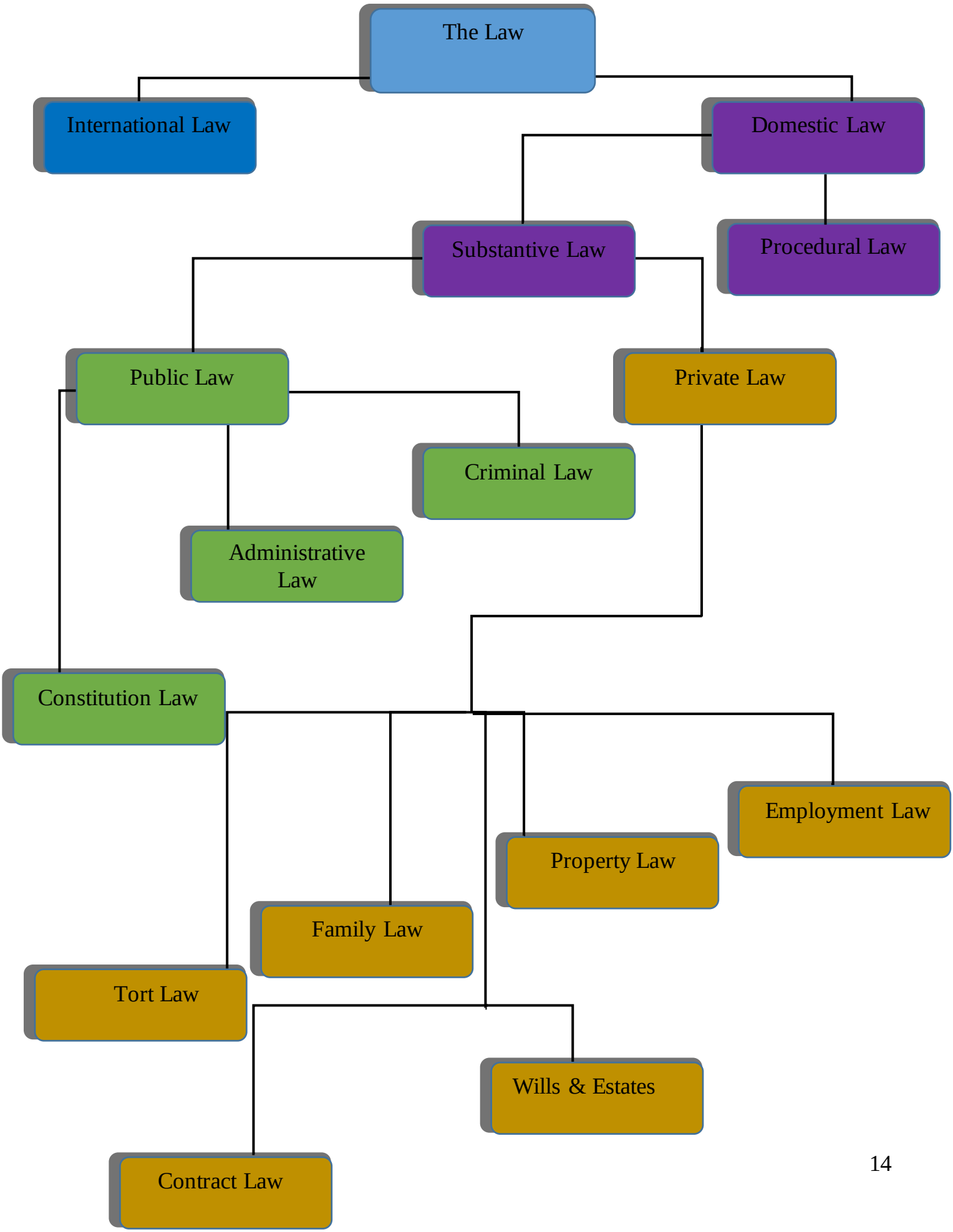
Task 2. Explain the score of the local law.

States have delegated lawmaking powers to thousands of age ncies, townships, counties, cities, and special districts. And all the state constitutions, statutes and regulations (as well as all the ordinances and regulations promulgated by local entities) are subject to judicial interpretation like their federal counterparts. It is common for residents of major U.S. metropolitan areas to live under six or more layers of special districts as well as a town or city, a county or township (in addition to the federal and state governments).

Thus, at any given time, the average American citizen is subject to the rules and regulations of several dozen different agencies at the federal, state, and local levels, depending upon one's current location and behavior.

Task 3. Transfer the given information from the passages onto a table.

№	Activity			
	Event	When	Where	Score
1.				


The Law
International Law
Domestic Law
Substantive Law
Procedural Law
Public Law
Private Law
Criminal Law
Administrative Law
Constitution Law
Employment Law
Property Law
Family Law
Tort Law
Wills & Estates
Contract Law

CRIMINAL & CIVIL PROCEDURE

The law of criminal procedure in the USA consists of a massive overlay of federal constitutional case law interwoven with the federal and state statutes that actually provide the foundation for the creation and operation of law enforcement agencies and prison systems as well as the proceedings in criminal trials.

Due to the perennial inability of legislatures in the U.S. to enact statutes that would actually force law enforcement officers to respect the constitutional rights of criminal suspects and convicts, the federal judiciary gradually developed the exclusionary rule as a method to enforce such rights. In turn, the exclusionary rule spawned a family of judge-made remedies for the abuse of law enforcement powers, of which the most famous is the Miranda warning. The writ of *habeas corpus* is often used by suspects and convicts to challenge their detention, while the Civil Rights Act of 1871 and *Bivens* actions are used by suspects to recover tort damages for police brutality.

The law of civil procedure governs process in all judicial proceedings involving lawsuits between private parties. Traditional common law pleading was replaced by code pleading in 24 states after New York enacted the Field Code in 1850 and code pleading in turn was subsequently replaced again in most states by modern notice pleading during the 20th century. The old English division between common law and equity courts was abolished in the federal courts by the adoption of the Federal Rules of Civil Procedure in 1938; it has also been independently abolished by legislative acts in nearly all states.

The Delaware Court of Chancery is the most prominent of the small number of remaining equity courts. 35 states have adopted rules of civil procedure modeled after the FRCP (including rule numbers). However, in doing so, they had to make some modifications to account for the fact that state courts have broad general jurisdiction while federal courts have relatively limited jurisdiction.

New York, Illinois, and California are the most significant states that have not adopted the FRCP. Furthermore, all three states continue to maintain most of their civil procedure laws in the form of codified statutes enacted by the state legislature, as opposed to court rules promulgated by the state supreme court, on the ground that the latter are undemocratic. But certain key portions of their civil procedure laws have been modified by their legislatures to bring them closer to federal civil procedure.

Generally, American civil procedure has several notable features, including extensive pretrial discovery, heavy reliance on live testimony obtained at deposition or elicited in front of a jury, and aggressive pretrial "law and motion" practice designed to result in a pretrial disposition (that is, summary judgment) or a settlement.

U.S. courts pioneered the concept of the opt-outclass action, by which the burden falls on class members to notify the court that they do not wish to be bound by the judgment, as opposed to opt-in class actions, where class members must join into the class. Another unique feature is the so-called American Rule under which parties generally bear their own attorneys' fees (as opposed to the English Rule of "loser pays"), though American legislators and courts have carved out numerous exceptions.

Active vocabulary

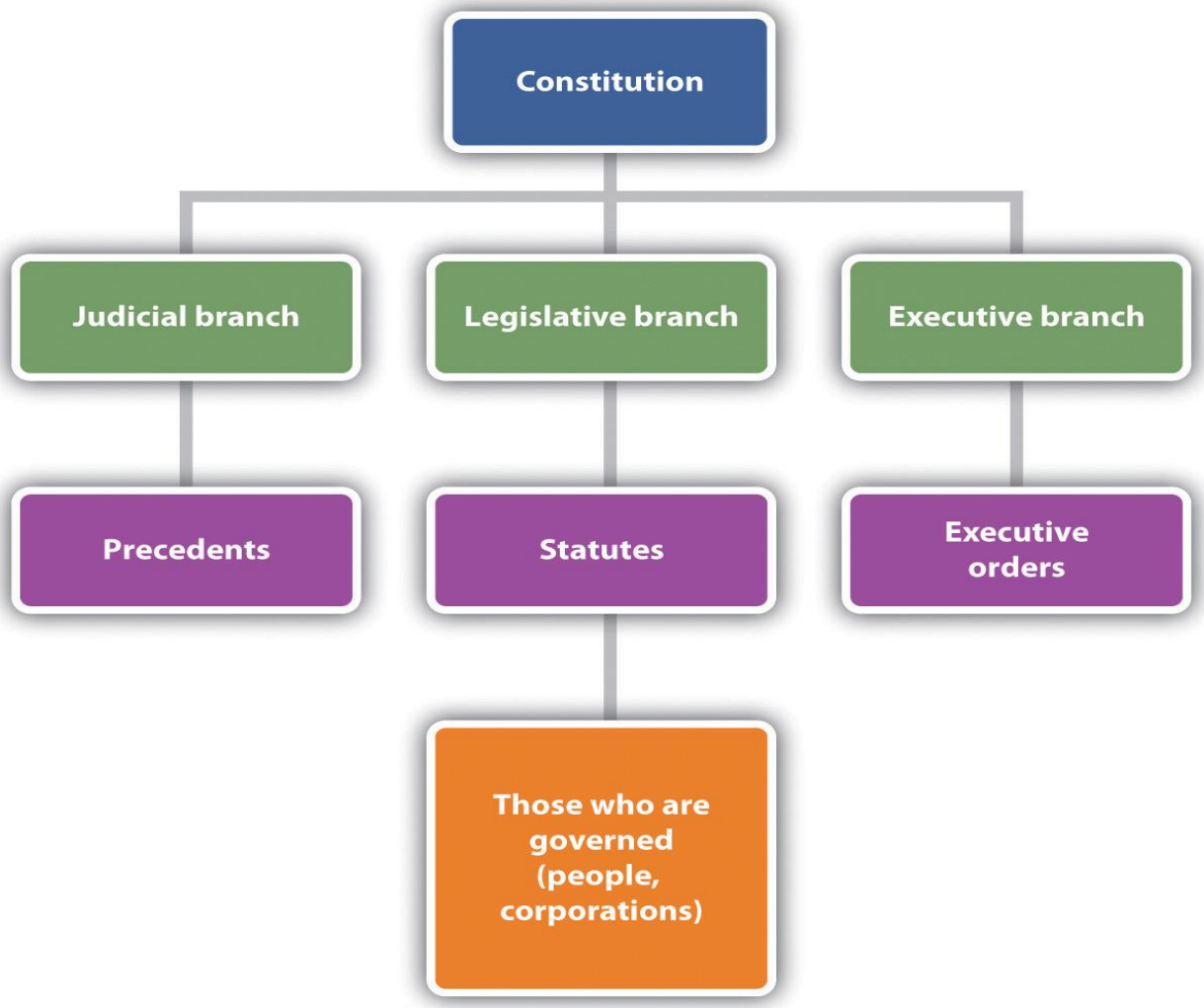
Law of civil procedure, to govern, process, notable features, to obtain, aggressive pretrial, practice, at deposition, settlement, to modify, elicited, concept.

Task 1. Provide short description of sky events in the form of notes.

Civil procedure, courts, concept of the opt-outclass action, summary judgment, legislatures, to promulgate, to enact, to replace, legislators, to provide, foundation, creation, operation of law, adoption, federal rules.

Task 2. Answer the questions.

1. What does the law of criminal procedure in the USA consists of? 2. What do state statutes provide? 3. What does the federal judiciary gradually develop? 4. What does the exclusionary rule do in turn? 5. What is the most famous? 6. How is the writ of *habeas corpus* often used? 7. How are the Civil Rights Act of 1871 and *Bivens* actions used? 8. What governs process in all judicial proceedings involving lawsuits between private parties? 9. Whe was traditional common law pleading replaced by code pleading in 24 states? 10. What was subsequently replaced again in most states by modern notice pleading during the 20th century? 11. What was abolished in the federal courts by the adoption of the Federal Rules of Civil Procedure in 1938? 12. Where has it also been independently abolished by legislative acts? 13. What is the most prominent of the small number of remaining equity courts? 14. How many states have adopted rules of civil procedure modeled after the FRCP? 15. What states have not adopted the FRCP? 16. What kind of notable features does American civil procedure have?



SUBSTANTIVE & CRIMINAL LAW

Substantive law comprises the actual "substance" of the law; that is, the law that defines legally enforceable rights and duties, and what wrongful acts amount to violations of those rights and duties. Because substantive law by definition is enormous, the following summary briefly covers only a few highlights of each of the major components of American substantive law.

Criminal law involves the prosecution by the state of wrongful acts which are considered to be so serious that they are a breach of the sovereign's peace (and cannot be deterred or remedied by mere lawsuits between private parties). Generally, crimes can result in incarceration, but torts cannot.

The majority of the crimes committed in the USA are prosecuted and punished at the state level. Federal criminal law focuses on areas specifically relevant to the federal government like evading payment of federal income tax, mail theft, or physical attacks on federal officials, as well as interstate crimes like drug trafficking and wire fraud.

All states have somewhat similar laws in regard to "higher crimes" (or felonies), such as murder and rape, although penalties for these crimes may vary from state to state. Capital punishment is permitted in some states but not others. Three strikes laws in certain states impose harsh penalties on repeat offenders.

Some states distinguish between two levels: felonies and misdemeanors (minor crimes). Generally, most felony convictions result in lengthy prison sentences as well as subsequentprobation, large fines, and orders to pay restitution directly to victims; while misdemeanors may lead to a year or less in jail and a substantial fine.

To simplify the prosecution of traffic violations and other relatively minor crimes, some states have added a third level, infractions. These may result in fines and sometimes the loss of one's driver's license, but no jail time.For public welfare offenses where the state is punishing merely risky (as opposed to injurious) behavior, there is significant diversity across the various states. Punishments fordrunk driving varied greatly prior to 1990.

State laws dealing with drug crimes still vary widely, with some states treating possession of small amounts of drugs as a misdemeanor offense or as a medical issue and others categorizing the same offense as a serious felony.

Active vocabulary

States, penalties, felonies, misdemeanors, prison sentences, victims, fines, to pay restitution, in jail, minor crimes, traffic violations, prosecution, driver's license, behavior, drug crimes, misdemeanor offense, medical issue.

Task 1. Analyze the information, which is in the highlight, and use it in practice.

Task 2. Choose the keywords that best convey the gist of the information.

Task 3. Read the text and pick up the essential details in the form of quick notes.

Task 4. Analyze the information and make up the chart about it.

№	Activity			
	Definitions	**When**	**Where**	**Score**
1.				

COMMON LAW

Common law and equity (legal concept) are systems of law whose sources are the decisions in cases by judges. In addition, every system will have a legislature that passes new laws and statutes. The relationships between statutes and judicial decisions can be complex. In some jurisdictions, such statutes may overrule judicial decisions or codify the topic covered by several contradictory or ambiguous decisions. In some jurisdictions, judicial decisions may decide whether the jurisdiction's constitution allowed a particular statute or statutory provision to be made or what meaning is contained within the statutory provisions. Statutes were allowed to be made by the government.

Common law developed in England, influenced by Anglo-Saxon law and to a much lesser extent by the Norman conquest of England, which introduced legal concepts from Norman law, which, in turn, had its origins in Salic law.

Common law was later inherited by the Commonwealth of Nations, and almost every former colony of the British Empire has adopted it (Malta being an exception).

The doctrine of *stare decisis*, also known as *case law* or *precedent by courts*, is the major difference to codified civil law systems. Common law is currently in practice in Ireland, most of the United Kingdom (England & Wales & Northern Ireland), Australia, New Zealand, Bangladesh, India (excluding Goa), Pakistan, South Africa, Canada (excluding Quebec), Hong Kong, the USA (on a state level excluding Louisiana), and many other places.

In addition to these countries, several others have adapted the common law system into a mixed system. Nigeria operates largely on a common law system, but incorporates religious law.

In the European Union, the Court of Justice takes an approach mixing civil law (based on the treaties) with an attachment to the importance of case law. One of the most fundamental documents to shape common law is the English Magna Carta, which placed limits on the power of the English Kings. It served as a kind of medieval bill of rights for the aristocracy and the judiciary who developed the law.

CONTRACT & TORT LAW

Contract law covers obligations established by agreement (express or implied) between private parties. Generally, contract law in transactions involving the sale of goods has become highly standardized nationwide as a result of the widespread adoption of the Uniform Commercial Code.

However, there is still significant diversity in the interpretation of other kinds of contracts, depending upon the extent to which a given state has codified its common law of contracts or adopted portions of the Restatement (Second) of Contracts.

Parties are permitted to agree to arbitrate disputes arising from their contracts. Under the Federal Arbitration Act (which has been interpreted to cover *all* contracts arising under federal or state law), arbitration clauses are generally enforceable unless the party resisting arbitration can show unconscionability or fraud or something else which undermines the entire contract.

Tort law generally covers any civil action between private parties arising from wrongful acts which amount to a breach of general obligations imposed by law and not by contract.Tort law covers the entire imaginable spectrum of wrongs which humans can inflict upon each other, and of course, partially overlaps with wrongs also punishable by criminal law.

Although the American Law Institute has attempted to standardize tort law through the development of several versions of the Restatement of Torts, many states have chosen to adopt only certain sections of the Restatements and to reject others. Thus, because of its immense size and diversity, American tort law cannot be easily summarized.

For example, a few jurisdictions allow actions for negligent infliction of emotional distress even in the absence of physical injury to the plaintiff, but most do not.

For any particular tort, states differ on the causes of action, types and scope of remedies, statutes of limitations, and the amount of specificity with which one must plead the cause. With practically any aspect of tort law, there is a "majority rule" adhered to by most states, and one or more "minority rules". Notably, the most broadly influential innovation of 20th-century American tort law was the rule of strict liability for defective products, which originated with judicial glosses on the law of warranty.

Outside the U.S., the rule was adopted by the European Economic Community in the Product Liability Directive of July 1985 by Australia in July 1992 and by Japan in June 1994.

By the 1990s, the avalanche of American cases had become so complicated that another restatement was needed, which occurred with the 1997 publication of the *Restatement (Third) of Torts: Products Liability*.

Active vocabulary

Legal Fictions, to base, matter of public policy, landmark case, strict liability, states, to differ, statutes of limitations, scope of remedies, tort law.

Task 1. Analyze the information and make up the chart about it.

№	Activity			
	Definitions	**When**	**Where**	**Score**
1.				

RELIGIOUS LAW

Religious law refers to the notion of a religious system or document being used as a legal source, though the methodology used varies. The use of Jewish and Halakha for public law has a static and unalterable quality, precluding amendment through legislative acts of government or development through judicial precedent; Christian Canon law is more similar to civil law in its use of codes; and Islamic Sharia law is based on legal precedent and reasoning by analogy, and is thus considered similar to common law.

The main kinds of religious law are Sharia in Islam, Halakha in Judaism, and canon law in some Christian groups. In some cases these are intended purely as individual moral guidance, whereas in other cases they are intended and may be used as the basis for a country's legal system. The latter was particularly common during the Middle Ages.

The Halakha is followed by orthodox and conservative Jews in both ecclesiastical and civil relations. No country is fully governed by Halakha, but two Jewish people may decide, because of personal belief, to have a dispute heard by a Jewish court, and be bound by its rulings. The Islamic legal system of Sharia (Islamic law) and Fiqh (Islamic jurisprudence) is the most widely used religious law, and one of the three most common legal systems in the world alongside common law and civil law. It is based on both divine law, derived from the Qur'an and Sunnah, and the rulings of Ulema (jurists), who used the methods of Ijma (consensus), *Qiyas* (analogical deduction), *Ijtihad* (research) and *Urf* (common practice) to derive *Fatma* (legal opinions).

An Ulema was required to qualify for an *Ijazah* (legal doctorate) at a *Madrasa* (law school/ college) before they could issue *Fatwā*. During the Islamic Golden Age, classical Islamic law may have had an influence on the development of common law and several civil law institutions. Sharia law governs a number of Islamic countries, including Saudi Arabia and Iran, though most countries use Sharia law only as a supplement to national law. It can relate to all aspects of civil law, including property rights, contracts or public law.

Civil law & Canon law

Canon law is not divine law, properly speaking, because it is not found in revelation. Instead, it is seen as human law inspired by the word of God and applying the demands of that revelation to the actual situation of the church. Canon law regulates the internal ordering of the Catholic Church, the Eastern Orthodox Church and the Anglican Communion. Canon law is amended and adapted by the legislative authority of the church, such as councils of bishops, individual bishops for their respective sees, the Pope for the entire Catholic Church, and the British Parliament for the Church of England.

Perceptions

Despite the usefulness of different classifications, every legal system has its own individual identity. Below are groups of legal systems, categorised by their geography.

Click the "expand" buttons on the right for the lists of countries. Some studies show that ethnic minorities are more likely to feel that the legal system within their particular jurisdiction is unfair and unjust. People with mental health issues, particularly young ones are also likely to have a low opinion of the justice system.

Task 1. Analyze the information, which is in the highlight, and use it in practice.

Task 2. Choose the keywords that best convey the gist of the information.

THE USA CONSTITUTION

The law of the USA comprises many levels of codified and uncodified forms of law, of which the most important is the USA Constitution, the foundation of the federal government of the USA. The Constitution sets out the boundaries of federal law, which consists of Acts of Congress, treaties ratified by the Senate, regulations promulgated by the executive branch, and case law originating from the federal judiciary. The USA Code is the official compilation and codification of general and permanent federal statutory law.

Federal law and treaties, so long as they are in accordance with the Constitution, preempt conflicting state and territorial laws in the 50 U.S. states and in the territories.

However, the scope of federal preemption is limited because the scope of federal power is not universal. In the dual-sovereignsystem of American federalism (actually tripartite because of the presence of Indian reservations), states are the plenary sovereigns, each with their own constitution, while the federal sovereign possesses only the limited supreme authority enumerated in the Constitution.

Indeed, states may grant their citizens broader rights than the federal Constitution as long as they do not infringe on any federal constitutional rights.

Thus, most U.S. law (especially the actual "living law" of contract, tort, property, criminal, family law experienced by the majority of citizens on a day-to-day basis) consists primarily of state law, which can and does vary greatly from one state to the next.

At both the federal and state levels, with the exception of the state of Louisiana, the law of the USA is largely derived from the common law system of English law, which was in force at the time of the American Revolutionary War. However, American law has diverged greatly from its English ancestor both in terms of substance and procedure,[16] and has incorporated a number of civil law innovations.

Sources of law

In the USA, the law is derived from five sources: constitutional law, statutory law, treaties, administrative regulations, and the common law (which includes case law).

Constitutionality

Where Congress enacts a statute that conflicts with the Constitution, state or federal courts may find that law unconstitutional and declare it invalid. Notably, a statute does not disappear *automatically* merely because it has been found unconstitutional; it must be deleted by a subsequent statute. Many federal and state statutes have remained on the books for decades after they were ruled to be unconstitutional.

Under the principle of *stare decisis*, no sensible lower court will enforce an unconstitutional statute, and any court that does so will be reversed by the Supreme Court. Conversely, any court that refuses to enforce a constitutional statute (where such constitutionality has been expressly established in prior cases) will risk reversal by the Supreme Court.

American common law

The USA and most Commonwealth countries are heirs to the common law legal tradition of English law. Certain practices traditionally allowed under English common law were expressly outlawed by the Constitution, such as bills of attainder and general search warrants. As common law courts, U.S. courts have inherited the principle of *stare decisis*. American judges, like common law judges elsewhere, not only apply the law.

They make the law, to the extent that their decisions in the cases before them become precedent for decisions in future cases.

The actual substance of English law was formally "received" into the USA in several ways. First, all U.S. states except Louisiana have enacted "reception statutes" which generally state that the common law of England (particularly judge-made law) is the law of the state to the extent that it is not repugnant to domestic law or indigenous conditions.

Some reception statutes impose a specific cutoff date for reception, such as the date of a colony's founding, while others are deliberately vague. Thus, contemporary U.S. courts often cite pre-Revolution cases when discussing the evolution of an ancient judge-made common law principle into its modern form, such as the heightened duty of care traditionally imposed upon common carriers.

Second, a small number of important British statutes in effect at the time of the Revolution have been independently reenacted by U.S. states. Two examples that many lawyers will recognize are the Statute of Frauds (still widely known in the U.S. by that name) and the Statute of 13 Elizabeth (the ancestor of the Uniform Fraudulent Transfer Act). Such English statutes are still regularly cited in contemporary American cases interpreting their modern American descendants. However, it is important to understand that despite the presence of reception statutes, much of *contemporary* American common law has diverged significantly from English common law.

The reason is that although the courts of the various Commonwealth nations are influenced by each other's rulings, American courts follow post-Revolution Commonwealth rulings unless there is no American ruling on point, the facts and law at issue are nearly identical, and the reasoning is strongly persuasive. Early on, American courts, even after the Revolution, often did cite contemporary English cases.

This was because appellate decisions from many American courts were not regularly reported until the mid-19th century; lawyers and judges, as creatures of habit, used English legal materials to fill the gap. But citations to English decisions gradually disappeared during the 19th century as American courts developed their own principles to resolve the legal problems of the American people. The number of published volumes of American reports soared from eighteen in 1810 to over 8,000 by 1910.

By 1879 one of the delegates to the California constitutional convention was already complaining: "Now, when we require them to state the reasons for a decision, we do not mean they shall write a hundred pages of detail. We [do] not mean that they shall include the small cases, and impose on the country all this fine judicial literature, for the Lord knows we have got enough of that already."

Today, in the words of Stanford law professor Lawrence Friedman: "American cases rarely cite foreign materials. Courts occasionally cite a British classic or two, a famous old case, or a nod to Blackstone; but current British law almost never gets any mention."

Foreign law has never been cited as binding precedent, but as a reflection of the shared values of Anglo-American civilization or even Western civilization in general.

Federal law

Federal law originates with the Constitution, which gives Congress the power to enact statutes for certain limited purposes like regulating interstate commerce. The USA Code is the official compilation and codification of the general and permanent federal statutes.

Many statutes give executive branch agencies the power to create regulations, which are published in the Federal Register and codified into the Code of Federal Regulations.

Regulations generally carry the force of law under the *Chevron* doctrine. Many lawsuits turn on the meaning of a federal statute or regulation, and judicial interpretations of such meaning carry legal force under the principle of *stare decisis*.

During the 18th and 19th centuries, federal law traditionally focused on areas where there was an express grant of power to the federal government in the federal Constitution, like the military, money, foreign relations (especially international treaties), tariffs, intellectual property (parents & copyrights), mail.

Since the start of the 20th century, broad interpretations of the Commerce and Spending Clauses of the Constitution have enabled federal law to expand into areas like aviation, telecommunications, railroads, pharmaceuticals, antitrust, and trademarks.

In some areas, like aviation and railroads, the federal government has developed a comprehensive scheme that preempts virtually all state law, while in others, like family law, a relatively small number of federal statutes (generally covering interstate and international situations) interacts with a much larger body of state law. In areas like antitrust, trademark, and employment law, there are powerful laws at both the federal and state levels that coexist with each other. In a handful of areas like insurance, Congress has enacted laws expressly refusing to regulate them as long as the states have laws regulating them.

Statutes

After the President signs a bill into law (or Congress enacts it over his veto), it is delivered to the Office of the Federal Register (OFR) of the National Archives and Records Administration (NARA) where it is assigned a law number, and prepared for publication as a slip law. Public laws, but not private laws, are given legal statutory citation by the OFR.

At the end of each session of Congress, the slip laws are compiled into bound volumes called the USA Statutes at Large, and they are known as session laws. The Statutes at Large present a chronological arrangement of the laws in the exact order that they have been enacted. Public laws are incorporated into the USA Code, which is a codification of all general and permanent laws of the USA. The main edition is published every six years by the Office of the Law Revision Counsel of the House of Representatives, and cumulative supplements are published annually. The U.S. Code is arranged by subject matter, and it shows the present status of laws (with amendments already incorporated in the text) that have been amended on one or more occasions.

Regulations

Congress often enacts statutes that grant broad rulemaking authority to federal agencies.

Often, Congress is simply too gridlocked to draft detailed statutes that explain how the agency should react to every possible situation, or Congress believes the agency's technical specialists are best equipped to deal with particular fact situations as they arise.

Therefore, federal agencies are authorized to promulgate regulations. Under the principle of *Chevron* deference, regulations normally carry the force of law as long as they are based on a reasonable interpretation of the relevant statutes.

Regulations are adopted pursuant to the Administrative Procedure Act (APA).

Regulations are first proposed and published in the Federal Register (FR or Fed. Reg.) and subject to a public comment period.

Eventually, after a period for public comment and revisions based on comments received, a final version is published in the Federal Register. The regulations are codified and incorporated into the Code of Federal Regulations (CFR) which is published once a year on a rolling schedule. Besides regulations formally promulgated under the APA, federal agencies frequently promulgate an enormous amount of forms, manuals, policy statements, letters, and rulings. These documents may be considered by a court as persuasive authority as to how a particular statute or regulation may be interpreted (known as *Skidmore* deference), but are not entitled to Chevron defence.

Unlike the situation with the states, there is no plenary reception statute at the federal level that continued the common law and thereby granted federal courts the power to formulate legal precedentlike their English predecessors. Federal courts are solely creatures of the federal Constitution and the federal Judiciary Acts.

However, it is universally accepted that the Founding Fathers of the USA, by vesting "judicial power" into the Supreme Court and the inferior federal courts in Article Three of the USA Constitution, thereby vested in them the implied judicial power of common law courts to formulate persuasive precedent; this power was widely accepted, understood, and recognized by the Founding Fathers at the time the Constitution was ratified.

Several legal scholars have argued that the federal judicial power to decide "cases or controversies" necessarily includes the power to decide the precedential effect of those cases and controversies. The difficult question is whether federal judicial power extends to formulating binding precedent through strict adherence to the rule of *stare decisis*. This is where the act of deciding a case becomes a limited form of lawmaking in itself.

In that an appellate court's rulings will thereby bind itself and lower courts in future cases (impliedly binds all persons within the court's jurisdiction). Prior to a major change to federal court rules in 2007, about one-fifth of federal appellate cases were published and thereby became binding precedents, while the rest were unpublished and bound only the parties to each case. As federal judge Alex Kozinski has pointed out, binding precedent as we know it today simply did not exist at the time the Constitution was framed.

Judicial decisions were not consistently, accurately, and faithfully reported on both sides of the Atlantic (reporters often simply rewrote or failed to publish decisions which they disliked), and the United Kingdom lacked a coherent court hierarchy prior to the end of the 19th century. Furthermore, English judges in the 18th century subscribed to now-obsolete natural law theories of law, by which law was believed to have an existence independent of what individual judges said. Judges saw themselves as merely declaring the law which had always theoretically existed, and not as making the law.

Therefore, a judge could reject another judge's opinion as simply an incorrect statement of the law, in the way that scientists regularly reject each other's conclusions as incorrect statements of the laws of science. In turn, according to Kozinski's analysis, the contemporary rule of binding precedent became possible in the U.S. in the nineteenth century only after the creation of a clear court hierarchy (under the Judiciary Acts), the beginning of regular *verbatim* publication of U.S. appellate decisions by West Publishing.

The rule gradually developed, case-by-case, as an extension of the judiciary's public policy of effective judicial administration (to efficiently exercise the judicial power).

The rule of precedent is generally justified today as a matter of public policy, first, as a matter of fundamental fairness, and second, because in the absence of case law, it would be completely unworkable for every minor issue in every legal case to be briefed, argued, and decided from first principles (such as relevant statutes, constitutional provisions, and underlying public policies), which in turn would create hopeless inefficiency, instability, and unpredictability, and thereby undermine the rule of law. Here is a typical exposition of that public policy in a 2008 majority opinion signed by Associate Justice Stephen Breyer:

Justice Brandeis once observed that "in most matters it is more important that the applicable rule of law be settled than that it be settled right". *Burnet v. Coronado Oil & Gas Co.* To overturn a decision settling one such matter simply because we might believe that decision is no longer "right" would inevitably reflect a willingness to reconsider others.

And that willingness could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability. We have not found here any factors that might overcome these considerations.

It is now sometimes possible, over time, for a line of precedents to drift from the express language of any underlying statutory or constitutional texts until the courts' decisions establish doctrines that were not considered by the texts' drafters. This trend has been strongly evident in federal substantive due process and Commerce Clause decisions.

Originalists and political conservatives, such as Associate Justice Antonin Scalia have criticized this trend as anti-democratic. Under the doctrine of *Erie Railroad Co. v. Tompkins* (1938), there is *no general federal common law*. Although federal courts can create federal common law in the form of case law, such law must be linked one way or another to the interpretation of a particular federal constitutional provision, statute, or regulation (enacted as part of the Constitution or after).

Federal courts lack the plenary power possessed by state courts to simply make up law, which the latter are able to do in the absence of constitutional or statutory provisions replacing the common law.

Only in a few narrow limited areas, like maritime law, has the Constitution expressly authorized the continuation of English common law at the federal level (meaning that in those areas federal courts can continue to make law as they see fit, subject to the limitations of *stare decisis*). The other major implication of the *Erie* doctrine is that federal courts cannot dictate the content of state law when there is no federal issue (and thus no federal supremacy issue) in a case.

When hearing claims under state law pursuant to diversity jurisdiction, federal trial courts *must*apply the statutory and decisional law of the state in which they sit, as if they were a court of that state, even if they believe that the relevant state law is irrational or just bad public policy. And under *Erie*, deference is one-way only: state courts are not bound by federal interpretations of state law. Although judicial interpretations of federal law from the federal district and intermediate appellate courts hold great persuasive weight, state courts are *not* bound to follow those interpretations. There is only one federal court that binds all state courts as to the interpretation of federal law and the federal Constitution: the U.S. Supreme Court itself.

Task 1. Analyze the information, which is in the highlight, and use it in practice.

Task 2. Read the text and pick up the essential details in the form of quick notes.

LOCAL LAW

States have delegated lawmaking powers to thousands of agencies, townships, counties, cities, and special districts. All the state constitutions, statutes and regulations (as well as all the ordinances and regulations promulgated by local entities) are subject to judicial interpretation like their federal counterparts.

It is common for residents of major U.S. metropolitan areas to live under six or more layers of special districts as well as a town or city, and a county or township (in addition to the federal and state governments). Thus, at any given time, the average American citizen is subject to the rules and regulations of several dozen different agencies at the federal, state, and local levels, depending upon one's current location and behavior.

American lawyers draw a fundamental distinction between procedural law (which controls the procedure followed by courts and parties to legal cases) and substantive law (the actual substance, or principles of law, which is what most people think of as law).

Criminal law & Procedure

Criminal law involves the prosecution by the state of wrongful acts which are considered to be so serious that they are a breach of the sovereign's peace (cannot be deterred or remedied by mere lawsuits between private parties). Generally, crimes can result in incarceration, but torts (cannot. The majority of the crimes committed in the USA are prosecuted and punished at the state level.

Federal criminal law focuses on areas specifically relevant to the federal government like evading payment of federal income tax, mail theft, or physical attacks on federal officials, as well as interstate crimes like drug trafficking and wire fraud.

All states have somewhat similar laws in regard to "higher crimes" (or felonies), such as murder and rape, although penalties for these crimes may vary from state to state. Capital punishment is permitted in some states but not others.

Three strikes laws in certain states impose harsh penalties on repeat offenders. Some states distinguish between two levels: felonies and misdemeanors (minor crimes). Generally, most felony convictions result in lengthy prison sentences as well as subsequent probation, large fines, and orders to pay restitution directly to victims; while misdemeanors may lead to a year or less in jail and a substantial fine. To simplify the prosecution of traffic violations and other relatively minor crimes, some states have added a third level, infractions. These may result in fines and sometimes the loss of one's driver's license, but no jail time.

For public welfare offenses where the state is punishing merely risky (as opposed to injurious) behavior, there is significant diversity across the various states.

Punishments for drunk driving varied greatly prior to 1990. State laws dealing with drug crimes still vary widely, with some states treating possession of small amounts of drugs as a misdemeanor offense or as a medical issue and others categorizing the same offense as a serious felony. The law of criminal procedure in the USA consists of a massive overlay of federal constitutional case law interwoven with the federal and state statutes that actually provide the foundation for the creation and operation of law enforcement agencies and prison systems as well as the proceedings in criminal trials. Due to the perennial inability of legislatures in the U.S. to enact statutes that would actually force law enforcement officers to respect the constitutional rights of criminal suspects and convicts. The federal judiciary gradually developed the exclusionary rule as a method to enforce such rights.

In turn, the exclusionary rule spawned a family of judge-made remedies for the abuse of law enforcement powers, of which the most famous is the Miranda warning.

The writ of *habeas corpus* is often used by suspects and convicts to challenge their detention, while the Civil Rights Act of 1871 and *Bivens* actions are used by suspects to recover tort damages for police brutality.

Civil Procedure

The law of civil procedure governs process in all judicial proceedings involving lawsuits between private parties. Traditional common law pleading was replaced by code pleading in 24 states after New York enacted the Field Code in 1850 and code pleading in turn was subsequently replaced again in most states by modern notice pleading during the 20th century. The old English division between common law and equity courts was abolished in the federal courts by the adoption of the Federal Rules of Civil Procedure in 1938; it has also been independently abolished by legislative acts in nearly all states.

The Delaware Court of Chancery is the most prominent of the small number of remaining equity courts. 35 states have adopted rules of civil procedure modeled after the FRCP (including rule numbers). However, in doing so, they had to make some modifications to account for the fact that state courts have broad general jurisdiction while federal courts have relatively limited jurisdiction.

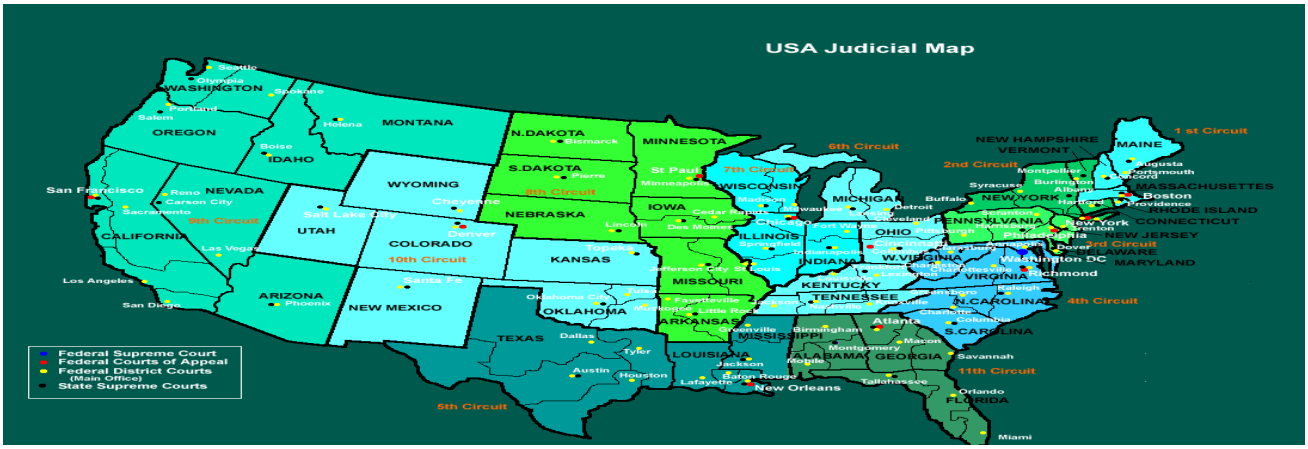
New York, Illinois, and California are the most significant states that have not adopted the FRCP. Furthermore, all three states continue to maintain most of their civil procedure laws in the form of codified statutes enacted by the state legislature, as opposed to court rules promulgated by the state supreme court, on the ground that the latter are undemocratic.

But certain key portions of their civil procedure laws have been modified by their legislatures to bring them closer to federal civil procedure.

Generally, American civil procedure has several notable features, including extensive pretrial discovery, heavy reliance on live testimony obtained at deposition or elicited in front of a jury, and aggressive pretrial "law and motion" practice designed to result in a pretrial disposition (summary judgment) or a settlement.

U.S. courts pioneered the concept of the opt-out class action, by which the burden falls on class members to notify the court that they do not wish to be bound by the judgment, as opposed to opt-in class actions, where class members must join into the class.

Another unique feature is the so-called American Rule under which parties generally bear their own attorneys' fees (as opposed to the English Rule of "loser pays"), though American legislators and courts have carved out numerous exceptions.



TORT LAW

Torts, sometimes called delicts, are civil wrongs. To have acted tortiously, one must have breached a duty to another person, or infringed some pre-existing legal right. A simple example might be accidentally hitting someone with a cricket ball.

Under the law of negligence, the most common form of tort, the injured party could potentially claim compensation for their injuries from the party responsible.

Lord Atkin said, the liability for negligence is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay.

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.

The example of tort might be a neighbour making excessively loud noises with machinery on his property. Under a nuisance claim the noise could be stopped.

Torts can also involve intentional acts, such as assault, battery or trespass.

A better known tort is defamation, which occurs, for example, when a newspaper makes unsupportable allegations that damage a politician's reputation. More infamous are economic torts, which form the basis of labour law in some countries by making trade unions liable for strikes, when statute does not provide immunity.

The Restatement (Second) of Torts, a highly influential restatement of USA tort law.

Tort law generally covers any civil action between private parties arising from wrongful acts which amount to a breach of general obligations imposed by law and not by contract.

Tort law covers the entire imaginable spectrum of wrongs which humans can inflict upon each other, and of course, partially overlaps with wrongs also punishable by criminal law. Although the American Law Institute has attempted to standardize tort law through the development of several versions of the Restatement of Torts, many states have chosen to adopt only certain sections of the Restatements and to reject others. Thus, because of its immense size and diversity, American tort law cannot be easily summarized.

A few jurisdictions allow actions for negligent infliction of emotional distress even in the absence of physical injury to the plaintiff, but most do not. For any particular tort, states differ on the causes of action, types and scope of remedies, statutes of limitations, and the amount of specificity with which one must plead the cause.

With practically any aspect of tort law, there is a "majority rule" adhered to by most states, and one or more "minority rules".

Notably, the most broadly influential innovation of 20th-century American tort law was the rule of strict liability for defective products, which originated with judicial glosses on the law of warranty. In 1963, Roger J. Traynor of the Supreme Court of California threw away legal fictionsbased on warranties and imposed strict liability for defective products as a matter of public policy in the landmark case of *Greenman v. Yuba Power Products*.

The American Law Institute subsequently adopted a slightly different version of the *Greenman* rule in Section 402A of the *Restatement (Second) of Torts*, which was published in 1964 and was very influential throughout the USA. Outside the U.S., the rule was adopted by the European Economic Community in the Product Liability Directive of July 1985 by Australia in July 1992 and by Japan in June 1994.

By the 1990s, the avalanche of American cases resulting from *Greenman* and Section 402A had become so complicated that another restatement was needed, which occurred with the 1997 publication of the *Restatement (Third) of Torts: Products Liability*.

The 50 American states are separate sovereigns, with their own state constitutions, state governments, state courts. All states have a legislative branch which enacts state statutes, an executive branch that promulgates state regulations pursuant to statutory authorization, and a judicial branch that applies, interprets, and occasionally overturns both state statutes and regulations, as well as local ordinances. They retain plenary power to make laws covering anything not preempted by the federal Constitution, federal statutes, or international treaties ratified by the federal Senate.

Normally, state supreme courts are the final interpreters of state constitutions and state law, unless their interpretation itself presents a federal issue, in which case a decision may be appealed to the U.S. Supreme Court by way of a petition for writ of certiorari.

State laws have dramatically diverged in the centuries since independence, to the extent that the USA cannot be regarded as one legal system as to the majority of types of law traditionally under state control, but must be regarded as 50 *separate* systems of tort law, family law, property law, contract law, criminal law, and so on. Most cases are litigated in state courts and involve claims and defenses under state laws.

In a 2012 report, the National Center for State Courts' Court Statistics Project found that state trial courts received 103.5 mln. newly filed cases in 2010, which consisted of 56.3 mln. traffic cases, 20.4 mln. criminal cases, 19.0 mln. civil cases, 5.9 mln. domestic relations cases, and 1.9 mln. juvenile cases. In 2010, state appellate courts received 272,795 new cases. By way of comparison, all federal district courts in 2016 together received only about 274,552 new civil cases, 79,787 new criminal cases, and 833,515 bankruptcy cases, while federal appellate courts received 53,649 new cases.

Active vocabulary

Civil wrongs, to break a duty, common form of tort, to claim, to suffer from shock, to fall ill, to be contaminated, manufacturer, offender, to injure, restricted reply, to avoid acts, omissions, neighbour, to make noises.

Task 1. Analyze the key takeaway.

There are many kinds of intentional torts. Some of them involve harm to the physical person or to his or her property, reputation or feelings, or economic interests. In each case of intentional tort, the plaintiff must show that the defendant intended harm, but the intent to harm does not need to be directed at a particular person and need not be malicious, as long as the resulting harm is a direct consequence of the defendant's actions.

Task 2. Analyze the key takeaway.

There are three kinds of torts, and in two of them (negligent torts and strict liability torts), damages are usually limited to making the victim whole through an enforceable judgment for money damages.

These compensatory damages awarded by a court accomplish only approximate justice for the injuries or property damage caused by a tortfeasor. Tort laws go a step further toward deterrence, beyond compensation to the plaintiff, in occasionally awarding punitive damages against a defendant. These are almost always in cases where an intentional tort has been committed.

Task 3. Find antonyms to the following ones.

Infamous, to occur, defamation, unsupportable, to damage, liable, to avoid, omission, care, to receive, restricted, to injure, safe, question, distinctly, moral, to involve, to include.

Task 4. Answer the questions & do the tasks.

- Why is deterrence needed for intentional torts (where punitive damages are awarded) rather than negligent torts?
- Why are costs imposed on others without their consent problematic for a market economy? What if the law did not try to reimpose the victim's costs onto the tortfeasor? What would a totally nonlitigious society be like?
- Distinguish intentional torts from other kinds of torts.
- Give three examples of an intentional tort – one that causes injury to a person, one that causes injury to property, and one that causes injury to a reputation.

Task 5. Remember the facts.

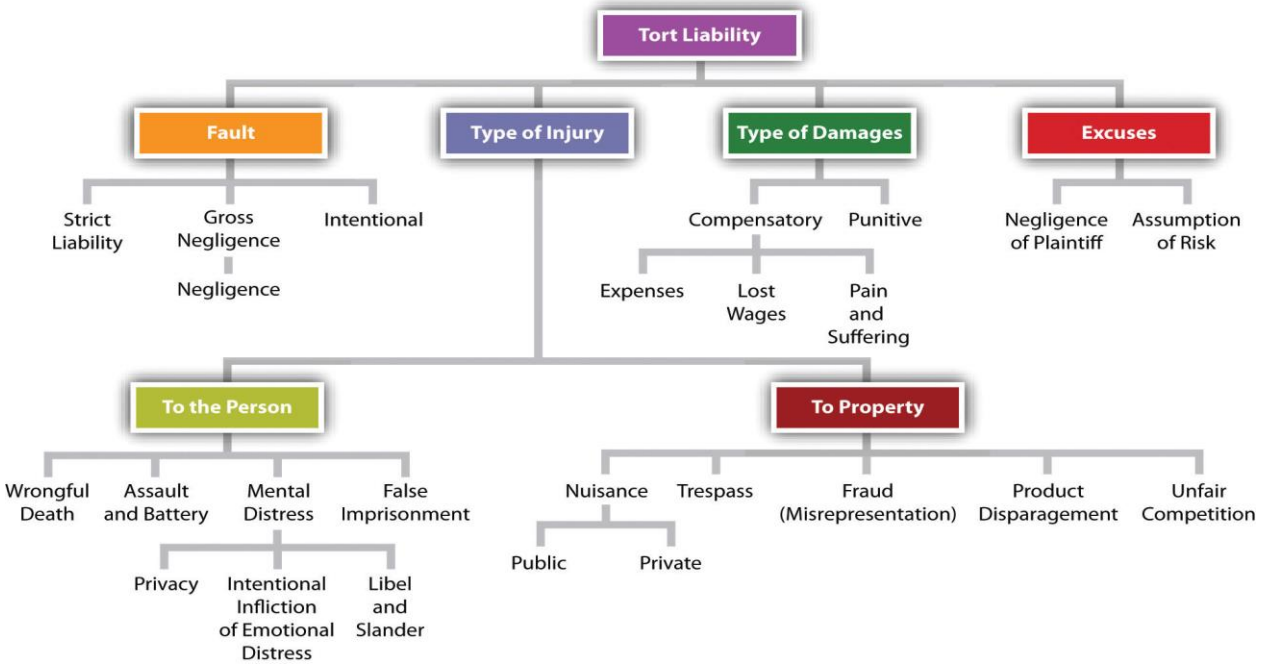
Tortious interference with a contract can be established by proving four elements:

- There was a contract between the plaintiff and a third party.
- The defendant knew of the contract.
- The defendant improperly induced the third party to breach the contract or made performance of the contract impossible.
- There was injury to the plaintiff.

Task 5. Make up some dialogues from the information.

Task 6. Answer the questions & do the tasks.

- Name two kinds of intentional torts that could result in damage to a business firm's bottom line.
- Name two kinds of intentional torts that are based on protection of a person's property.
- Why are intentional torts to result in a verdict not only for compensatory damages but also for punitive damages?

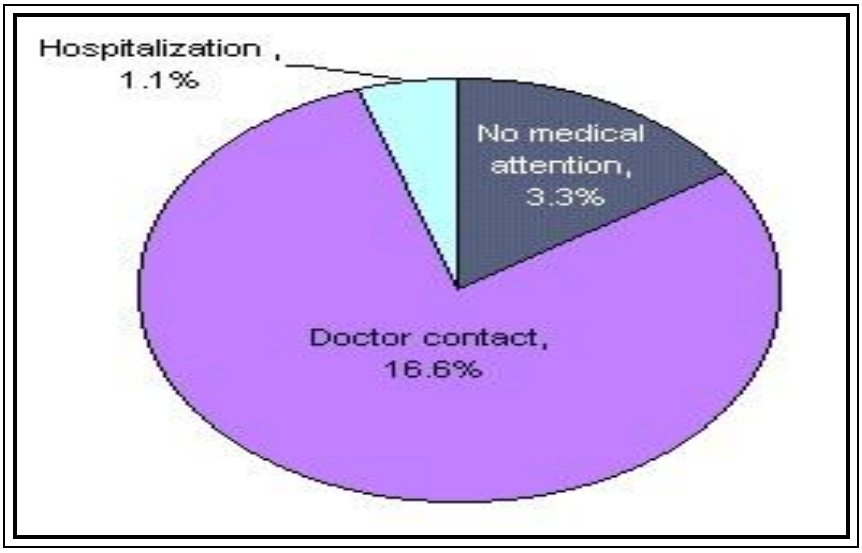


TORT LAW REFORM IN THE USA

What are the latest developments regarding tort reform?

A major national Republican victory in its efforts to achieve meaningful tort reform occurred in February 2005 when Congress approved a class action reform measure.

The legislation authorizes federal courts to hear class-action suits involving over $5 mln. and involving people or companies from different states. The objective in moving the suits to federal courts is to make it significantly more difficult for the lawsuits to be approved. The bill would also crack down on "coupon settlements" in which plaintiffs get little but their lawyers get big fees. It would link lawyers' fees to the amount of coupons redeemed. But national efforts at other reforms, such as medical malpractice reform and establishing an asbestos trust fund, have fallen short. There continue to be legislative achievements at the state level on tort reform issues.



Tort reform remains a major policy objective of the Republican Party. The 2008 Republican platform continues the pledge to reform what is described as corruption in the civil litigation system. Democrats are basically in a defensive position on the issue.

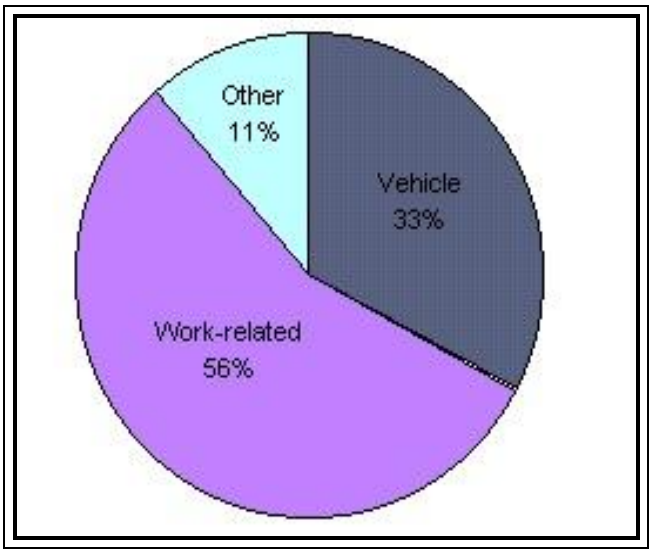
"Tort reform" is a major part of the domestic agenda. What are torts?

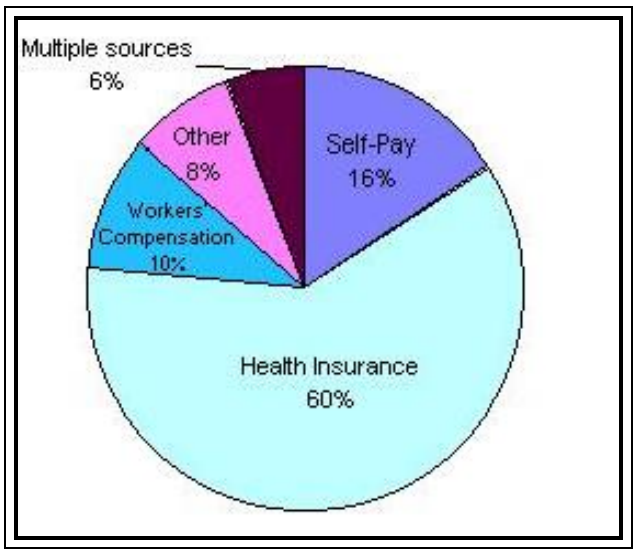
Until "tort reform" became a policy issue, the word "tort" was primarily the part of the vernacular of first year law students. Technically, a tort is any civil wrong in which a damaged victim can seek legal redress from the individual who caused the harm.

In its political context, "tort reform" generally refers to proposals to limit the prevalence of legal claims prosecuted with the assistance of personal injury lawyers which are perceived to unfairly burden insurance policy holders with exorbitant premiums.

Tort law, like most of our legal system, is traditionally a matter of state "common law" and legislation. But Bush Administrative legislative initiatives seek to partially modify this by imposing uniform limits applicable to all states. In actuality, the "tort system" is part of an overall system for compensating victims who suffer from accidental injuries.

Accidents are a part of our human experience. Studies indicate that over the course of a year, approximately 20% of Americans suffer some type of accidental injury and most of these require a doctor's attention. The vast majority of accidents causing economic loss are either work-related or automobile-related.





Many of these accidents do not involve potential liability of a third party.

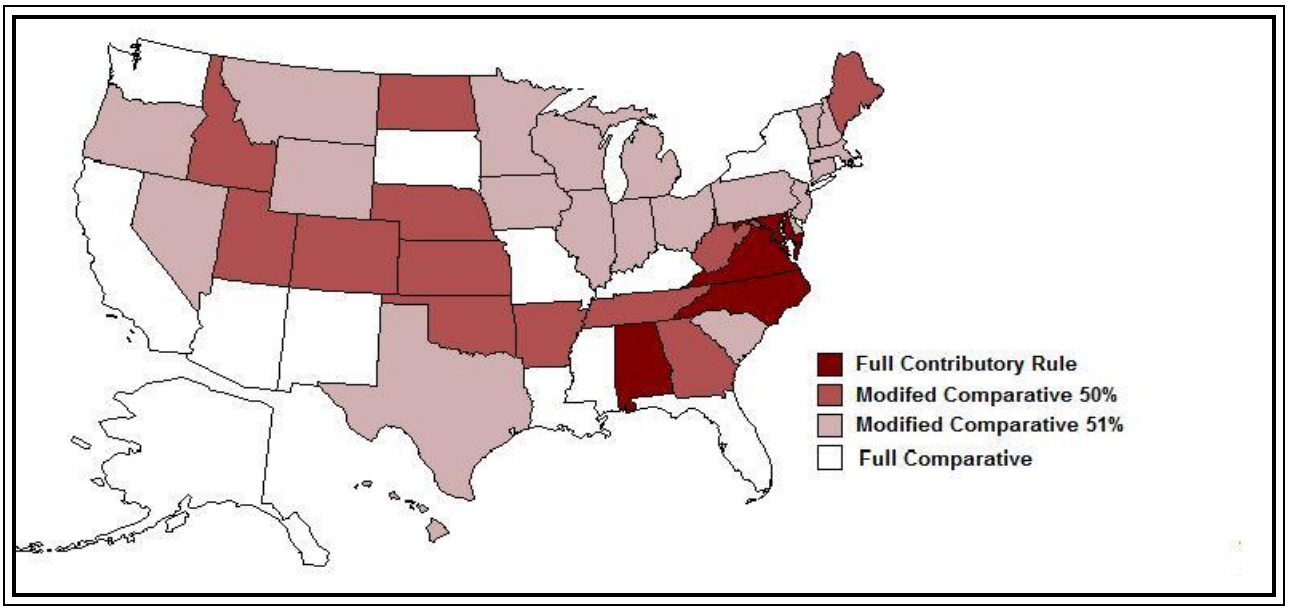
The primary source of compensation for medical treatment of these injuries is the victim's health insurance. To the extent that compensation is provided through legal claims, critics of the present tort system maintain that it is too expensive and inefficient. Over 60 years, the per capita annual costs of the tort system have increased significantly.

Even when non-economic "pain and suffering" awards are included, it has been estimated that claimants ultimately collect only 46 % of the total cost of the tort system.

Tort costs, as a percentage of the GDP, exploded in the decades of the '70's and '80's. There has been a slight decrease in recent years due mainly to legislation in several states. The system is also not even-handed. An important variable in determining the value of a given personal injury claim is the locality where the claim is filed. A case with the same type of liability and injury can be worth variable amounts in different jurisdictions.

This factor accounts for much of the regional variance in insurance rates.

Proponents of the tort system argue that it deters accidents by combining compensation for victims with negligence. They also maintain that the system provides necessary compensation for victims who would not otherwise be sufficiently compensated by other social insurance programs.



What has caused the increase in liability costs?

Until about 20 years ago, a plaintiff was required to show a complete absence of personal negligence in order to recover. This "contributory negligence" rule significantly limited the number of injured persons who could claim damages.

Today all but a handful of states have a "comparative negligence" standard which allows an apportionment of damage based on degree of liability.

In most states, the plaintiff must be less at fault than the defendant. There has been expansion of liability in other areas as well, such as product liability.

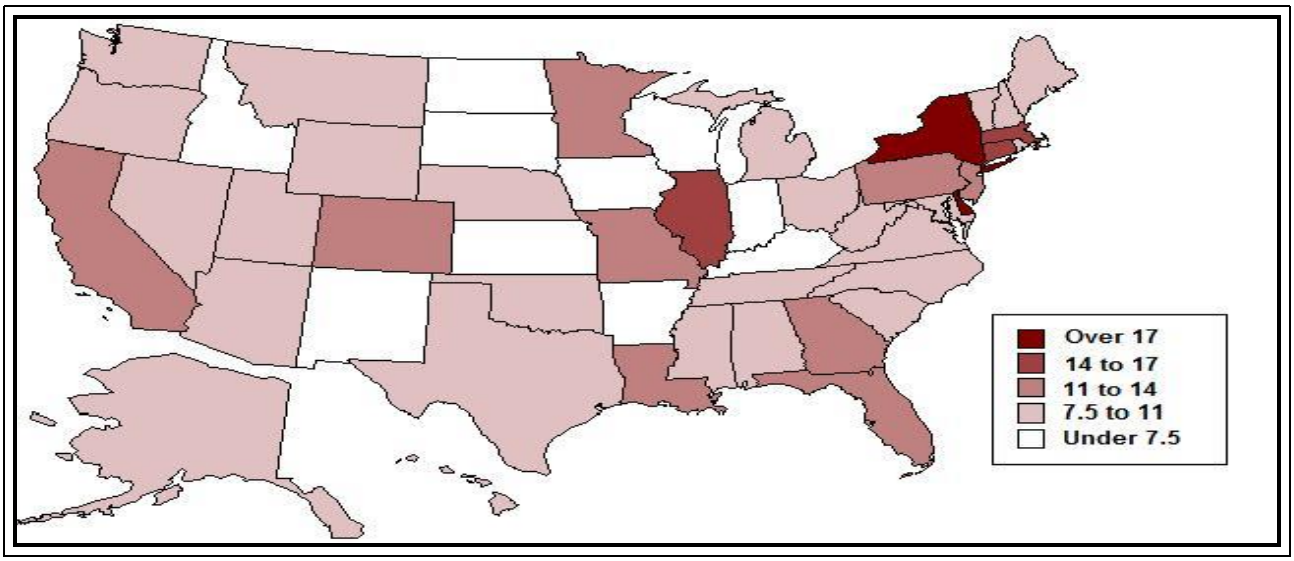
Increase in number of lawyers

Many critics of the current system suggest that the increased use of the tort system has been driven by an increase in the number of attorneys. The number of lawyers has increased at a rate which far exceeds population growth.

The number of lawyers per capita varies significantly from state to state.

The expansion of legal employment opportunities has occurred throughout the legal field. In particular, there has been a major increase in the divorce rate and in criminal cases.

Still, personal injury litigation is a common practice specialty for lawyers, accounting for about 25% of the legal workload in many states.



Increase in legal specialization and technology

Like other professions, the law profession has undergone significant specialization in recent years and has significantly benefited from technological advances.

This has enabled lawyers to more efficiently process cases. The specialization has also enabled practitioners to become successful in areas demanding significant expertise such as medical malpractice and product liability.

The investment market

A unique feature of liability and casualty insurance is that the premium is received long before the losses occur. This provides the insurance company the opportunity to profitably invest the premiums. Insurance premium rates are thus not only dependent on actuarial risk factors but also the degree to which premiums can be profitably invested. In times of slow economic growth and low interest rates, it is inevitable that premium amounts will increase even if potential losses are not increasing.

The contingency fee system of compensating attorneys

Plaintiff's attorneys are compensated by the "contingency fee" system in the majority of cases. Under this method of compensation, the attorney bears the full cost of trial preparation and is paid only if a favorable result is obtained. Proponents of the contingency fee system maintain that without it, most injured victims would be unable to obtain relief.

Salary surveys have revealed that the compensation of personal injury plaintiff attorneys is not significantly different than other practicing attorneys.

The overall cost of plaintiff's attorney's fees constitutes approximately 19% of total tort costs, an amount slightly larger than defendant's attorney fees.

Promotion of Attorney Services

Prior to a Supreme Court decision in 1977, attorneys were prohibited from using paid advertisements to promote their services. Today, advertisements for attorney services are abundant and solicitations for personal injury services are most prominent.

Although most plaintiffs find attorneys through a referral, the advertising has a cumulative effect of persuading prospective personal injury litigants of the desirability of hiring an attorney to get maximum benefit. Interestingly, a 2017 study indicated which surveyed attitudes of persons who filed claims, found that the satisfaction rate was significantly less when the claimant hired an attorney. Studies also indicate that for some types of injuries, policy holders are better off settling the claim without an attorney.

Why is medical malpractice reform a policy issue?

There are many reasons. By the nature of their profession, doctors practice in an environment in which mistakes can create significant injuries. This has always been true, but legal actions against doctors did not become common until the last several decades.

There has been a steady increase in overall costs. There are several reasons for the increase: greater specialization and expertise of plaintiff's attorneys, a more impersonal medical system in which victims are less reluctant to sue, and the emergence of medical experts who are willing to testify against doctors.

Malpractice premiums are a small portion of medical costs, even for doctors who practice in high risk specialties. But it is not just the financial cost of medical malpractice insurance that annoys doctors. It is understandably discomforting to have the quality of one's professional efforts dissected in an adversarial setting, particularly when the outcome was disappointing.

A significant portion of claims filed (even some are successfully settled or litigated) involve no negligence. Studies indicate that only a small fraction of medical mishaps become legal malpractice claims. Although the vast majority of doctors are not sued, a study involving New York doctors indicates that about 40% who made malpractice payments have had multiple claims.

Malpractice awards are brought against physicians, the hospitals, and other medical personnel. In recent years the number of malpractice payments has declined.

The rate of such claims does significantly vary from state to state. There has been very little change in the average payment when adjusted for inflation over the past two decades. Medical malpractice reform was at the forefront of the "tort reform" because it combines the particular dissatisfaction of medical community with the overall concerns of insurers and businesses regarding the costs of the tort system.

What reforms are proposed for medical malpractice cases?

The Bush Administration's reform proposals are based on a reform measure enacted by California in 1975. The House has approved this legislation but it has been stalled in the Senate. In 2006, a Senate measure failed to secure the necessary 60 votes to close debate.

The principle features of the House bill are following ones.

Cap on non-economic damages

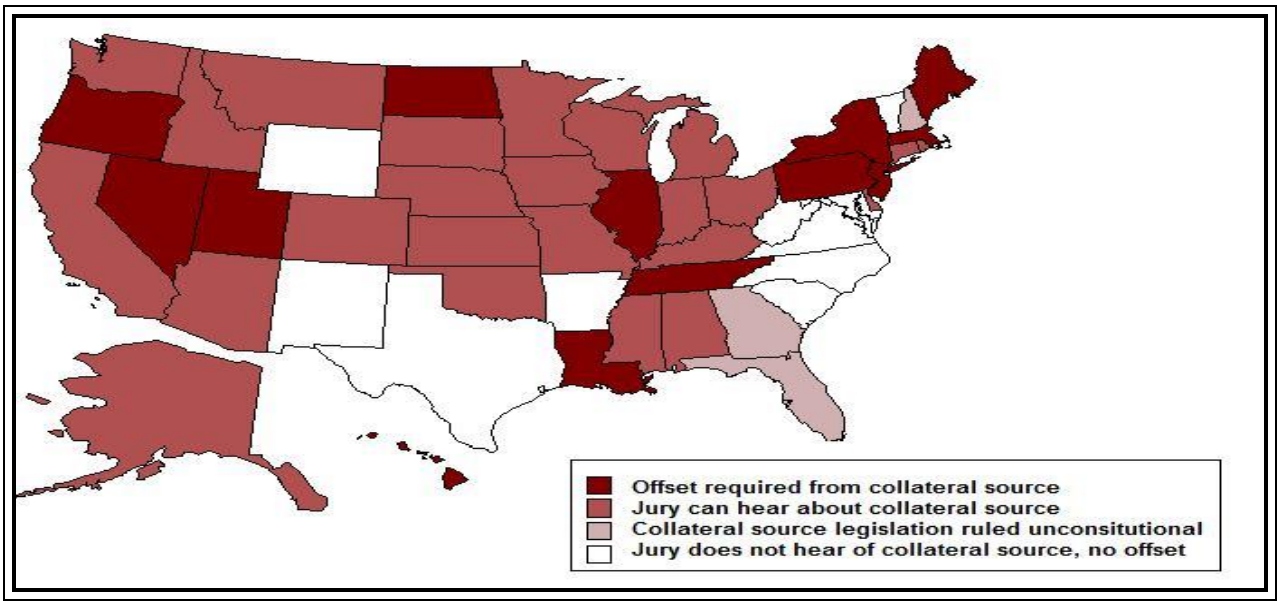
There would be separate caps for "non-economic" damages at $250,000. Virtually all medical malpractice awards include a substantial amount for "pain and suffering".

It is this element of damages that would be limited. Although several states presently have medical malpractice "damage caps" of some type, only five states have the limit on non-economic damages proposed by this legislation. Although proponents of this legislation argue that California's similar provisions have successfully kept insurance rates down, the evidence suggests that it was insurance reform, not damage caps, that has truly affected California's malpractice rates.

Allows consideration of "collateral sources" in measuring damages

In many states, juries are not informed about the extent to which injured patients may have already received benefits, usually through health or disability insurance policies.

The proposed legislation will allow the jury to consider this information in determining damages. A majority of states already have similar rules pertaining to collateral sources.



How does the tort system interact with automobile liability?

The tort system is the foundation for the settlement of claims resulting from traffic accidents. The controversies involving the tort system in general are certainly applicable to automobile liability. While there has been an overall decrease in the accident rate, automobile insurance costs have increased dramatically throughout the country.

The notable exception to the trend is in California, where the rates are regulated through 1988 voter-passed legislation. This legislation also mandates a 20% "good driver" discount which has encouraged motorists to reduce the number of claims. Insurance costs are a substantial portion of household transportation expenditures.

Although all states mandate that drivers carry auto insurance, a substantial percentage of drivers remain uninsured which significantly increases the premium rates of drivers who are insured. The percentage of bodily claims varies significantly from state to state. Only about a third of auto injury victims who consider filing a claim actually hire a lawyer.

The percentage of such claimants who retain a lawyer has increased in the last 20 years, but not significantly.

16 states have attempted to address the problems associated with the traditional tort treatment of automobile liability with "no fault" insurance systems which removes effectively removes automobile liability from the traditional tort system.

Three of these (Pennsylvania, New Jersey and Kentucky) offer motorists a "choice" between no-fault and the traditional liability system.

Under "no fault" plans, injuries for all accidents are compensated regardless of fault but the amount of damages is regulated. The no-fault system has not lived up to its promise of lowering the cost of auto insurance as insurance rates in the majority of these states are above the national average.

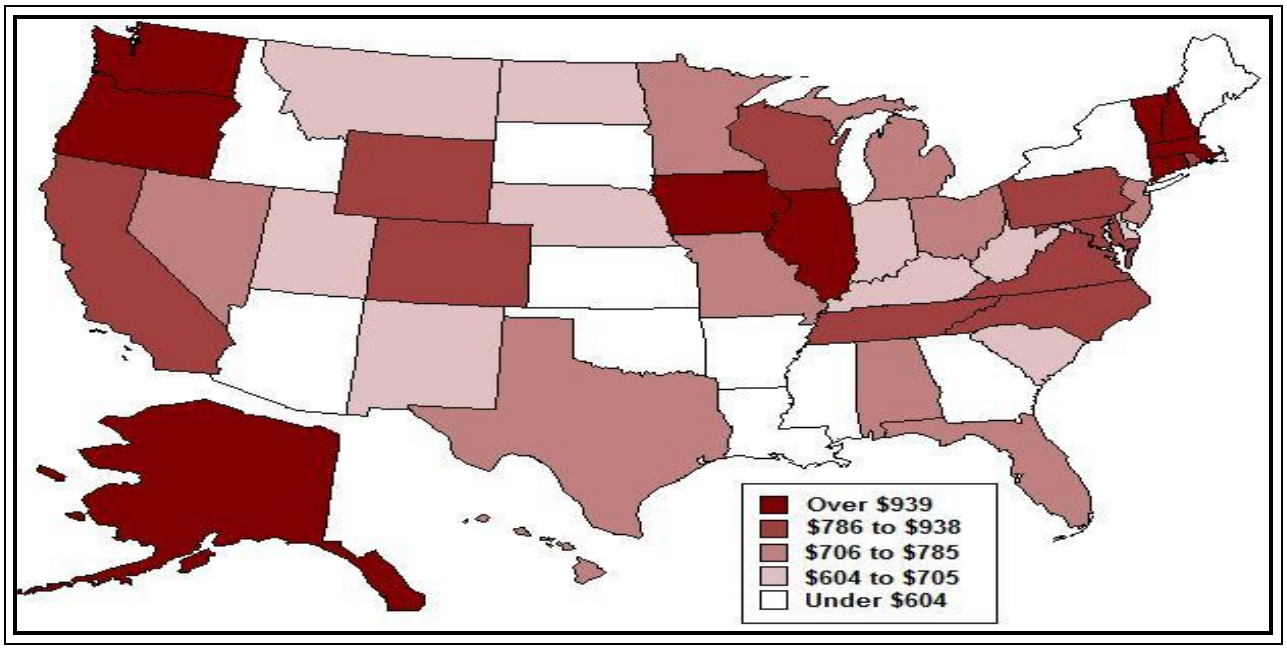
The New York no-fault system in particular has been plagued by fraudulent claims where "staged" accidents and "phantom" symptoms have been common.

Despite the predictions of plaintiff lawyers, the adoption of "no fault" systems do not appear to have led to more negligence as there is no appreciable difference between no-fault states or tort states in the rate of fatally related accidents.

Most accidents are work-related compensated by the tort system

No. A "no fault" system called "Worker's Compensation" has been in effect since the 1920's to compensate such injuries. Worker's Compensation legislation was created because employers had used the tort system successfully to defeat many legitimate claims.

Worker's Compensation is quite similar to "no-fault" auto insurance – it provides benefits to injured victims regardless of fault according to a regulated system of damages.



In all states but Texas, the programs are mandatory although there are exemptions in some states for small firms and agricultural employees. Although coverage is voluntary in Texas, over 80% of non-federal employees are covered.

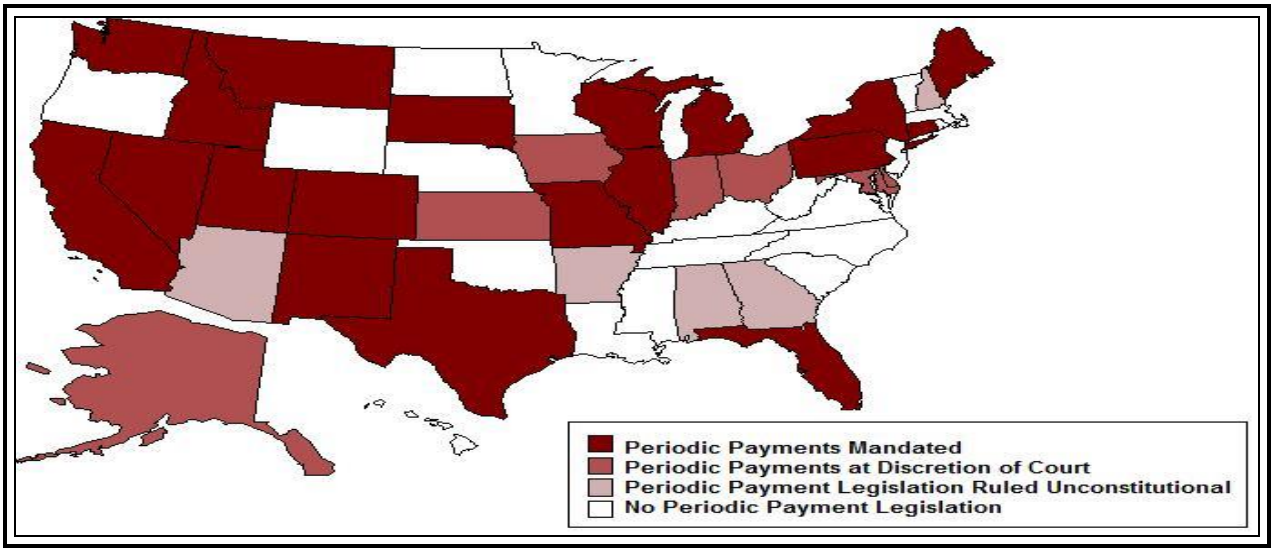
Nationwide, the coverage is split between state-operated companies, private insurers, the federal government (for federal employees), and employers who self-insure.

The portion of Workers Compensation payments which constitute payments for medical costs has increased significantly in the past 40 years. Worker's Compensation costs, as a percentage of wages, have significantly decreased during the past decade.

This decrease is directly related to the reduced incidence of work injuries.

Most Workers Compensation claims involve temporary cash benefits only but most of the total dollars paid in benefits are for permanent, partial disability.

The amount of temporary benefits varies from state to state. The amount of total benefits significantly increased from during the '80's but has leveled since. Much of the increase has been driven by the overall increase in the cost of health care.



What about product liability and class actions?

One of the major developments within the tort system during the past half-century has been the emergence of "product liability" lawsuits. These are suits brought by purchases of products were defective and which caused injury.

This type of liability was the result of the mass marketing of consumer products, the increasing ability of plaintiff attorneys to understand the technical information necessary to prove these cases, and a growing "consumer awareness" on the part of the public. Changes in the law have also spurred this development of product liability.

Until 30 years ago, it was necessary for a victim's lawyer to prove negligence in the manufacture of a product in order to impose liability.

Recognizing that this was a significant burden, a series of state court decisions began to impose "strict liability" on product manufacturers if the product was shown to be defective. Today, all but a few states impose such a "strict liability" requirement.

In the past decade, major jury verdicts have been reached in tobacco and pharmaceutical cases. To date, approximately $54 billion has been awarded as compensation in asbestos-related litigation alone. The asbestos verdicts and settlements have caused the bankruptcies of a growing number of firms. Quite often, product liability cases are brought as "class action" lawsuits involving multiple plaintiffs.

The advantage of such class actions to plaintiff attorneys has been the ability to prove multiple cases of liability at the same time, thus leading to enormous verdicts.

In California, class action construction-defect lawsuits have become very common for multi-unit developments, thus leading to a significant decrease in such housing at a time when overall California housing costs are exorbitant. California has passed legislation which provides contractors the opportunity to remedy such defects before a suit can be brought in the hopes of reducing this type of litigation.

What is the controversy about "punitive damages"?

Punitive damages can often be awarded in civil cases, including tort cases, where the defendant's conduct is found to be intentional or willful or wanton or maliciousA few states prohibit the award of punitive damages and the majority of states which allow such damages require clear and convincing evidence.

In addition, several states have placed limits on the amount of punitive damages which can be awarded (usually no more than a certain percentage of the compensatory damages). In ten states, a portion of the punitive damage award goes into a state fund.

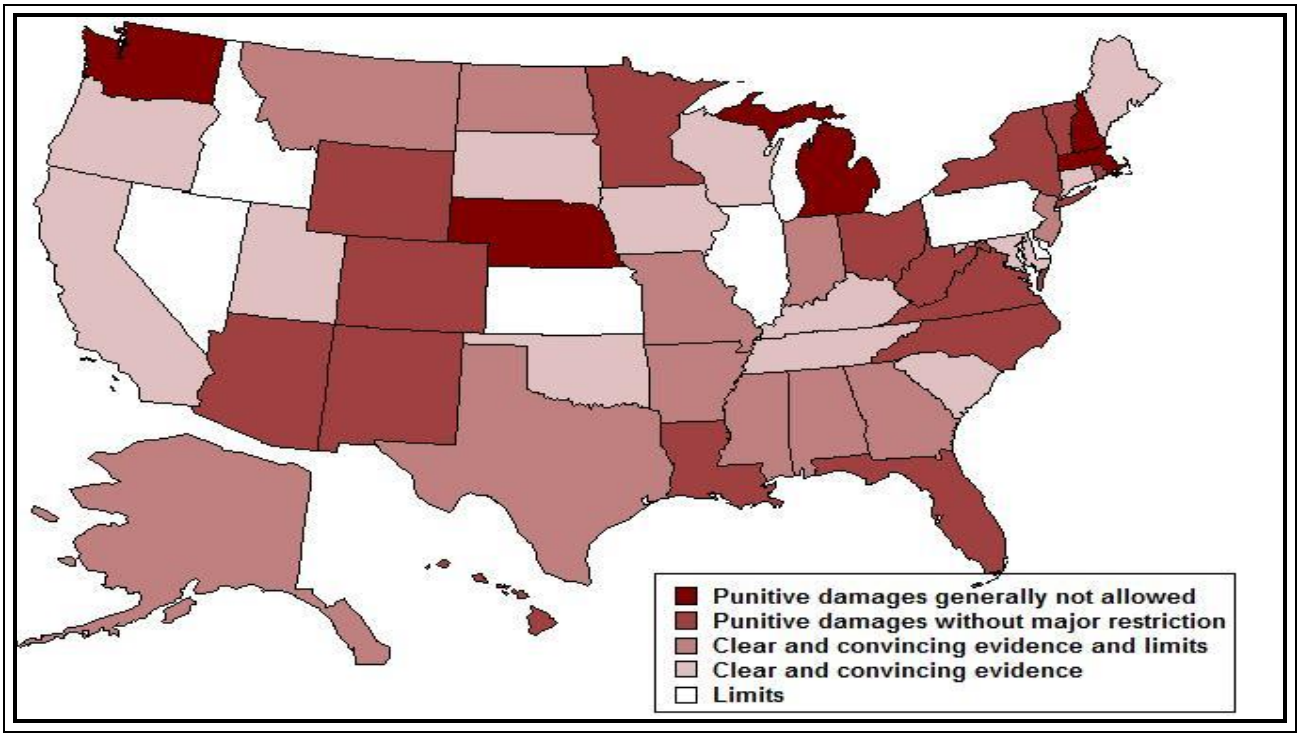
Punitive damages verdicts are unusual; they are awarded in less than 4% of all tort jury verdicts where the plaintiff prevails. They are more common in financial litigation.

Because most lawsuits are never go to trial and are settled, punitive damages are very small part of the tort system costs. But they are nonetheless controversial because they bear no relationship to compensation. Instead, they become a sort of windfall for the victim.

The theory of punitive damages is to punish the perpetrator for particularly egregious conduct. It may be that such additional liability helps spur defendant companies to take remedial measures but it is difficult to measure whether this is true.

In 1996, Congress passed legislation which would have placed limits on the amount of punitive damages which could be awarded in products liability cases.

The legislation also contained procedural measures which would make litigating these cases more costly. The legislation was vetoed by President Clinton. Similar legislation is expected to be considered again.



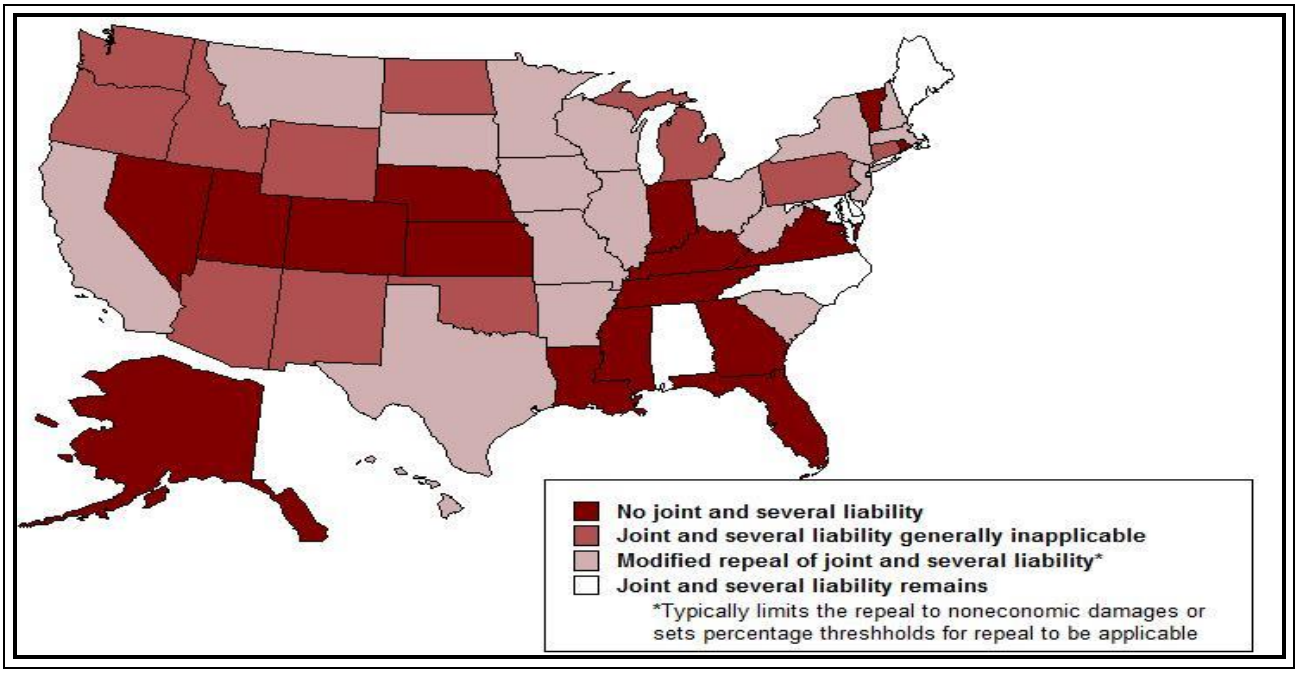
Why have states enacted "Joint and Several Liability" reform?

Tort defendants have long maintained that "joint and several liability" is inherently unfair and inequitable. Many tort actions involve multiple defendants.

For example, a motor vehicle accident might involve the possible liability of not only a driver but also the government entity that constructed and allegedly unsafe roadway.

Or a products liability matter might involve the seller, the manufacturer and any number of subcontractors. Medical malpractice actions typically involve the doctor and hospital as multiple defendants. Under the traditional concept of recovery, known as "joint and several liability", a single verdict is rendered against all defendants and the plaintiff is entitled to recover all of the damages from any defendant.

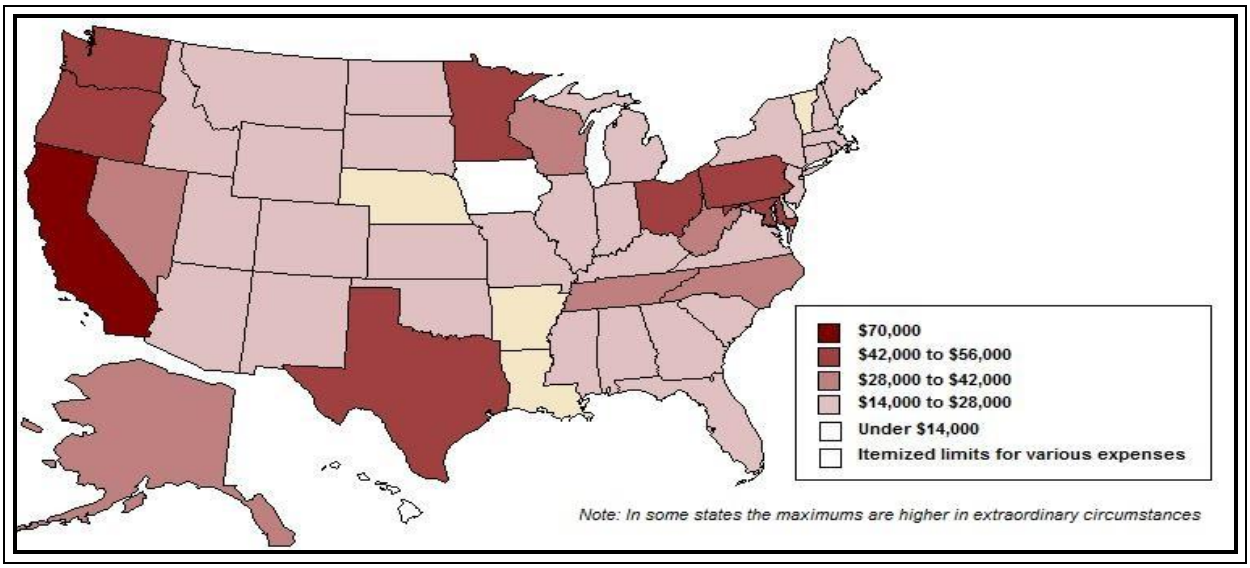
The paying defendant then has recourse against other defendants for their share of the damage award. The practical effect of this procedure is that the defendant who has the "deepest pockets" generally bears the major burden of paying damages even though that defendant may have had contributed on slightly to the injury. Many states have completely repealed joint and several liability, others have modified it, and only a handful retain it.



What about victims of criminal behavior?

One of the many anomalies of the tort system is that some of the most deserving victims have no way to recover. Perpetrators of crimes are liable for the damages that they cause but most are uninsured and incarcerated. Only recently have states developed comprehensive compensation programs for crime victims.

The benefits issued by the states are supplemented by federal funds obtained through fines and forfeitures. Eligibility requirements for these programs are limited and most states have maximum payment levels which are relatively low compared to other compensation programs. The amount awarded in proportion to the overall crime rate significantly varies from state to state. Over half of the benefits compensate for medical and mental health expenses incurred by the victims.



How does the U.S. tort system compare to other countries?

This is difficult to measure. According to one study, the USA pays more than twice as much in tort costs than most industrialized countries. Although the U.S. has a favorable vehicle fatality rate in comparison to many countries, it is very difficult to conclude that the tort system has significantly contributed to this safety statistic.

But there are fundamental legal and structural differences between most European countries and the U.S. with respect to compensation.

Contingency fee arrangements are often not allowed and there are other procedural obstacles to recovery. The most important of these is that in virtually all legal systems except the U.S., the loser of a claim must pay the winner's attorney fees. On the other hand, European social insurance systems provide victims with far more comprehensive medical and financial benefits than comparable U.S. programs.

New Zealand and Switzerland have abolished their tort law system and have adopted comprehensive "accident" programs to compensate all injured persons.

How do Democrats and Republicans stand on tort reform issues?

"Tort Reform" is a very partisan issue. At both the state and national levels, Republicans overwhelmingly support tort reform and Democrats oppose it.

The trial lawyer associations which represent plaintiff lawyers are major contributors to the Democrats. Insurance and medical interests contribute heavily to Republicans.

In fact, the tort reform debate can be considered as an aspect of the overall political dynamic involving distribution of the nation's wealth.

The most contentious issues involve medical malpractice and product liability.

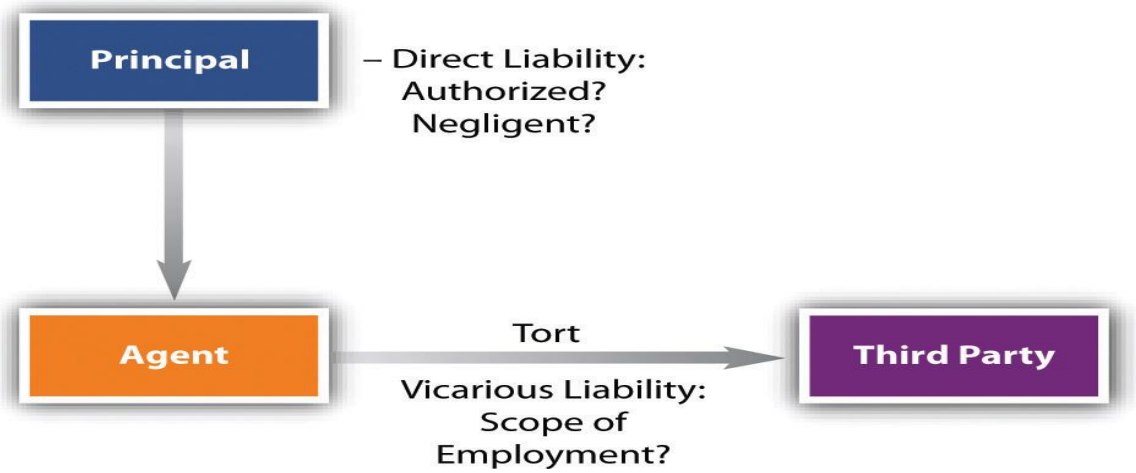
The result of settlements and verdicts of these cases is a transfer of wealth from groups which tend to be wealthy to victims and their lawyers.

Virtually all the reform proposals ultimately attempt to limit the amount of funds which are distributed in this fashion.

Task 1. Analyze the information, which is in the highlight, and use it in practice.

Task 2. Choose the keywords that best convey the gist of the information.

Task 3. Read the text & pick up the essential details in the form of quick notes.


Principal
– Direct Liability:
Authorized?
Negligent?
Agent
Tort
Third Party
Vicarious Liability:
Scope of
Employment?


LAW

PROPERTY LAW

Property law governs ownership and possession. Real property, sometimes called "real estate", refers to ownership of land and things attached to it.

Personal property, refers to everything else; movable objects, such as computers, cars, jewelry or intangible rights, such as stocks and shares.

A right *in rem* is a right to a specific piece of property, contrasting to a right *in personam* which allows compensation for a loss, but not a particular thing back.

Land law forms the basis for most kinds of property law, and is the most complex. It concerns mortgages, rental agreements, licences, covenants, easements and the statutory systems for land registration. Regulations on the use of personal property fall under intellectual property, company law, trusts and commercial law. Obligations, like contracts and torts, are conceptualised as rights good between individuals. The idea of property raises many further philosophical and political issues. Locke argued that our "lives, liberties and estates" are our property because we own our bodies and mix our labour with our surroundings.

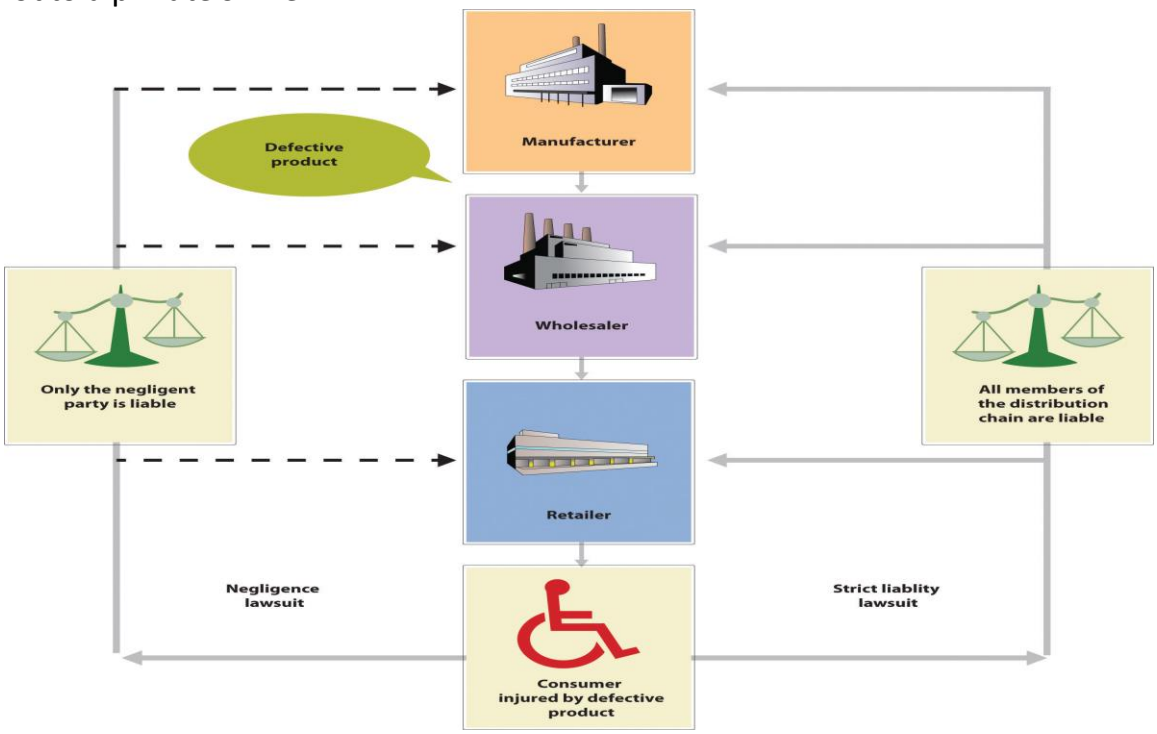
Active vocabulary

To support, the view of property, speculations, personal property, to consider, evidence, apprentice, possessory interest, intellectual property, company law, trusts, commercial law, individuals, to argue, to own, liberties.

Task 1. Make notes of your new knowledge about property law.

Task 2. Translate the sentences with the keyword «poperty».

1. All the property went to the eldest son. 2. We have several downtown properties for sale. 3. This is national property. 4. He owns several properties in a city. 5. You have property rights. 6. One must know the medicinal properties of herbs. 7. Lost property consists of things that people have lost or accidentally left in a public place, for example on a train or in a school. 8. Public property is land and other assets that belong to the public and not to a private owner.



Task 3. Analyze the topical vocabulary, learn it and make up sentences with it.

Property – а) имущество; собственность
to buy property – приобретать имущество / собственность
to confiscate property – конфисковывать имущество
to seize property – налагать арест на имущество
to inherit property – получить собственность по наследству
to lease (rent) property – сдавать (брать) имущество внаём, в аренду
to reclaim property – вернуть себе (получить обратно утраченное имущество)
to recover stolen property – возвращать украденные вещи
to sell property – продавать собственность
to transfer property – передавать имущество
abandoned property – бесхозная собственность
communal property – общественная собственность
individual property – личная собственность
landed property – земельная собственность
Intellectual property – интеллектуальная собственность
movable (real) property – движимое имущество
private property – частная собственность
public property – государственная / муниципальная собственность
community property – общее имущество супругов
property qualification – имущественный ценз
man of property – собственник; богач
lost property – вещи, забытые в общественных местах
property tax – налог на недвижимость
government property – государственная собственность
to buy (sell, inherit) property – покупать (продавать,наследовать) собственность
to lease (rent) property – сдавать в аренду/арендовать собственность
to leave all one's property – оставить кому-л. (в наследство) свое имущество
to own several properties in a city – быть владельцем нескольких домов в городе
property rights – как право на собственность

PUBLIC INTEREST LAW

"Public interest law" is a term that became widely adopted in the USA during and after the social turmoil of the 1960s. It built on a tradition exemplified by Louis Brandeis, who before becoming a U.S. Supreme Court justice incorporated advocacy for the interests of the general public into his legal practice. In a celebrated 1905 speech, Brandeis decried the legal profession, complaining that "able lawyers have to a large extent allowed themselves to become adjuncts of great corporations and have neglected their obligation to use their powers for the protection of the people".

In the late 1960s and 1970s, large numbers of American law school graduates began to seek "relevance" in their work – wishing to have an impact on the social issues that were so visibly and hotly debated within American society at that time. They defined themselves as public interest lawyers in order to distinguish themselves from the "corporate adjuncts" referred to by Brandeis.

Summing up the movement's history in the USA, Stanford University Law Professor Deborah Rhode writes: "Public interest lawyers have saved lives, protected fundamental rights, established crucial principles, transformed institutions, and ensured essential benefits for those who need them most. In virtually every major American social reform movement of the last half century, public interest lawyers have played an important role."

Public interest law is institutionalized in the USA. Non-governmental organizations (NGOs) that work to promote and protect human rights using the U.S. legal system, or fight to protect the environment, or advocate on behalf of consumers, call themselves public interest law organizations. A large community of lawyers practices public interest law in the form of providing legal aid free of charge to those who cannot afford to pay for it.

The grim reality remains that lawyers are underpaid & grossly overworked, offering perfunctory representation. Clinical legal education, which is well established in the USA, provides opportunities for law students to do practical legal work on basic legal matters as well as more complex public interest issues, such as women's rights, anti-discrimination law, constitutional rights, and environmental protection, among others.

Some law schools have public interest law centers, which advise law students interested in pursuing public interest law careers. Pro bono programs at bar associations and law firms provide opportunities for commercial lawyers to donate time to public interest law activities.

Active vocabulary

Community of lawyers, to practice, public interest law, legal aid free of charge, to afford, to establish, practical legal work, to provide opportunities, legal matters, public interest law organizations, perfunctory representation.

Task 1. Explain the score of some notions in English.

Task 2. Analyze the information, which is in the highlight, and use it in practice.

Task 3. Choose the keywords that best convey the gist of the information.

Task 4. Try to understand the notion.

Natural law is a body of unchanging moral principles regarded as a basis for all human conduct. It is an observable law relating to natural phenomena.

THE SHERMAN ANTITRUST ACT OF 1890

The Sherman Antitrust Act of 1890 was a United States antitrust law that was passed by Congress under the presidency of Benjamin Harrison, which regulates competition among enterprises. The Sherman Act broadly prohibits (1) anticompetitive agreements and (2) unilateral conduct that monopolizes or attempts to monopolize the relevant market.

The Act authorizes the Department of Justice to bring suits to enjoin (prohibit) conduct violating the Act, and additionally authorizes private parties injured by conduct violating the Act to bring suits for treble damages (three times as much money in damages as the violation cost them). Over time, the federal courts have developed a body of law under the Sherman Act making certain types of anticompetitive conduct per se illegal, and subjecting other types of conduct to case-by-case analysis regarding whether the conduct unreasonably restrains trade.

The law attempts to prevent the artificial raising of prices by restriction of trade or supply. "Innocent monopoly", or monopoly achieved solely by merit, is perfectly legal, but acts by a monopolist to artificially preserve that status, or nefarious dealings to create a monopoly, are not. The purpose of the Sherman Act is not to protect competitors from harm from legitimately successful businesses, nor to prevent businesses from gaining honest profits from consumers, but rather to preserve a competitive marketplace to protect consumers from abuses.

Background

"The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."

According to its authors, it was not intended to impact market gains obtained by honest means, by benefiting the consumers more than the competitors. Senator George Hoar of Massachusetts, another author of the Sherman Act, said the following: "... [a person] who merely by superior skill and intelligence...got the whole business because nobody could do it as well as he could was not a monopolist..(but was if) it involved something like the use of means which made it impossible for other persons to engage in fair competition".

The legislative history of the Sherman Act, as well as the decisions of this Court interpreting it, show that it was not aimed at policing interstate transportation or movement of goods and property. The legislative history and the voluminous literature which was generated in the course of the enactment and during 50 years of litigation of the Sherman Act give no hint that such was its purpose. They do not suggest that, in general, state laws or law enforcement machinery were inadequate to prevent local obstructions or interferences with interstate transportation, or presented any problem requiring the interposition of federal authority.

In 1890, when the Sherman Act was adopted, there were only a few federal statutes imposing penalties for obstructing or misusing interstate transportation. With an expanding commerce, many others have since been enacted safeguarding transportation in interstate commerce as the need was seen, including statutes declaring conspiracies to interfere or actual interference with interstate commerce by violence or threats of violence to be felonies.

The goal was to prevent restraints of free competition in business and commercial transactions which tended to restrict production, raise prices. Otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury. For that reason the phrase "restraint of trade", which, as will presently appear, had a well understood meaning in common law, was made the means of defining the activities prohibited.

The addition of the words "or commerce among the several States" was not an additional kind of restraint to be prohibited by the Sherman Act, but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes, so that Congress, through its commerce power, might suppress and penalize restraints on the competitive system which involved or affected interstate commerce.

Because many forms of restraint upon commercial competition extended across state lines so as to make regulation by state action difficult or impossible, Congress enacted the Sherman Act. It was in this sense of preventing restraints on commercial competition that Congress exercised "all the power it possessed".

Original text

The Sherman Act is divided into three sections. Section 1 delineates and prohibits specific means of anticompetitive conduct, while Section 2 deals with end results that are anti-competitive in nature. Thus, these sections supplement each other in an effort to prevent businesses from violating the spirit of the Act, while technically remaining within the letter of the law. Section 3 simply extends the provisions of Section 1 to U.S. territories and the District of Columbia.

Section 1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 2:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.

Subsequent legislation expanding its scope

The Clayton Antitrust Act, passed in 1914, proscribes certain additional activities that had been discovered to fall outside the scope of the Sherman Antitrust Act. The Clayton Act added certain practices to the list of impermissible activities:

- price discrimination between different purchasers, if such discrimination tends to create a monopoly
- exclusive dealing agreements
- tying arrangements
- mergers and acquisitions that substantially reduce market competition.

The Robinson-Patman Act of 1936 amended the Clayton Act. The amendment proscribed certain anti-competitive practices in which manufacturers engaged in price discrimination against equally-situated distributors. The federal government began filing cases under the Sherman Antitrust Act in 1890. Some cases were successful and others were not; many took several years to decide, including appeals.

Constitutional basis for legislation

Congress claimed power to pass the Sherman Act through its constitutional authority to regulate interstate commerce. Therefore, federal courts only have jurisdiction to apply the Act to conduct that restrains or substantially affects either interstate commerce or trade within the District of Columbia. This requires that the plaintiff must show that the conduct occurred during the flow of interstate commerce or had an appreciable effect on some activity that occurs during interstate commerce.

Elements

A Section 1 violation has three elements:

(1) an agreement;

(2) which unreasonably restrains competition;

(3) which affects interstate commerce.

A Section 2 monopolization violation has two elements:

(1) the possession of monopoly power in the relevant market;

(2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Section 2 bans attempted monopolization, which has the following elements:

(1) qualifying exclusionary or anticompetitive acts designed to establish a monopoly

(2) specific intent to monopolize;

(3) dangerous probability of success (actual monopolization).

Violations "per se" and violations of the "rule of reason"

Violations of the Sherman Act fall (loosely) into two categories:

Violations "per se": these are violations that meet the strict characterization of Section 1 ("agreements, conspiracies or trusts in restraint of trade"). A per se violation requires no further inquiry into the practice's actual effect on the market or the intentions of those individuals who engaged in the practice. Conduct characterized as per se unlawful is that which has been found to have a "pernicious effect on competition" or "lack[s] ... any redeeming virtue". Such conduct "would always or almost always tend to restrict competition and decrease output". When a per se rule is applied, a civil violation of the antitrust laws is found merely by proving that the conduct occurred that it fell within a per se category. (Contrasted with rule of reason analysis.) Conduct considered per se unlawful includes horizontal price-fixing, horizontal market division, and concerted refusals to deal.

Violations of the "rule of reason": A totality of the circumstances test, asking whether the challenged practice promotes or suppresses market competition. Unlike with per se violations, intent and motive are relevant when predicting future consequences. The rule of reason is said to be the "traditional framework of analysis" to determine whether Section 1 is violated. The court analyzes "facts peculiar to the business, the history of the restraining, and the reasons why it was imposed", to determine the effect on competition in the relevant product market. A restraint violates Section 1 if it unreasonably restrains trade.

Quick-look: A "quick look" analysis under the rule of reason may be used when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets", yet the violation is also not one considered illegal per se.

Taking a "quick look", economic harm is presumed from the questionable nature of the conduct, and the burden is shifted to the defendant to prove harmlessness or justification. The quick-look became a popular way of disposing of cases where the conduct was in a grey area between illegality "per se" and demonstrable harmfulness under the "rule of reason".

MODERN TRENDS

Inference of conspiracy

A modern trend has increased difficulty for antitrust plaintiffs as courts have come to hold plaintiffs to increasing burdens of pleading. Under older Section 1 precedent, it was not settled how much evidence was required to show a conspiracy.

A conspiracy could be inferred based on parallel conduct, etc. That is, plaintiffs were only required to show that a conspiracy was conceivable. Since the 1970s, however, courts have held plaintiffs to higher standards, giving antitrust defendants an opportunity to resolve cases in their favor before significant discovery under FRCP. That is, to overcome a motion to dismiss, plaintiffs must plead facts consistent with FRCP sufficient to show that a conspiracy is plausible (and not merely conceivable or possible). This protects defendants from bearing the costs of antitrust "fishing expeditions"; however it deprives plaintiffs of perhaps their only tool to acquire evidence (discovery).

Manipulation of market

Second, courts have employed more sophisticated and principled definitions of markets. Market definition is necessary, in rule of reason cases, for the plaintiff to prove a conspiracy is harmful. It is necessary for the plaintiff to establish the market relationship between conspirators to prove their conduct is within the per se rule.

In early cases, it was easier for plaintiffs to show market relationship, or dominance, by tailoring market definition, even if it ignored fundamental principles of economics.

The trial judge, Charles Wyzanski, composed the market only of alarm companies with services in every state, tailoring out any local competitors; the defendant stood alone in this market, but had the court added up the entire national market, it would have had a much smaller share of the national market for alarm services that the court purportedly used. The appellate courts affirmed this finding; however, today, an appellate court would likely find this definition to be flawed. Modern courts use a more sophisticated market definition that does not permit as manipulative a definition.

Monopoly

Section 2 of the Act forbade monopoly. In Section 2 cases, the court has, again on its own initiative, drawn a distinction between coercive and innocent monopoly. The act is not meant to punish businesses that come to dominate their market passively or on their own merit, only those that intentionally dominate the market through misconduct, which generally consists of conspiratorial conduct of the kind forbidden by Section 1 of the Sherman Act, or Section 3 of the Clayton Act.

Application of the act outside pure commerce

The Act was aimed at regulating businesses. However, its application was not limited to the commercial side of business. Its prohibition of the cartel was also interpreted to make illegal many labor union activities.

This is because unions were characterized as cartels as well (cartels of laborers). This persisted until 1914, when the Clayton Act created exceptions for certain union activities.

To determine whether a particular state statute that restrains competition was intended to be preempted by the Act, courts will engage in a two-step analysis, as set forth by the Supreme Court: First, they will inquire whether the state legislation "mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or ... places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute". ("Our decisions reflect the principle that the federal antitrust laws pre-empt state laws authorizing or compelling private parties to engage in anticompetitive behavior.") Second, they will consider whether the state statute is saved from preemption by the state action immunity doctrine (aka *Parker* immunity).

The Supreme Court established a two-part test for applying the doctrine: "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself."

Alan Greenspan, in his essay entitled *Antitrust* described the Sherman Act as stifling innovation and harming society. "No one will ever know what new products, processes, machines, and cost-saving mergers failed to come into existence, killed by the Sherman Act before they were born. No one can ever compute the price that all of us have paid for that Act which, by inducing less effective use of capital, has kept our standard of living lower than would otherwise have been possible." Greenspan summarized the nature of antitrust law as: "a jumble of economic irrationality and ignorance".

In 1890, Representative William Mason said "trusts have made products cheaper, have reduced prices; but if the price of oil, for instance, were reduced to one cent a barrel, it would not right the wrong done to people of this country by the trusts which have destroyed legitimate competition and driven honest men from legitimate business enterprise."

Consequently, if the primary goal of the act is to protect consumers, and consumers are protected by lower prices, the act may be harmful if it reduces economy of scale, a price-lowering mechanism, by breaking up big businesses.

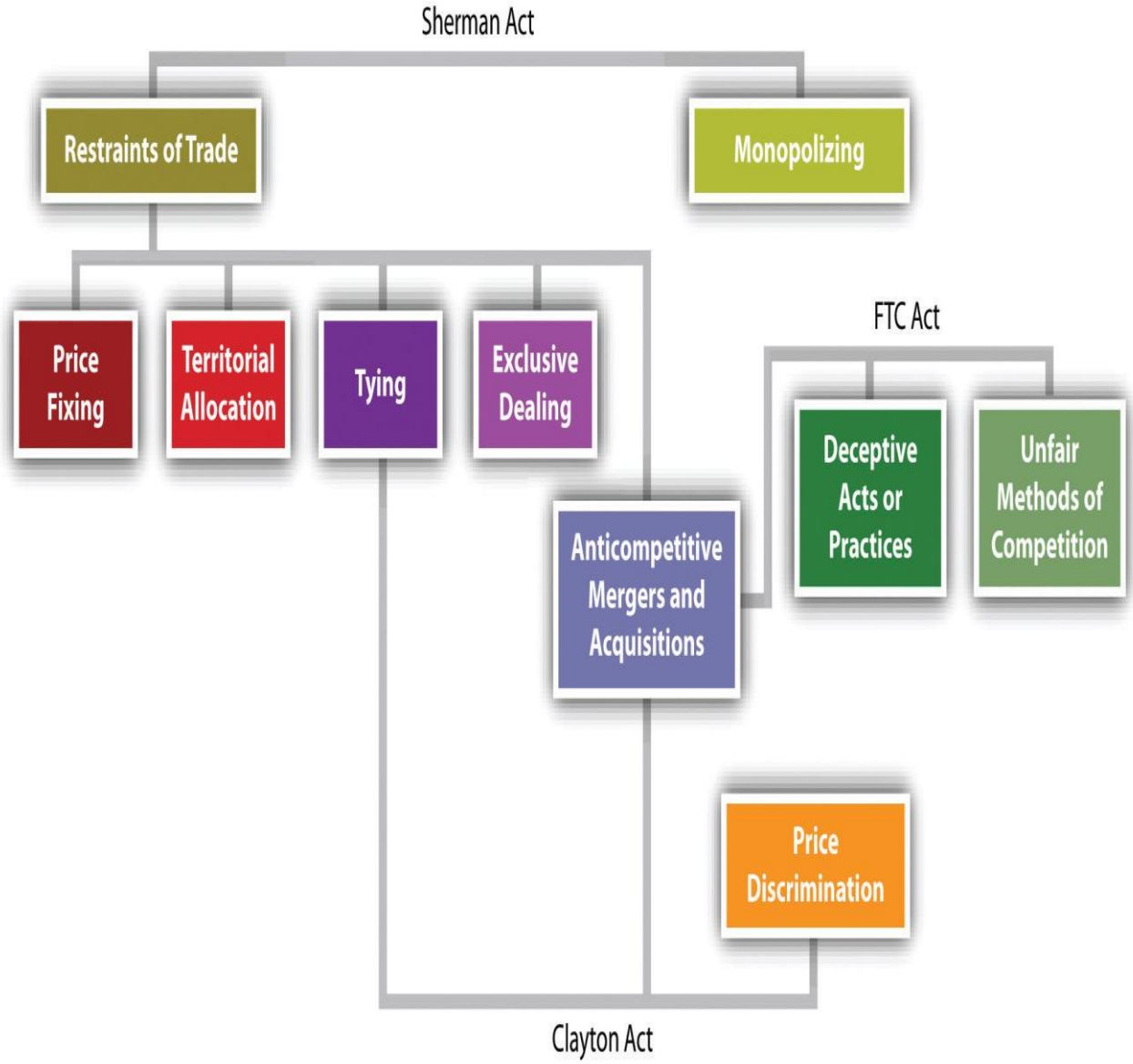
Mason put small business survival, a justice interest, on a level concomitant with the pure economic rationale of consumer. Conversely, liberal Supreme Court Justice William O. Douglas criticized the judiciary for interpreting and enforcing the antitrust law unequally: "From the beginning it has been applied by judges hostile to its purposes, friendly to the empire builders who wanted it emasculated trusts that were dissolved reintegrated in new forms; It is ironic that the Sherman Act was truly effective in only one respect, and that was when it was applied to labor unions.

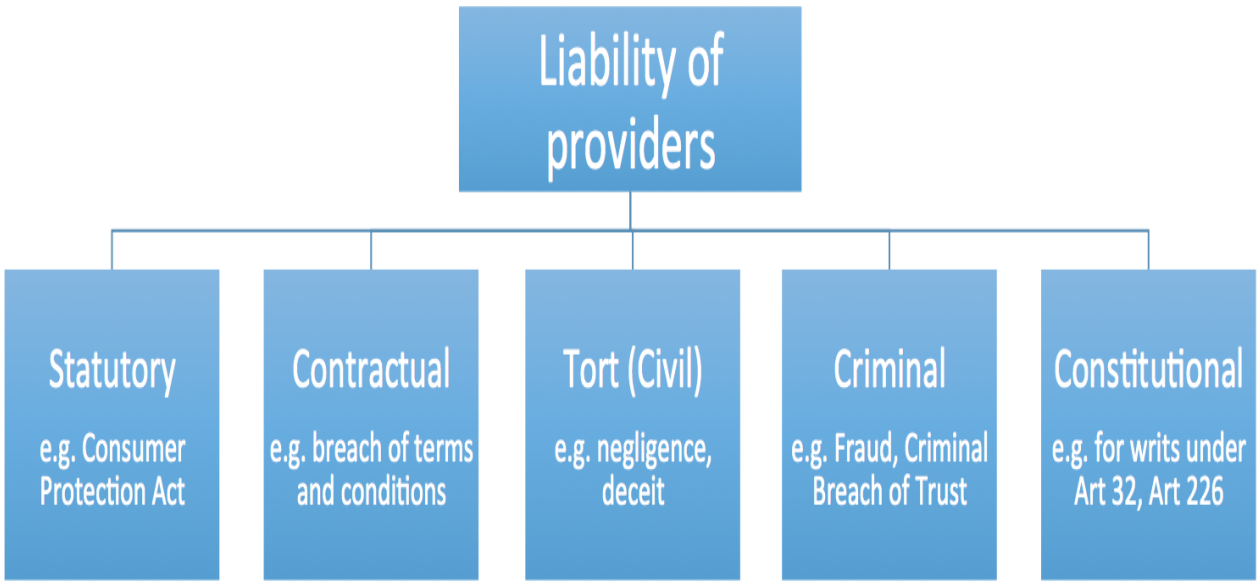
Then the courts read it with a literalness that never appeared in their other decisions." According to a 2018 study in the journal *Public Choice*, "Senator John Sherman of Ohio was motivated to introduce an antitrust bill in late 1889 partly as a way of enacting revenge on his political rival, General and former Governor Russell Alger of Michigan, because Sherman believed that Alger personally had cost him the presidential nomination at the 1888 Republican national convention.

Task 1. Analyze the information, which is in the highlight, and use it in practice.

Task 2. Choose the keywords that best convey the gist of the information.

Task 3. Read the text & pick up the essential details in the form of quick notes.


Sherman Act
Restraints of Trade
Monopolizing
Price Fixing
Territorial Allocation
Tying
Exclusive Dealing
FTC Act
Deceptive Acts or Practices
Unfair Methods of Competition
Anticompetitive Mergers and Acquisitions
Price Discrimination
Clayton Act


Liability of providers
Statutory
e.g. Consumer Protection Act
Contractual
e.g. breach of terms and conditions
Tort (Civil)
e.g. negligence, deceit
Criminal
e.g. Fraud, Criminal Breach of Trust
Constitutional
e.g. for writs under Art 32, Art 226

PRIVACY LAWS OF THE USA

The privacy laws of the USA deal with several different legal concepts. One is the *invasion of privacy*, a tort based in common law allowing an aggrieved party to bring a lawsuit against an individual who unlawfully intrudes into his or her private affairs, discloses his or her private information, publicizes him or her in a false light, or appropriates his or her name for personal gain. Public figures have less privacy, and this is an evolving area of law as it relates to the media.

The essence of the law derives from a *right to privacy*, defined broadly as "the right to be let alone". It usually excludes personal matters or activities which may reasonably be of public interest, like those of celebrities or participants in newsworthy events. Invasion of the right to privacy can be the basis for a lawsuit for damages against the person or entity violating the right.

These include the Fourth Amendment right to be free of unwarranted search or seizure, the First Amendment right to free assembly, and the Fourteenth Amendment due process right, recognized by the Supreme Court as protecting a general right to privacy within family, marriage, motherhood, procreation, and child rearing. Attempts to improve consumer privacy protections in the US in the wake of the May-July 2017 Equifax data breach, which affected 145.5 mln. US consumers, failed to pass in Congress.

Early years

The early years in the development of privacy rights began with English common lawwhich protected "only the physical interference of life and property". The Castle doctrine analogizes a person's home to his or her castle – a site that is private and should not be accessible without permission of the owner. The development of tort remedies by the common law is "one of the most significant chapters in the history of privacy law".

Those rights expanded to include a "recognition of man's spiritual nature, of his feelings and his intellect". Eventually, the scope of those rights broadened even further to include a basic "right to be let alone", and the former definition of "property" would then comprise "every form of possession – intangible, as well as tangible".

By the late 19th century, interest in privacy grew as a result of the growth of print media, especially newspapers.

Between 1850 and 1890, U.S. newspaper circulation grew by 1,000 % – from 100 papers with 800,000 readers to 900 papers with more than 8 mln. readers. In addition, newspaper journalism became more sensationalized, and was termed yellow journalism.

The growth of industrialism led to rapid advances in technology, including the handheld camera, as opposed to earlier studio cameras, which were much heavier and larger.

In 1884, Eastman Kodak company introduced their Kodak Brownie, and it became a mass market camera by 1901, cheap enough for the general public. This allowed people and journalists to take candid snapshots in public places for the first time.

Samuel D. Warren and Louis D. Brandeis, partners in a new law firm, feared that this new small camera technology would be used by the "sensationalistic press". Seeing this becoming a likely challenge to individual privacy rights, they wrote the "pathbreaking" *Harvard Law Review* article in 1890, "The Right to Privacy". According to legal scholar Roscoe Pound, the article did "nothing less than add a chapter to our law", and in 1966 legal textbook author, Harry Kalven, hailed it as the "most influential law review article of all".

Brandeis & Warren article

The development of the doctrine regarding the tort of "invasion of privacy" was largely spurred by the Warren and Brandeis article, "The Right to Privacy". In it, they explain why they wrote the article in its introduction: "Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society". More specifically, they also shift their focus on newspapers:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers.

The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

They then clarify their goals: "It is our purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is". Warren and Brandeis write that privacy rights should protect both businesses and private individuals. They describe rights in trade secrets and unpublished literary materials, regardless whether those rights are invaded intentionally or unintentionally, and without regard to any value they may have. For private individuals, they try to define how to protect "thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts".

They describe such things as personal diaries and letters needing protection, and how that should be done: "Thus, the courts, in searching for some principle upon which the publication of private letters could be enjoined, naturally came upon the ideas of a breach of confidence, and of an implied contract". They define this as a breach of trust, where a person has trusted that another will not publish their personal writings, photographs, or artwork, without their permission, including any "facts relating to his private life, which he has seen fit to keep private". Recognizing that technological advances will become more relevant, they write: "Now that modern devices afford abundant opportunities for the perpetration of such wrongs without any participation by the injured party, the protection granted by the law must be placed upon a broader foundation".

Modern tort law

In the USA today, "invasion of privacy" is a commonly used cause of action in legal pleadings. Modern tort law, categorized by W. Prosser, includes four categories of invasion of privacy:

Intrusion of solitude: physical or electronic intrusion into one's private quarters

Public disclosure of private facts: the dissemination of truthful private information which a reasonable person would find objectionable

False light: the publication of facts which place a person in a false light, even though the facts themselves may not be defamatory

Appropriation: the unauthorized use of a person's name or likeness to obtain some benefits

Intrusion of Solitude & Seclusion

Intrusion of solitude occurs where one person intrudes upon the private affairs of another. In a famous case from 1944, author Marjorie Kinnan Rawlings was sued by Zelma Cason, who was portrayed as a character in Rawlings' acclaimed memoir, *Cross Creek*.

The Florida Supreme Court held that a cause of action for invasion of privacy was supported by the facts of the case, but in a later proceeding found that there were no actual damages. Intrusion upon seclusion occurs when a perpetrator intentionally intrudes, physically, electronically, or otherwise, upon the private space, solitude, or seclusion of a person, or the private affairs or concerns of a person, by use of the perpetrator's physical senses or by electronic device or devices to oversee or overhear the person's private affairs, or by some other form of investigation, examination, or observation intrude upon a person's private matters if the intrusion would be highly offensive to a reasonable person.

Hacking into someone else's computer is a type of intrusion upon privacy, as is secretly viewing or recording private information by still or video camera. In determining whether intrusion has occurred, one of three main considerations may be involved: expectation of privacy; whether there was an intrusion, invitation, or exceedance of invitation; or deception, misrepresentation, or fraud to gain admission. Intrusion is "an information-gathering, not a publication, tort legal wrong occurs at the time of the intrusion. No publication is necessary".

Restrictions against the invasion of privacy encompasses journalists as well.

The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office.

Public disclosure of private facts arises where one person reveals information which is not of public concern, and the release of which would offend a reasonable person.

"Unlike libel or slander, truth is not a defense for invasion of privacy. " Disclosure of private facts includes publishing or widespread dissemination of little-known, private facts that are non-newsworthy, not part of public records, public proceedings, not of public interest, and would be offensive to a reasonable person if made public.

False light is a legal term that refers to a tort concerning privacy that is similar to the tort of defamation. The privacy laws in the USA include a non-public person's right to privacy from publicity which puts them in a false light to the public.

A non-public person's right to privacy from publicity is balanced against the First Amendment right of free speech. False light laws are "intended primarily to protect the plaintiff's mental or emortional well-being". If a publication of information is false, then a tort of defamation might have occurred. If that communication is not technically false but is still misleading, then a tort of false light might have occurred. The specific elements of the Tort of false light vary considerably even among those jurisdictions which do recognize this tort. Generally, these elements consist of the following:

- A publication by the defendant about the plaintiff.
- Places the plaintiff in a false light.
- Highly offensive (i.e., embarrassing to reasonable persons).
- Thus in general, the doctrine of false light holds.

One who gives publicity to a matter concerning another before the public in a false light is subject to liability to the other for invasion of privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in a reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

For this wrong, money damages may be recovered from the first person by the other. At first glance, this may appear to be similar to defamation (libel and slander), but the basis for the harm is different, and the remedy is different in two respects.

First, unlike libel and slander, no showing of actual harm or damage to the plaintiff is usually required in false light cases, and the court will determine the amount of damages.

Second, being a violation of a Constitutional right of privacy, there may be no applicable statute of limitations in some jurisdictions specifying a time limit within which period a claim must be filed. Consequently, although it is infrequently invoked, in some cases false light may be a more attractive cause of action for plaintiffs than libel or slander, because the burden of proof may be less onerous.

What does "publicity" mean? A newspaper of general circulation (or comparable breadth) or as few as 3-5 people who know the person harmed? Neither defamation nor false light has ever required everyone in society be informed by a harmful act, but the scope of "publicity" is variable. In some jurisdictions, publicity "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge".

Moreover, the standards of behavior governing employees of government institutions subject to a state or national Administrative Procedure Act (as in the USA) are often more demanding than those governing employees of private or business institutions like newspapers.

A person acting in an official capacity for a government agency may find that their statements are not indemnified by the principle of agency, leaving them personally liable for any damages. Settled cases suggest false light may not be effective in private school personnel cases, but they may be distinguishable from cases arising in public institutions.

Appropriation of Name or Likeness

Although privacy is often a common-law tort, most states have enacted statutes that prohibit the use of a person's name or image if used without consent for the commercial benefit of another person. Appropriation of name or likeness occurs when a person uses the name or likeness of another person for personal gain or commercial advantage.

Action for misappropriation of right of publicity protects a person against loss caused by appropriation of personal likeness for commercial exploitation.

A person's exclusive rights to control his or her name and likeness to prevent others from exploiting without permission is protected in similar manner to a trademark action with the person's likeness, rather than the trademark, being the subject of the protection.

Appropriation is the oldest recognized form of invasion of privacy involving the use of an individual's name, likeness, or identity without consent for purposes such as ads, fictional works, or products.

"The same action – appropriation – can violate either an individual's right of privacy or right of publicity. Conceptually, however, the two rights differ".

Task 1. Analyze the information, which is in the highlight, & use it in practice.

CONSTITUTIONAL BASIS FOR RIGHT TO PRIVACY

Although the word "privacy" is actually never used in the text of the USA Constitution, there are Constitutional limits to the government's intrusion into individuals' right to privacy.

This is true even when pursuing a public purpose such as exercising police powers or passing legislation. The Constitution only protects against state actors. Invasions of privacy by individuals can only be remedied under previous court decisions.

The Fourth Amendment to the Constitution of the USA ensures that "the right of the people to be secure in their persons, houses, papers, effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

The First Amendment protects the right to free assembly, broadening privacy rights.

Some believe that the Ninth Amendment declares that the fact that a right is not explicitly mentioned in the Constitution does not mean that the government can infringe on that right. The Supreme Court recognized the 14th Amendment as providing a substantive due process right to privacy.

Alaska

On August 22, 1972 the Alaska Right of Privacy Amendment, Amendment 3, was approved with 86% of the vote in support of the legislatively referred constitutional amendment. Article I, Section 22 of Alaska's constitution states, "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section".

California

Article 1, §1 of the California Constitution articulates privacy as an inalienable right.

CA SB 1386 expands on privacy law and guarantees that if a company exposes a Californian's sensitive information this exposure must be reported to the citizen. This law has inspired many states to come up with similar measures. California's "Shine the Light" law (SB 27, CA Civil Code § 1798.83), operative on January 1, 2005, outlines specific rules regarding how and when a business must disclose use of a customer's personal information and imposes civil damages for violation of the law. California's Reader Privacy Act was passed into law in 2011. The law prohibits a commercial provider of a book service, as defined, from disclosing, or being compelled to disclose, any personal information relating to a user of the book service, subject to certain exceptions.

The bill would require a provider to disclose personal information of a user only if a court order has been issued, as specified, and certain other conditions have been satisfied.

The bill would impose civil penalties on a provider of a book service for knowingly disclosing a user's personal information to a government entity in violation of these provisions. This law is applicable to electronic books in addition to print books.

Florida

Article I, §23 of the Florida Constitution states that "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."

Montana

Article 2, §10 of the Montana Constitution states that "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest".

Washington

Law enforcement are required to obtain a warrant before using IMSI-catcher technology.

Private individual's text messages are protected from warrantless searches. The right to privacy is protected also by more than 600 laws in the states and by a dozen federal laws, like those protecting health and student information, also limiting electronic surveillance.

Several of the US Federal privacy laws have substantial "opt-out" requirements, requiring that the individual specifically "opt-out" of commercial dissemination of personally identifiable information (PII). In some cases, an entity wishing to "share" (disseminate) information is required to provide a notice, such as a GLBA notice or a HIPAA notice, requiring individuals to specifically Opt-out. These "opt-out" requests may be executed either by use of forms provided by the entity collecting the data, with or without separate written requests.

CHAPTER II. AMERICAN LEGAL SYSTEM

INTRODUCTION

The American legal system has many distinctive features. We will not here attempt to survey all of these, but will instead look closely at those characteristics that we consider to be the most significant. In our opinion, these features are most important because they give the American legal system its uniqueness; they set the forum for any economic, legal or political relationships it engages in domestically and internationally.

An analysis of any legal system must involve an examination of the historical circumstances from which that legal system emerged. This paper will therefore include a brief discussion of history of the American legal system. In this course, we have reviewed many aspects of the U.S. legal system in comparative and historical perspective.

Based upon the reading and our discussions, what in your view are the most important characteristics of the American legal system? What is most distinctive about the U.S. system? Explain those features and the reasons for your choice.

How would you compare these characteristics of the U.S. system to the equivalent features of your own legal system? Can you suggest any other approaches that would be helpful to an understanding of the U.S. system?

The colonization of the USA began in the 16th Century. The first settlers were not all English. In what is today known as Florida, they were Spanish; in Louisiana, French.

The Dutch were the first to settle parts of New York. Consequently, the legal traditions and laws of some states of the USA still contain elements that draw from Civil Law tradition.

The path of political and economic development, however, has been such that the Common Law tradition came to take over in American law.

The American Revolution did not bring about a comparable break with English practices.

The connections with England did lessen, however, and American judges, jurists, and legislators began in a more independent fashion than previously to develop (using the received English law as a basis) legal institutions and doctrines that reflected the economic, political, and social realities of the new American society.

Gradually over the years a distinctive American legal tradition has emerged. While still faithful in many aspects to the Common Law tradition, it developed original features and moved closer to the Civil Law tradition. Federalism, the American Constitution, separation of Federal and State powers and Constitutional Review

The American Constitution was created in 1789 and is one of the most distinctive features of the American legal system. It made a clear distinction between the various branches of government and their respective jurisdictions. This separation of powers provides a system of shared power known which acts as checks and balances between the various branches of government. Three branches of government were created in the Constitution.

These are: the Legislative, the Executive, and the Judiciary branch. Each of these branches has certain powers, and each of these powers is limited. The President appoints judges and departmental secretaries.

But these appointments must be approved by the Senate. The Congress can pass a law, but the President can veto it. The Supreme Court can rule a law to be unconstitutional, but the Congress, with the States, can amend the Constitution. The separation of Federal and state powers remains one of the most distinctive features of the American legal system.

Among the nations that have been steady democracies since the end of World War II, the USA has been one of the few countries that has a chief executive who is elected independently of the legislature and is not, in any meaningful way accountable to the legislative branch. While the USA has always used this "presidential" model of government, very few other countries with stable, enduring democratic systems have done so. Instead, over history most other countries, such as France and Germany, have adopted more of a parliamentary model of government, whereby the chief executive is accountable to the legislative branch, rather than independent of the legislative branch.

As a consequence of this separation of Federal and state powers, the Unites States has national and state law, federal courts and state courts.

Federal courts often decide cases based on state law, and within states there are often complex court structures which themselves have overlapping jurisdictions.

Around this exists all sorts of complicated rules of civil procedure that have had to be developed in order to administer the allocation of cases to the various courts. As a result of these rules, a case can often be tried in one of two or more courtrooms.

Due to this strategic advantage to one side or the other of having the case heard in a specific court, the parties often seek to exploit aspects of these procedural rules to their advantage. This in itself is a distinctive feature of the American legal system, and one that is non-existent in the civil law legal systems of Europe.

One of the most notable and recognizable elements of the American legal system is its robust system of constitutional review. This refers to the process by which a court invalidates the actions of another branch of government as being inconsistent with a higher law, and the other branch of government cannot do anything about it.

This feature is particular to the legal system of the USA. As with the separation of powers between Federal and state government, constitutional review is unrivalled in any of the democracies of the western world. The manner in which the USA has structured constitutional review is unique. Firstly, constitutional review is administered in generalist courts, which have jurisdiction over constitutional law as well as other bodies of law. Very few countries in the world have such a system of constitutional review in place that allows courts to address both constitutional and other legal issues.

Secondly, the USA remains distinctive in spreading the power of constitutional review among a range of courts, rather than administering it in a single constitutional court (in Germany).

Thirdly, even though more American courts have the ability to address constitutional issues, they can only address constitutional issues in the context of adversarial disputes.

By contrast, many countries, such as Canada, France and Germany, have permitted constitutional issues to be put to their courts even when there is not a live, concrete dispute.

Fourthly and finally, judges hearing constitutional cases have an enormous degree of official institutional independence. Unlike their European counterparts who operate within the inquisitorial legal system, American federal judges have life tenure, with no mandatory retirement age.

Task 1. Read the text & pick up the essential details in the form of quick notes.

COURTS OF THE USA

The courts of the USA are closely linked hierarchical systems of courts at the federal and state levels. The federal courts form the judicial branch of the Federal government of the USA and operate under the authority of the USA Constitution and federal law. The state and territorial courts of the individual U.S. states and territories operate under the authority of the state and territorial constitutions and state and territorial law.

Federal statutes that refer to the "courts of the USA" are referring only to the courts of the federal government, and not the courts of the individual states.

Because of the federalist underpinnings of the division between sovereign federal and state governments, the various state court systems are free to operate in ways that vary widely from those of the federal government, and from one another.

In practice, however, every state has adopted a division of its judiciary into at least two levels, and almost every state has three levels, with trial courtshearing cases which may be reviewed by appellate courts, and finally by a state supreme court.

A few states have two separate supreme courts, with one having authority over civil matters and the other reviewing criminal cases. 47 states and the federal government allow at least one appeal of right from a final judgment on the merits, meaning that the court receiving the appeal *must* decide the appeal after it is briefed and argued properly.

Three states do not provide a right to a first appeal. Rather, they give litigants only a right to *petition* the right to have an appeal heard.

State courts often have diverse names and structures, as illustrated below.

State courts hear about 98% of litigation; most states have courts of special jurisdiction, which typically handle minor disputes such as traffic citations, and courts of general jurisdiction responsible for more serious disputes.

The U.S. federal court system hears cases involving litigants from two or more states, violations of federal laws, treaties, and the Constitution, admiralty, bankruptcy, and related issues. In practice, about 80% of the cases are civil and 20% criminal. The civil cases often involve civil rights, patents, and Social Security while the criminal cases involve tax fraud, robbery, counterfeiting, and drug crimes.

The trial courts are U.S. district courts, followed by USA courts of appeals and then the Supreme Court of the USA.

The judicial system, whether state or federal, begins with a court of first instance, whose work may be reviewed by an appellate court, and then ends at the court of last resort, which may review the work of the lower courts.

Active vocabulary

Courts, hierarchical systems of courts, federal, state levels, judicial branch, to operate, under the authority, federal law, division, various state court systems.

Task 1. Choose the keywords that best convey the gist of the information.

Task 2. Find synonyms to the following ones.

General, to review, district, to appellate, lower courts, to involve, treaty, dispute, to handle, robbery, crime, civil rights, violation, to provide, to appeal.

Task 3. Analyze the information and use it in practice.

Task 4. Analyze the information, which is in the highlight, and use it in practice.

COMMON LAW SYSTEM & THE SUPREME COURT

The common law was received in the American colonies and adopted as the basis of American legal systems after the Revolution in the state and federal constitutions.

In American practice, the common law is one of two legal systems (the other being equity), now merged in all jurisdictions including the federal, that are the basis of the American legal order.

American law has over the years established its own tradition, one which though connected in important ways with the Common-Law tradition and in a lesser degree with the Civil-Law tradition, has many uniquely American traits. They derive from institutions and conditions that are not replicated elsewhere.

The U.S. legal system is, for the most part, derived from the English common law system in which previous case decisions are used as precedents and followed.

Other countries such as France, have a code-based legal system in which case law is far less important. To maintain its structure and to guarantee fundamental human rights, an independent judicial branch of government was created and formed a central part of the American legal system. The Supreme Court of the USA was thus called upon to serve, with the assistance of the lower courts, as the "balance wheel" of the federal system, protector of individual rights, and arbiter of the allocation of powers among the executive, judicial, and legislative branches of the federal government.

The degree to which courts, especially the Supreme Court of the USA, establish the values and principles of American economic, social, and personal life is unmatched elsewhere.

In its exercise of judicial review in particular cases, the Court sets precedents that apply to future cases. This can be contrasted to the legal systems of Europe where case law is not of paramount importance and where a civil code is adhered to.

Civil Procedure & Litigation & Contingency Fees

American ideology makes civil procedure especially important. The importance of civil procedure is connected to broader American norms. This commitment to the ideal of procedural due process reflects the American belief in individualism which, in the legal context, promotes a formality designed to assure that every claimant will receive individualized justice. It also reflects the American cultural notion that there are supposed to be winners and losers, rather than compromise solutions.

American procedural law has developed class action procedures that have no counterparts in the procedural law of Civil-Law jurisdictions and go well beyond the practices of most other Common-Law jurisdictions.

As a consequence of a regime of complex legal procedures that is so characteristic of the American legal system, ordinary citizens are less capable of handling their disputes on their own, and more dependent upon engaging the services of lawyers.

Many think disputes over auto accidents and the purchase and sale of homes and apartments should be handled without lawyers. Yet, in most states in the Unites States the baffling procedures that now surround what could be simple matters force people to turn these problems over to lawyers. Even sophisticated corporate executives are helpless before complex legal procedures known only to attorneys. Moreover, many of these executives quickly learn that losing or winning a case at the trial level rarely brings an end to their legal bills.

Because the losing side is typically able to assert that one procedural irregularity or another has fatally tainted the case and requires a re-trial.

Indeed, a large number of cases are overturned on procedural technicalities.

Litigation plays a much broader role in the USA than elsewhere. The U.S. system is noted for having many rules that are seen as favorable to plaintiffs.

Each party to a private lawsuit pays its own legal fees and a loser does not pay a winner's legal costs as in the United Kingdom. The American legal system is well known for its especially adversarial nature. A greater number of lawyers are in control of cases in the Unites States than any where else in the world.

It is an undisputed fact that the American legal system has relatively few judges available when compared with the amount of litigation. The idea of litigating to completion more than even a small share of cases is out of the question. Hence, the overriding objective of the judiciary is to get the lawyers to manage, and ultimately settle, cases themselves. It has consequently become critical to develop procedural arrangements that facilitate that process. This accounts for the complex discovery system that allows each side a level of access to each other's documents and witnesses in advance of a trial.

This in itself is astonishing to lawyers of other countries. What this effectively means is that lawyers have an enticement to abuse the discovery process, and that problem has required the development of additional multifaceted procedural measures intended to discourage such misuse.

In addition to the important and unique characteristics discussed above, courts within the American legal system permit a distinctive method of financing private lawsuits. U.S. courts allow lawyers to finance their clients' cases on a contingent basis in return for the chance to receive 30-40 % of any damages awarded. This contingency arrangement is often attractive to those who cannot afford to bring a lawsuit to assert their claims & means that plaintiff lawyers, who may or may not receive a windfall, have a financial interest in the outcome. Contingency fees also make litigation more likely.

Role of Juries

Juries are much more widely used in the USA to decide cases and to resolve questions of fact. The American legal system has retained juries for civil trials, for both personal injury cases as well as complex commercial disputes. This is quite unlike other common law nations, such as Great Britain, Canada and Australia. Having juries, however, has required the U.S. to develop special procedures to govern precisely what jurors are permitted to hear and what they are permitted to decide.

The American legal system has sophisticated controls on what lawyers may say, how they may conduct themselves in the courtroom, and how witnesses may be handled, amongst many other procedures. We will discuss the role of juries in the American legal system in detail in the latter part of this paper.

Political Public Law

The American public law system is distinctive in how political it always has been and still remains in terms of the way officials with formal legal authority come to acquire their positions. Many American legal personnel usually either have to campaign themselves for their positions in competitive elections, or must petition the support of elected officials in order to acquire their positions.

By contrast, many of the world's other main legal systems feature more bureaucratic systems of appointment, where appointments are made based on a career of dedicated training and exceptional government service.

In the majority of other countries with successful criminal justice systems, legal personnel are professionalized bureaucrats, hired and fired in a civil service fashion.

Unlike other legal systems around the world state judges in America are elected. Very few jurisdictions anywhere in the world feature direct elections of judges.

Furthermore, federal judges, although not directly elected and instead appointed, are also political figures. In deciding who among the best of the American legal profession to nominate, the President of the USA often goes by who has the most political connections or experience. Justice Stephen Breyer, an appointee by President Bill Clinton to the Supreme Court in 1994, was a close advisor to leading Democratic Senator Edward Kennedy.

The control of judicial appointment is spread out more evenly among the different branches of government in other countries than in the USA. The result being appointed judges in other democracies seems to come from more judicial and less political backgrounds.

The Adversarial Nature of the American Legal System

One of the most distinctive features of the American legal system is its adherence to the adversarial system of law administration. The contemporary Anglo-American adversary system has gradually evolved over several hundred years. Early English jury trials were unstructured proceedings in which the judge might act as inquisitor or even prosecutor as well as fact finder. Criminal defendants were not allowed to have an advocate, call witnesses, conduct cross-examination, or present affirmative defenses.

All types of evidence were allowed, and juries, although supposedly neutral and passive, were actually highly influenced by the judge's comments and directions. In fact, before 1670, jurors could be fined or jailed for refusing to follow a judge's instructions.

The late 1600s saw the advent of a true adversarial system in the USA. Juries took a more neutral stance, and previously non-existent appellate review became possible in certain circumstances. By the 18th century, juries assumed an even more independent position as they started operating as a restraint on governmental and judicial exploitation and corruption. The Framers of the Constitution recognized the significance of the jury trial in a liberal society by specifically establishing it in the Sixth Amendment as a right in criminal prosecutions.

The autonomous judiciary was somewhat slower in developing. Before the 1800s, English judges were still influenced by their ties with the Crown, and U.S. judges were often politically partisan. U.S. Supreme Court Chief Justice John Marshall, who served from 1801 to 1835, established the sovereignty and independence of the Supreme Court with his opinion established "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution". By the early 1800s, attorneys had also become important as advocates and presenters of evidence.

Procedural and evidentiary rules were developed, which turned the attention of litigation towards dispute resolution rather than arguments on minor points of law.

The fundamental pillars of the USA' contemporary legal system had been established.

In the USA today the adversary system is applied and adhered to, not only because of the protection it accords the accused.

But because its competitive style of presenting evidence and argument is thought to produce a more accurate result than the inquisitorial alternative, where proof-taking in controlled by the judge. In accordance with this view, the judge who administers an apparently nonpartisan inquiry cannot truly keep an open mind to the case before him, and lacks sufficient motivations to do a proper job.

The probability of conflict between the aims of achieving accurate results and maintaining high barriers to conviction is often denied. It is occasionally conceded, however, that such barriers, while they lessen the possibility of convicting an innocent person, increase the possibility that the guilty may escape conviction. Hence, by keeping these barriers high, as required by the adversary system, the accuracy of outcomes in the total number of cases irrespective of the kind of error can well be decreased.

Another difference between the Civil Law systems of Europe and the Anglo-American legal system of the Unites States respects the manner in which the authoritative starting points for legal reasoning are set out. In the Civil Law, these are contained in legislation which, when general rules of private law are in question, takes the form of a code.

In the Anglo-American legal system starting points for legal reasoning are found in judicial decisions (Common Law) and to a lesser degree, in statutes. Today, statutes play a larger role than in the past, but judicial decisions remain of central importance.

A further contrasting characteristic of the two legal systems concerns the style of legal analysis and thinking. Civilian jurists, for example, still state legal propositions more than do jurists in the Anglo-American Common Law tradition.

Moreover, civilians also generally place greater value than do Common Law jurists on coherence and structure. The latter proceed in a more fact-specific fashion. The Common Law accordingly tends to place less weight on the administration of the law than does the Civil Law. More contrasts between the two systems can be seen in the judicial decisions rendered by Common Law courts and those rendered by Civil-Law courts.

Decisions arrived at by the former, for example, offer far more explicit and complete explanation of the court's reasoning than do their Civil Law counterparts. The opinion in a case is written by one judge and bears his name. Other judges are free to concur or dissent in separate and signed opinions. Other judges sitting on the same case are free to dissent.

Unlike European courts, American courts do not face the outside world as a single authority that always speaks with only one, unanimous and anonymous voice.

Another stark difference between these two systems is that many litigation practices and tools accepted by the American adversarial system are almost entirely rejected elsewhere.

The unsuccessful party in a legal suit is not required to pay his opponents' litigation expenses. The robust discovery available in American courts is not to be found elsewhere.

Unlike most Civil Law systems, it is common legal practice for American lawyers to contact witnesses and talk at length with them before they give their testimony in court.

Moreover, through direct and cross-examination American lawyers manipulate and control the flow, pace, and scope of the witnesses' court testimonies.

In the Anglo-American adversary system, the parties to a dispute or their advocates square off against each other and assume roles that are strictly separate and distinct from that of the decision maker, usually a judge or jury. The decision maker is expected to be objective and free from bias.

Rooted in the ideals of the American Revolution, the modern adversary system reflects the conviction that everyone is entitled to a day in court before a free, impartial, and independent judge. Adversary theory holds that requiring each side to develop and present its own proofs and arguments is the surest way to uncover the information that will enable the judge or jury to resolve the conflict. The Anglo-American requirement of an impartial and passive fact finder contrasts with the requirements of other legal systems.

Most European countries employ the inquisitorial system, in which a judge investigates the facts, interviews witnesses, and renders a decision. Juries are not held in high regard in an inquisitorial court; the disputants are moderately involved in the fact-finding process.

The main emphasis in a European court is the search for truth, whereas in an Anglo-American courtroom, truth is secondary to the aim of reaching the fairest decision in the resolution of the dispute. It has been suggested that the inquisitorial system, with its goal of seeking and finding the truth, is a more just and equitable legal system.

However, proponents of the adversary system maintain that the truth is most likely to emerge after all sides of an argument are put forward.

Supporters of the Anglo-American adversarial system also point out that the civil law inquisitorial system has its own deficiencies, including abuse and corruption.

European judges must assume all roles in a trial, including those of fact finder, evidence gatherer, interrogator, and decision maker. Due to these sometimes conflicting roles, European judges may tend to prejudge a case in an effort to finalize it and dispose of it.

Inquisitorial courts are far more indifferent to individual rights than are adversarial courts, and inquisitorial judges, who are government bureaucrats (rather than part of an independent judiciary), may identify more with the government than with the parties.

Critics of the inquisitorial system say that it provides little, if any, check on government excess and invites corruption, bribery, and abuse of power.

A further argument for the Anglo-American adversary system is that the parties to a lawsuit are responsible for gathering and compiling all the evidence in the case. This forces them to develop their arguments and present their most compelling evidence, and also preserves the impartiality and passivity of the fact finder.

The adversary process is governed by strict rules of evidence and procedure that allow both sides equal opportunity to argue their cases. These rules also help to ensure that the decision is based solely on the evidence presented. The structure of this legal system unsurprisingly encourages enthusiastic advocacy by lawyers on behalf of their clients, but the code of ethics governing the behavior of lawyers is intended to restrain the propensity to endeavor to win by any means.

Conclusion

There are no doubts that the American legal system has its unique and perhaps to some degree, questionable characteristics. The litigious and adversarial nature of the legal system of the USA has a vastly different structure to Europe's bureaucratic legalism.

The American legal system's methods of litigation are more adversarial, unpredictable and costly, and its courts have a larger role in making and implementing public policy.

Although the two legal systems share basic principles, they differ sharply in terms of laws, legal institutions, and legal style.

Task 1. Choose the keywords that best convey the gist of the information.

ADVANTAGES & DISADVANTAGES OF THE JURY SYSTEM

A discussion regarding the advantages and disadvantages of the American jury system can not exclude some analysis of the historical origins of the modern version of this institution. The American jury system has its deep roots in medieval England.

As early as the 1100s, groups of twelve knights were assembled to resolve disputes over land titles and taxation. The group of twelve evolved into a jury, which had the power to give testimony and ask questions of the accused and accuser, as well as decide the merits of arguments and evidence.

By the 1400s the characteristic of the jury as an impartial decider of facts was well rehearsed. In 1670 the Bushel's case established the principle that a juror can not be fined or imprisoned for acquitting a defendant. By the 1700s it became rule that a jury must decide a case purely on the facts before it during a trial, and not on any extrajudicial knowledge. That version of the jury institution was subsequently transported to the USA by English colonists. Over the course of the 1900s, judges came into the jury picture. They gained power to control juries and juries' roles became what they are today- hearing evidence and deciding the guilt or innocence of an individual. The institution of the jury is a fundamental part of American jurisprudence.

One of the questions surrounding the validity of trial by jury is that a juror's competence comes into play when decisions have to be made about the trial. Opponents of the jury system argue that the judge- by training, experience and superior intelligence, is better able to understand law and fact than the laypersons drawn from a broad range of levels of intelligence without experience, and without sanctioned responsibility.

One of the many criticisms of jury trials is that they are time consuming and expensive. It is estimated that trial by jury takes about forty % longer than bench trials. Lawyers take longer in presenting their cases and enforcing the rules of evidence is also time consuming. Unlike judges who are "professional listeners" jurors often need breaks in order to remain focused. The decision making process of juries is also long and drawn out. It is argued, however, that the length of a trial could be reduced by making sure that both the defense and prosecution are more prepared for their cases.

The trials become very expensive when the appeal process is put into play. Individuals have so many appeals which become very costly. This could be cut down if an individual was allowed simply one appeal instead of the several that they use at present.

Another area that has been a focus of controversy is the jury's interpretation of the law. Critics complain that juries will not follow the law, either because they do not understand it or because they do not like it.

Task 1. Analyze the information, which is in the highlight, and use it in practice.

Task 2. Transfer the given information from the passages onto a table.

№	Activity			
	Event	When	Where	Score
1.				

CASES & THE LAW

In the US cases are decided based on principles established in previous cases.

KEY TAKEAWAYS

Key Points

Common law is created when a court decides on a case and sets precedent.

The principle of common law involves precedent, which is a practice that uses previous court cases as a basis for making judgments in current cases.

Justice Brandeis established stare decisis as the method of making case law into good law. The principle of stare decisis refers to the practice of letting past decisions stand, and abiding by those decisions in current matters.

Key Terms

Common law: A legal system that gives great precedential weight to common law on the principle that it is unfair to treat similar facts differently on different occasions.

Stare decisis: The principle of following judicial precedent.

Precedent: a decided case which is cited or used as an example to justify a judgment in a subsequent case.

Establishing Common Law

When a decision in a court case is made and is called law, it typically is referred to as "good law". Thus, subsequent decisions must abide by that previous decision. This is called "common law", and it is based on the principle that it is unfair to treat similar facts differently in subsequent occasions. Essentially, the body of common law is based on the principles of case precedent and *stare decisis*.

Case Precedent

In the USA legal system, a precedent or authority is a principle or rule established in a previous legal case that is either binding on or persuasive for a court or other tribunal when deciding subsequent cases with similar issues or facts. The general principle in common law legal systems is that similar cases should be decided so as to give similar and predictable outcomes, and the principle of precedent is the mechanism by which this goal is attained.

Black's Law Dictionary defines "precedent" as a "rule of law established for the first time by a court for a particular type of case and thereafter referred to in deciding similar cases".

Stare Decisis

Stare decisis is a legal principle by which judges are obliged to respect the precedent established by prior decisions. The words originated from the phrasing of the principle in the Latin maxim *Stare decisis et non quieta movere*: "to stand by decisions and not disturb the undisturbed". In a legal context, this is understood to mean that courts should generally abide by precedent and not disturb settled matters. In other words, stare decisis applies to the holding of a case, or, the exact wording of the case. As the USA Supreme Court has put it: "dicta may be followed if sufficiently persuasive but are not binding". In the USA Supreme Court, the principle of stare decisis is most flexible in constitutional cases:

Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.... But in cases involving the Federal Constitution this Court has often overruled its earlier decisions....

TYPES OF COURTS

The federal court system has 3 levels: district courts, courts of appeals, the Supreme Court.

KEY TAKEAWAYS

Key Points

District courts and administrative courts were created to hear lower level cases.

The courts of appeals are required to hear all federal appeals.

The Supreme Court is not required to hear appeals and is considered the final court of appeals. The Supreme Court may exercise original jurisdiction in cases affecting ambassadors and other diplomats, and in cases in which a state is a party.

Key Terms

Appeal: (a) An application for the removal of a cause or suit from an inferior to a superior judge or court for re-examination or review. (b) The mode of proceeding by which such removal is effected. (c) The right of appeal. (d) An accusation; a process which formerly might be instituted by one private person against another for some heinous crime demanding punishment for the particular injury suffered, rather than for the offense against the public. (e) An accusation of a felon at common law by one of his accomplices, which accomplice was then called an approver.

The federal court system is divided into three levels: the first and lowest level is the USA district courts, the second, intermediate level is the court of appeals, and the Supreme Court is considered the highest court in the USA.

The USA district courts are the general federal trial courts, although in many cases Congress has passed statutes which divert original jurisdiction to these specialized courts or to administrative law judges (ALJs). In these cases, the district courts have jurisdiction to hear appeals from such lower bodies.

The USA courts of appeals are the federal intermediate appellate courts. They operate under a system of mandatory review which means they *must* hear all appeals of right from the lower courts. They can make a ruling of their own on the case, or choose to accept the decision of the lower court. In the latter case, many defendants appeal to the Supreme Court. The highest court is the Supreme Court of the USA, which is considered the court of last resort. It generally is an appellate court that operates under discretionary review.

This means that the Court, through granting of writs of certiorari, can choose which cases to hear. There is generally no right of appeal to the Supreme Court.

In a few situations, like lawsuits between state governments or some cases between the federal government and a state, the Supreme Court becomes the court of original jurisdiction. In addition, the Constitution specifies that the Supreme Court may exercise original jurisdiction in cases affecting ambassadors and other diplomats, in cases in which a state is a party, and cases between the state and another country.

In all other cases the Court has only appellate jurisdiction. It considers cases based on its original jurisdiction very rarely; almost all cases are brought to the Supreme Court on appeal. In practice, the only original jurisdiction cases heard by the Court are disputes between two or more states. Such cases are generally referred to a designated individual, usually a sitting or retired judge, or a well-respected attorney, to sit as a special master and report to the Court with recommendations.

COURTS OF FEDERAL JURISDICTION

The federal court system has limited, though important, jurisdiction.

KEY TAKEAWAYS

Key Points

In the justice system, state courts hear state law, and federal courts hear federal law and sometimes appeals. Federal courts only have the power granted to them by federal law and the Constitution. Courts render their decisions through opinions; the majority will write an opinion and the minority will write a dissent.

Key Terms

Jurisdiction: the power, right, or authority to interpret and apply the law.

Federal system: a system of government based upon democratic rule in which sovereignty and the power to rule is constitutionally divided between a central governing authority and constituent political units (such as states or provinces)

Federal Jurisdiction

The American legal system includes both state courts and federal courts. Generally, state courts hear cases involving state law, although they may also hear cases involving federal law so long as the federal law in question does not grant exclusive jurisdiction to federal courts. Federal courts may only hear cases where federal jurisdiction can be established.

Specifically, the court must have both subject-matter jurisdiction over the matter of the claim and personal jurisdiction over the parties.

The Federal Courts are courts of limited jurisdiction, meaning that they can only exercise the powers that are granted to them by the Constitution and federal laws. For subject matter jurisdiction, the claims in the case must either: raise a federal question, such as a cause of action or defense arising under the Constitution; a federal statute, or the law of admiralty; or have diversity of parties. For example, all of the defendants are from a different state than the plaintiff, and have an amount in controversy that exceeds a monetary threshold (which changes from time to time).

If a Federal Court has subject matter jurisdiction over one or more of the claims in a case, it has discretion to exercise ancillary jurisdiction over other state law claims.

The Supreme Court has "cautioned that Court[s] must take great care to "resist the temptation" to express preferences about [certain types of cases] in the form of jurisdictional rules. Judges must strain to remove the influence of the merits from their jurisdictional rules. The law of jurisdiction must remain apart from the world upon which it operates".

Generally, when a case has successfully overcome the hurdles of standing, Case or Controversy, and State Action, it will be heard by a trial court. The non-governmental party may raise claims or defenses relating to alleged constitutional violation(s) by the government. If the non-governmental party loses, the constitutional issue may form part of the appeal.

Eventually, a petition for certiorari may be sent to the Supreme Court. If the Supreme Court grants certiorari and accepts the case, it will receive written briefs from each side (and schedule oral arguments. The Justices will closely question both parties.

Task 1. Analyze the information, which is in the highlight, and use it in practice.

Task 2. Choose the keywords that best convey the gist of the information.

BUREAUCRATIC REFORM

Bureaucratic reform in the U.S. was a major issue in the late 19th century and the early 20th century.

KEY TAKEAWAYS

Key Points

The five important civil service reforms were the two Tenure of Office Acts of 1820 and 1867, the Pendleton Act of 1883, the Hatch Acts (1939 and 1940) and the CSRA of 1978. The Civil Service Reform Act (the Pendleton Act) is an 1883 federal law that established the USA Civil Service Commission, placing most federal employees on the merit system and marking the end of the so-called "spoils system".

The CSRA was an attempt to reconcile the need for improved performance within bureaucratic organizations with the need for protection of employees.

Key Terms

Merit: Something deserving good recognition.

Merit system: the process of promoting and hiring government employees based on their ability to perform a job, rather than on their political connections.

Spoils system: The systematic replacement of office holders every time the government changed party hands.

Patronage: granting favours, giving contracts or making appointments to office in return for political support

Bureaucratic reform in the USA was a major issue in the late nineteenth century at the national level and in the early twentieth century at the state level.

Proponents denounced the distribution of office by the winners of elections to their supporters as corrupt and inefficient. They demanded nonpartisan scientific methods and credentials be used to select civil servants. The five important civil service reforms were the two Tenure of Office Acts of 1820 and 1867, the Pendleton Act of 1883, the Hatch Acts (1939 and 1940), and the Civil Service Reform Act (CSRA) of 1978.

In 1801, President Thomas Jefferson, alarmed that Federalists dominated the civil service and the army, identified the party affiliation of office holders, and systematically appointed Republicans. President Andrew Jackson in 1829 began the systematic rotation of office holders after four years, replacing them with his own partisans.

By the 1830s, the "spoils system" referred to the systematic replacement of office holders every time the government changed party hands. The Civil Service Reform Act (the Pendleton Act) is an 1883 federal law that established the USA Civil Service Commission.

It eventually placed most federal employees on the merit system and marked the end of the so-called "spoils system". Drafted during the Chester A. Arthur administration, the Pendleton Act served as a response to President James Garfield's assassination by a disappointed office seeker. The new law prohibited mandatory campaign contributions, or "assessments", which amounted to 50-75% of party financing during the Gilded Age. Second, the Pendleton Act required entrance exams for aspiring bureaucrats. One result of this reform was more expertise and less politics among members of the civil service. An unintended result was political parties increasing reliance on funding from business, since they could no longer depend on patronage hopefuls. The CSRA became law in 1978.

TERMINATION

Civil service laws have consistently protected federal employees from political influence, and critics of the system complained that it was impossible for managers to improve performance and implement changes recommended by political leaders.

The CSRA was an attempt to reconcile the need for improved performance with the need for protection of employees. Bureaucratic reform includes the history of civil service reform and efforts to curb or eliminate excessive

KEY TAKEAWAYS

Key Points

A bureaucrat is a member of a bureaucracy and can comprise the administration of any organization of any size. Civil service reform is a deliberate action to improve the efficiency, effectiveness, professionalism, representation and democratic character of a bureaucracy, with a view to promoting better delivery of public goods and services, with increased accountability.

Red tape is excessive regulation or rigid conformity to formal rules that is considered redundant or bureaucratic and hinders or prevents action or decision-making.

The "cutting of red tape" is a popular electoral and policy promise. In the USA, a number of committees have discussed and debated Red Tape Reduction Acts.

Key Terms

Civil service reform: Civil service reform is a deliberate action to improve the efficiency, effectiveness, professionalism, representation and democratic character of a bureaucracy, with a view to promoting better delivery of public goods and services, with increased accountability.

Bureaucracy: Structure and regulations in place to control activity. Usually in large organizations and government operations.

Red tape: A derisive term for regulations or bureaucratic procedures that are considered excessive or excessively time- and effort-consuming.

A bureaucracy is a group of specifically non-elected officials within a government or other institution that implements the rules, laws, ideas, and functions of their institution. In other words, a government administrative unit that carries out the decisions of the legislature or democratically-elected representation of a state.

Bureaucracy may be defined as a form of government: "government by many bureaus, administrators, and petty officials. A government is defined as: "the political direction and control exercised over the actions of the members, citizens, or inhabitants of communities, societies, and states; direction of the affairs of a state, community, etc ".

On the other hand democracy is defined as: "government by the people; a form of government in which the supreme power is vested in the people and exercised directly by them or by their elected agents under a free electoral system", thus not by non-elected bureaucrats.

A bureaucrat is a member of a bureaucracy and can comprise the administration of any organization of any size, though the term usually connotes someone within an institution of government. Bureaucrat jobs were often "desk jobs" (the French for "desk" being bureau, though bureau can be translated as "office").

Civil Service Reform

A civil servant is a person in the public sector employed for a government department or agency. The term explicitly excludes the armed services, although civilian officials can work at "Defence Ministry" headquarters. Civil service reform is a deliberate action to improve the efficiency, effectiveness, professionalism, representation and democratic character of a bureaucracy, with a view to promoting better delivery of public goods and services, with increased accountability. Such actions can include

- data gathering and analysis;
- organizational restructuring;
- improving human resource management and training;
- enhancing pay & benefits while assuring sustainability under overall fiscal constraints;
- strengthening measures for public participation;
- transparency;
- combating corruption.

Important differences between developing countries and developed countries require that civil service and other reforms first rolled out in developed countries be carefully adapted to local conditions in developing countries.

The Problem of Bureaucratic Red Tape

Bureaucratic Red Tape is excessive regulation or rigid conformity to formal rules that is considered redundant or bureaucratic and hinders or prevents action or decision-making.

It is usually applied to governments, corporations and other large organizations. Red tape generally includes filling out paperwork, obtaining licenses, having multiple people or committees approve a decision and various low-level rules that make conducting one's affairs slower, more difficult, or both. Red tape can include "filing and certification requirements, reporting, investigation, inspection and enforcement practices, and procedures".

The "cutting of red tape" is a popular electoral and policy promise. In the USA, a number of committees have discussed and debated Red Tape Reduction Acts.

The Pendleton Civil Service Reform of USA is a federal law established in 1883 that stipulated that government jobs should be awarded on the basis of merit.

The act provided selection of government employees competitive exams, rather than ties to politicians or political affiliation. It also made it illegal to fire or demote government employees for political reasons and prohibits soliciting campaign donations on Federal government property.

To enforce the merit system and the judicial system, the law also created the USA Civil Service Commission. A crucial result was the shift of the parties to reliance on funding from business, since they could no longer depend on patronage hopefuls. The Paperwork Reduction Act of 1980 is a USA federal law enacted in 1980 that gave authority over the collection of certain information to the Office of Management and Budget (OMB) established with specific authority to regulate matters regarding federal information and to establish information policies. These information policies were intended to reduce the total amount of paperwork handled by the USA government and the general public.

Task 1. Analyze the information, which is in the highlight, and use it in practice.

Task 2. Choose the keywords that best convey the gist of the information.

DEVOLUTION

A byproduct is that it has become harder to track internal transfers to tax havens in Consolidated Corporate Income Tax returns. Devolution is the statutory granting of powers from central government to government at a regional, local, or state level.

KEY TAKEAWAYS

Key Points

Devolution differs from federalism in that the devolved powers of the subnational authority may be temporary and ultimately reside in central government.

In the USA, the District of Columbia is a devolved government. The District is separate from any state and has its own elected government. Local governments like municipalities, counties, parishes, boroughs and school districts are devolved. They are established and regulated by the constitutions or laws of the state in which they reside.

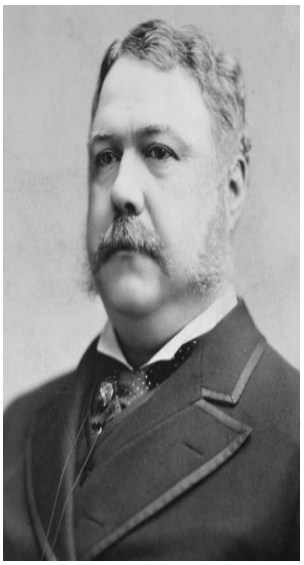
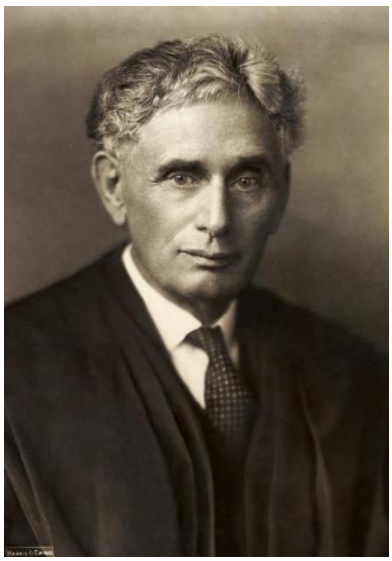
Key Terms

Statutory: Of, relating to, enacted or regulated by a statute.

Devolution is the statutory granting of powers from central government to government at a regional, local, or state level. The power to make legislation relevant to the area may also be granted. Legislation creating devolved parliaments or assemblies can be repealed or amended by central government in the same way as any statute. Federal systems differ in that state or provincial government is guaranteed in the constitution.

The District of Columbia in the USA offers an illustration of devolved government.

It operates much like other state with its own laws and court system. However, the broad range of powers reserved for the 50 states cannot be voided by any act of U.S. federal government. The District of Columbia is constitutionally under the control of the USA Congress, which created the current District government. Any law passed by District legislature can be nullified by Congressional action. Indeed, the District government itself could be significantly altered by a simple majority vote in Congress.

Chester A. Arthur: The Pendleton Act was passed under Chester A. Arthur's administration.
Louis Brandeis: Brandeis developed the idea of case law and the importance of stare decisis. His opinion in New Ice Co. set the stage for new federalism.
District of Colmbia: The District of Columbia is an example of devolved government.

PRIVATIZATION

In the USA, local governments are subdivisions of states, while the federal government, state governments and federally recognized American Indian tribal nations are recognized by the USA Constitution. Theoretically, a state could abolish all local governments within its borders. Local governmental entities like municipalities, counties, parishes, boroughs and school districts are devolved. This is because they are established and regulated by the constitutions or laws of the state in which they reside. In most cases, U.S. state legislatures have the power to change laws that affect local government. The governor of some states may have power over local government affairs. Privatization is the process of transferring ownership of a business from the public sector to the private sector.

KEY TAKEAWAYS

Key Points

Privatization can mean government outsourcing of services or functions to private firms, e.g. revenue collection, law enforcement, and prison management.

Privatization has been used to describe two unrelated transactions: the buying of all outstanding shares of a publicly traded company by a single entity, making the company private, or the demutualization of a mutual organization or cooperative to form a joint stock company. Outsourcing is the contracting out of a business process, which an organization may have previously performed internally or has a new need for, to an independent organization from which the process is purchased back as a service.

Though the practice of purchasing a business function – instead of providing it internally – is a common feature of any modern economy, the term outsourcing became popular in America near the turn of the 21st century.

Key Terms

Outsourcing: The transfer of a business function to an external service provider

Privatization: The transfer of a company or organization from government to private ownership and control. Privatization can have several meanings.

Primarily, it is the process of transferring ownership of a business, enterprise, agency, public service, or public property from the public sector (a government) to the private sector, either to a business that operates for a profit or to a non-profit organization. The term can also mean government outsourcing of services or functions to private firms, e.g. revenue collection, law enforcement, and prison management.

An outsourcing deal may involve transfer of the employees and assets involved to the outsourcing business partner. The definition of outsourcing includes both foreign or domestic contracting, which may include offshoring, described as "a company taking a function out of their business and relocating it to another country".

Some privatization transactions can be interpreted as a form of a secured loan and are criticized as a "particularly noxious form of governmental debt". In this interpretation, the upfront payment from the privatization sale corresponds to the principal amount of the loan, while the proceeds from the underlying asset correspond to secured interest payments – the transaction can be considered substantively the same as a secured loan, though it is structured as a sale. This interpretation is particularly argued to apply to recent municipal transactions in the USA.

Particularly for fixed term, such as the 2008 sale of the proceeds from Chicago parking meters for 75 years. It is argued that this is motivated by "politicians" desires to borrow money surreptitiously," due to legal restrictions on and political resistance to alternative sources of revenue, namely raising taxes or issuing debt.

Outsourcing in the USA

"Outsourcing" became a popular political issue in the USA, having been confounded with offshoring, during the 2004 U.S. presidential election. The political debate centered on outsourcing's consequences for the domestic U.S. workforce. Democratic U.S. presidential candidate John Kerry criticized U.S. firms that outsource jobs abroad or that incorporate overseas in tax havens to avoid paying their "fair share" of U.S. taxes during his 2004 campaign, calling such firms "Benedict Arnold corporations".

Criticism of outsourcing, from the perspective of U.S. citizens, generally revolves around the costs associated with transferring control of the labor process to an external entity in another country. A Zogby International poll conducted in August 2004 found that 71% of American voters believed that "outsourcing jobs overseas" hurt the economy while another 62% believed that the U.S. government should impose some legislative action against companies that transfer domestic jobs overseas, possibly in the form of increased taxes on companies that outsource.

Union Busting: Ohio, 1884

Union busting is one possible cause of outsourcing. As unions are disadvantaged by union busting legislation, workers lose bargaining power and it becomes easier for corporations to fire them and ship their job overseas.

Another given rationale is the high corporate income tax rate in the U.S. relative to other OECD nations, and the uncommonness of taxing revenues earned outside of U.S. jurisdiction. However, outsourcing is not solely a U.S. phenomenon as corporations in various nations with low tax rates outsource as well, which means that high taxation can only partially, if at all, explain US outsourcing.

For example, the amount of corporate outsourcing in 1950 would be considerably lower than today, yet the tax rate was actually higher in 1950. It is argued that lowering the corporate income tax and ending the double-taxation of foreign-derived revenue (taxed once in the nation where the revenue was raised, and once from the U.S.) will alleviate corporate outsourcing and make the U.S. more attractive to foreign companies.

However, while the US has a high official tax rate, the actual taxes paid by US corporations may be considerably lower due to the use of tax loopholes, tax havens, and "gaming the system". Rather than avoiding taxes, outsourcing may be mostly driven by the desire to lower labor costs (see standpoint of labor above). Sarbanes-Oxley has also been cited as a factor for corporate flight from U.S. jurisdiction.

Task 1. Analyze the information, which is in the highlight, and use it in practice.

Task 2. Remember the notions.

Outsourcing ['autˌsɔːsɪŋ] – аутсорсинг (передача независимому подрядчику некоторых бизнес-функций или частей бизнес-процесса предприятия)

outsourcing market – рынок услуг по аутсорсингу

outsourcing partnership — аутсорсинговое сотрудничество, партнёрство

SUNSHINE LAWS

The Sunshine Laws enforce the principle of liberal democracy that governments are typically bound by a duty to publish and promote openness.

KEY TAKEAWAYS

Key Points

They establish a right-to-know legal process by which requests may be made for government held information to be received freely or at minimal cost, barring standard exceptions. In the USA the Freedom of Information Act was signed into law by President Lyndon B. Johnson on July 4, 1966. It went into effect the following year.

The Freedom of Information Act (FOIA) is a federal freedom of information law that allows for the full or partial disclosure of previously unreleased information and documents controlled by the USA government. The Act applies only to federal agencies.

However, all of the states, as well as the District of Columbia and some territories, have enacted similar statutes to require disclosures by agencies of the state and of local governments, although some are significantly broader than others.

The Electronic Freedom of Information Act Amendments of 1996 (E-FOIA) stated that all agencies are required by statute to make certain types of records, created by the agency on or after 1996, available electronically. A major issue in released documentation is government "redaction" of certain passages deemed applicable to the Exemption section of the FOIA. The extensive practice by the FBI has been considered highly controversial, given that it prevents further research and inquiry.

Key Terms

Redaction: The process of editing or censoring.

Introduction

Freedom of information laws by country detail legislation that gives access by the general public to data held by national governments. They establish a "right-to-know" legal process by which requests may be made for government-held information, to be received freely or at minimal cost, barring standard exceptions. Variously referred to as open records, or sunshine laws in the USA, governments are typically bound by a duty to publish and promote openness. In many countries there are constitutional guarantees for the right of access to information, but usually these are unused if specific support legislation does not exist.

Freedom of Information Act

The Act defines agency records subject to disclosure, outlines mandatory disclosure procedures and grants nine exemptions to the statute. The act explicitly applies only to executive branch government agencies. These agencies are under several mandates to comply with public solicitation of information. Along with making public and accessible all bureaucratic and technical procedures for applying for documents from that agency.

Agencies are also subject to penalties for hindering the process of a petition for information. If "agency personnel acted arbitrarily or capriciously with respect to the withholding, a Special Counsel shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding".

In this way, there is recourse for one seeking information to go to a federal court if suspicion of illegal tampering or delayed sending of records exists. However, there are nine exemptions, ranging from a withholding "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and "trade secrets" to "clearly unwarranted invasion of personal privacy".

The Electronic Freedom of Information Act Amendments were signed by President Bill Clinton on October 2, 1996. The Electronic Freedom of Information Act Amendments of 1996 (E-FOIA) stated that all agencies are required by statute to make certain types of records, created by the agency on or after 1996, available electronically.

Agencies must provide electronic reading rooms for citizens to use to have access to records. Given the large volume of records and limited resources, the amendment extended the agencies' required response time to FOIA requests. Formerly, the response time was ten days and the amendment extended it to twenty days.

Notable Cases

A major issue in released documentation is government "redaction" of certain passages deemed applicable to the Exemption section of the FOIA. Federal Bureau of Investigation (FBI) officers in charge of responding to FOIA requests have prevented further research by using extensive use of redaction of documents in print or electronic form. This has brought into question just how one can verify that they have been given complete records in response to a request.

FBI Redaction: In the early 1970s, the US government conducted surveillance on ex-Beatle John Lennon. This is a letter from FBI director J. Edgar Hoover to the Attorney General. After a 25-year Freedom of Information Act Request battle initiated by historian Jon Wiener, the files were released.

Here is one page from the file. This first release received by Wiener had some information missing – it had been blacked out presumably with magic marker – or what is termed "redacted". A subsequent version was released which showed almost all of the previously blacked-out text. This trend of unwillingness to release records was especially evident in the process of making public the FBI files on J. Edgar Hoover.

Of the 164 files and about eighteen thousand pages collected by the FBI, two-thirds were withheld from Athan G. Theoharis and plaintiff, most notably one entire folder entitled the "White House Security Survey. "

J. Edgar Hoover: John Edgar Hoover (1895-1972) was the first Director of the Federal Bureau of Investigation (FBI) of the USA. Appointed director of the Bureau of Investigation – predecessor to the FBI – in 1924, he was instrumental in founding the FBI in 1935, where he remained director until his death in 1972 at age 77. Hoover is credited with building the FBI into a large and efficient crime-fighting agency, and with instituting a number of modernizations to police technology, such as a centralized fingerprint file and forensic laboratories.

Task 1. Analyze the information, which is in the highlight, and use it in practice.

Task 2. Transfer the given information from the passages onto a table.

№	Activity			
	Event	When	Where	Score

SUNSET LAWS

A sunset provision is a measure within a statute that provides that a law shall cease to be in effect after a specific date.

KEY TAKEAWAYS

Key Points

In American federal law parlance, legislation that is meant to renew an expired mandate is known as a reauthorization act or extension act. Reauthorizations of controversial laws or agencies may be preceded by extensive political wrangling before final votes.

The Sedition Act of 1798 was a political tool used by John Adams and the Federalist Party to suppress opposition. It contained a sunset provision ensuring that the law would cease at the end of Adams' term (the date the law would cease) so that Democratic Republicans against the Federalist Party could not use it.

Several surveillance portions of the USA Patriot Act were set to originally expire on December 31, 2005. These were later renewed but expired again on March 10, 2006, and was renewed once more in 2010. The Congressional Budget Act governs the role of Congress in the budget process. Among other provisions, it affects Senate rules of debate during the budget reconciliation, not least by preventing the use of the filibuster against the budget resolutions. In the Economic Growth and Tax Relief Reconciliation Act of 2001 the US Congress enacted a phase-out of the federal estate tax over the following 10 years, so that the tax would be completely repealed in 2010.

Key Terms

Warrant: Authorization or certification; sanction, as given by a superior.
Mandate: An official or authoritative command; a judicial precept.
Sedition: the organized incitement of civil disorder against authority/ state.

Sunset Laws

A sunset provision or clause in public policy is a measure within a statute, regulation, or other law that provides for the law to cease to have effect after a specific date, unless further legislative action is taken to extend the law.

Most laws do not have sunset clauses and therefore remain in force indefinitely.

The Congressional Budget Act governs the role of Congress in the budget process.

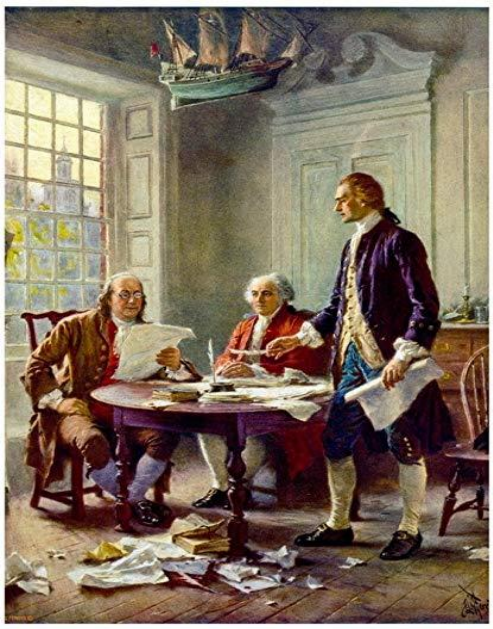
Among other provisions, it affects Senate rules of debate during the budget reconciliation, not least by preventing the use of the filibuster against the budget resolutions.

The Byrd rule was adopted in 1985 and amended in 1990 to modify the Budget Act and is contained in section 313. The rule allows Senators to raise a point of order against any provision held to be extraneous, where extraneous is defined according to one of several criteria. The definition of extraneous includes provisions that are outside the jurisdiction of the committee or that do not affect revenues or outlays.

In the Economic Growth and Tax Relief Reconciliation Act of 2001, the US Congress enacted a phase-out of the federal estate tax over the following 10 years, so that the tax would be completely repealed in 2010. However, while a majority of the Senate favored the repeal, there was not a three-fifths supermajority in favor. Therefore, a sunset provision in the Act reinstated the tax to its original levels on January 1, 2011 in order to comply with the Byrd Rule.

As of April 2011, Republicans in Congress have tried to repeal the sunset provision, but their efforts have been unsuccessful. Uncertainty over the prolonged existence of the sunset provision has made estate planning more complicated.

John Adams: John Adams and his Federalist Party used a sunset provision in the Sedition Act of 1798 to ensure that the Sedition Act would cease once Adams was out of office. Several surveillance portions of the USA Patriot Act were originally set to expire on December 31, 2005. These were later renewed, but expired again on March 10, 2006, and was renewed once more in 2010. The Patriot Act is a sunset law on wiretapping for terrorism cases, wiretapping for computer fraud and abuse, sharing of wiretap and foreign intelligence information, warranted seizure of voicemail messages, computer trespasser communications, nationwide service or warrants for electronic evidence, and privacy violation of civil liability.



INCENTIVES FOR EFFICIENCY & PRODUCTIVITY

Efficiency is the extent to which effort is used for a task and productivity is the measure of the efficiency of production.

KEY TAKEAWAYS

Key Points

The Efficiency Movement played a central role in the Progressive Era (1890-1932) in the USA. The result was strong support for building research universities and schools of business and engineering, municipal research agencies, as well as reform of hospitals and medical schools and the practice of farming.

At the national level, productivity growth raises living standards because more real income improves people's ability to purchase goods and services, enjoy leisure, improve housing and education and contribute to social environment programs.

Key Terms

Operationalization: The act or process of operationalizing.

Manifold: Exhibited at diverse times or in various ways.

Efficiency describes the extent to which time or effort is well used for the intended task or purpose for relaying the capability of a specific application of effort to produce a specific outcome effectively with a minimum amount or quantity of waste, expense or unnecessary effort. The Efficiency Movement was a major movement in the USA, Britain and other industrial nations in the early 20th century that sought to identify and eliminate waste in all areas of the economy and society and to develop and implement best practices.

The concept covered mechanical, economic, social and personal improvement. The quest for efficiency promised effective, dynamic management rewarded by growth.

Adherents argued that all aspects of the economy, society and government were riddled with waste and inefficiency. Everything would be better if experts identified the problems and fixed them. The result was strong support for building research universities and schools of business and engineering, municipal research agencies, as well as reform of hospitals and medical schools and the practice of farming.

Perhaps the best known leaders were engineers Frederick Taylor (1856-1915), who used a stopwatch to identify the smallest inefficiencies, and Frank Gilbreth (1868-1924).

Frederick Winslow Taylor: a mechanical engineer by training, is often credited with inventing scientific management and improving industrial efficiency.

Productivity is a measure of the efficiency of production. Productivity is a ratio of production output to what is required to produce it. The measure of productivity is defined as a total output per one unit of a total input. In order to obtain a measurable form of productivity, operationalization of the concept is necessary. A production model is a numerical expression of the production process that is based on production data.

The benefits of high productivity are manifold. At the national level, productivity growth raises living standards because more real income improves people's ability to purchase goods and services, enjoy leisure, improve housing and education and contribute to social and environmental programs. Productivity growth is important to the firm because more real income means that the firm can meet its obligations to customers, suppliers, workers, shareholders and governments and still remain competitive.

PROTECTING WHISTLEBLOWERS

There exist several U.S. laws protecting whistleblowers, people who inform authorities of alleged dishonest or illegal activities.

KEY TAKEAWAYS

Key Points

Alleged misconduct may be classified as a violation of a law, rule, regulation or a direct threat to public interest in the realms of fraud, health/safety violations and corruption.

Investigation of retaliation against whistleblowers falls under the jurisdiction of the Office of the Whistleblower Protection Program (OWPP) of the Department of Labor's Occupational Safety and Health Administration (OSHA). Whistleblowers frequently face reprisal at the hands of the accused organization, related organizations, or under law.

Key Terms

Qui tam: A writ whereby a private individual who assists a prosecution can receive all or part of any penalty imposed. A whistle-blower is a person who tells the public or someone in authority about alleged dishonest or illegal activities occurring in a government department, private company or organization.

The misconduct may be classified as a violation of a law, rule, regulation or a direct threat to public interest in the realms of fraud, health/safety violations and corruption.

Whistle-blowers may make their allegations internally or externally to regulators, law enforcement agencies or the media. One of the first laws that protected whistle-blowers was the 1863 USA False Claim Act, which tried to combat fraud by suppliers of the USA government during the Civil War. The act promises whistle-blowers a percentage of damages won by the government and protects them from wrongful dismissal.

The Lloyd-La Follette Act of 1912 guaranteed the right of federal employees to furnish information to Congress. The first US environmental law to include employee protection was the Clean Water Act of 1972. Similar protections were included in subsequent federal environmental laws including the Safe Drinking water Act (1974), Energy Reorganization Act of 1974, and the Clean Air Act (1990). In passing the 2002 Sarbanes-Oxley Act, the Senate Judiciary Committee found that whistleblower protections were dependent on the vagaries of varying state statutes.

Clean Air Act: The signing of the Clean Air Act, the first U.S. environmental law offering employee protection as a result of whistleblower action.

Whistleblowers frequently face reprisal at the hands of the accused organization, related organizations, or under law. Investigation of retaliation against whistleblowers falls under jurisdiction of the Office of the Whistleblower Protection Program (OWPP) of the Department of Labor's Occupational Safety and Health Administration (OSHA).

The patchwork of laws means that victims of retaliation must determine the deadlines and means for making proper complaints. Those who report a false claim against the federal government and as a result suffer adverse employment actions may have up to six years to file a civil suit for remedies under the US False Claims Act. Under a qui tam provision, the original source for the report may be entitled to a %age of what the government recovers from the offenders.

Task 1. Analyze the information, which is in the highlight, and use it in practice.

Task 2. Choose the keywords that best convey the gist of the information.

Task 3. Read the text and pick up the essential details in the form of quick notes.

Task 4. Remember the notion.

Whistle(-)blower – информатор (сообщающий собственному руководству, властям или СМИ о недостатках либо злоупотреблениях в деятельности своей организации) The Whistleblower Protection Act of 1989 – закон "О защите федеральных служащих, информирующих о недостатках в работе своих ведомств"от 1989 года.

Many acts of corruption are discovered thanks to denouncements from whistleblowers. – Многие случаи коррупции раскрываются благодаря разоблачительной информации, полученной от информаторов. An employee who was fired after filing a whistleblower complaint was rehired last week. – Служащий, уволенный после того, как он подал разоблачающее заявление, был восстановлен на прошлой неделе.

Task 5. Transfer the given information from the passages onto a table.

№	Activity			
	Event	When	Where	Score
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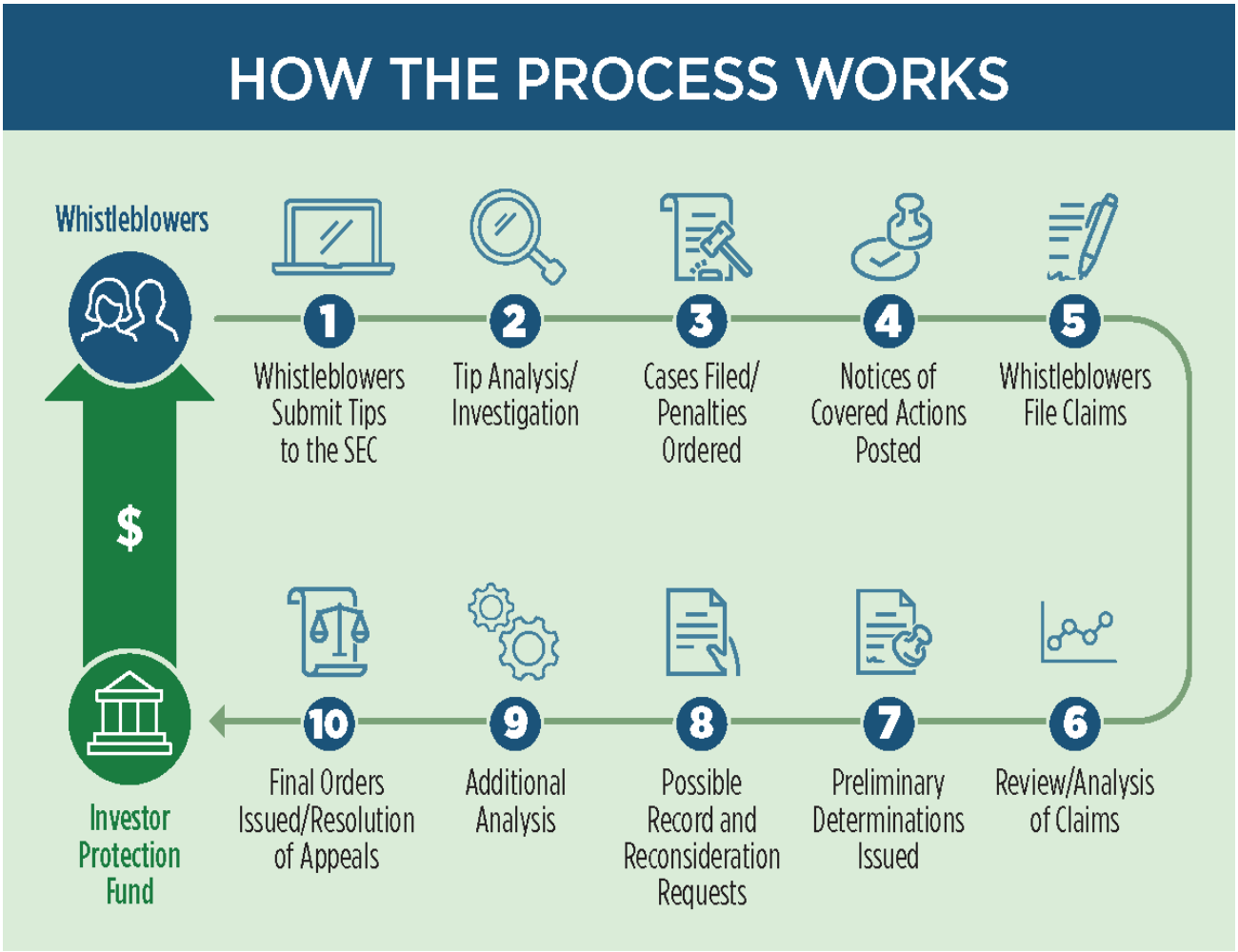


CHAPTER III. THE AMERICAN JUDICIAL SYSTEM

INTRODUCTION

The USA is a federal system, with a central federal government and individual governments for each of the fifty states. As with the other branches of government, each of the states has their own complete judicial system (state courts) as does the USA itself (federal courts). Although there are important differences between the federal courts and between the various state court systems, they do share some common characteristics.

Each judicial system has a number of courts of original jurisdiction, in which cases are originally filed and tried. The jurisdiction of these trial courts can be both geographically and subject matter based. Each system also has a smaller number of intermediate appellate courts. These courts hear appeals from the trial courts. An appeal is a claim by the losing party that the lower court has made a mistake of law. Usually, a losing party is entitled to one appeal as a matter of right. Each court system also has a supreme court, which hears appeals from the appellate courts. Appeals to the Supreme Court are usually discretionary, that is the court may choose whether or not to hear the appeal.

FEDERAL COURTS

At the time of the adoption of the USA Constitution in 1789, each of the original thirteen states had a fully functioning judicial system. These state courts handled all judicial matters, such as criminal cases, private civil disputes, and family law matters such as divorce and adoption, etc. The framers of the Constitution agreed, however, that a national judiciary was also necessary, at the very least a Supreme Court, which could be the final arbiter on matters of federal law. Therefore, Article III of the Constitution provides for a Supreme Court and gives Congress the power to establish other, lower courts.

As one of its initial acts, the first Congress established not only the Supreme Court, but also a system of trial courts (District Courts) and intermediate Appeals Courts (Courts of Appeal). The Supreme Court has nine justices.

At present, the USA is divided into 91 districts, each with a District Court staffed by between two and 28 judges. There are 13 Courts of Appeal with between six and 28 judges each. Courts of Appeal normally sit in panels of three judges to hear cases.

The USA Constitution specifies the method of selection and terms of office for all federal judges. These methods were chosen to make federal judges as independent of the other branches of government and of public pressure as possible.

Federal judges are appointed by the President of the USA, and must be confirmed by a majority vote of the Senate. They serve for life, may not have their salaries reduced, and may only be removed from office for serious offenses through the impeachment process.

This requires impeachment by the House of Representatives and conviction by a two-thirds vote of the Senate. In more than two hundred years, only seven federal judges have been removed from office. The subject-matter jurisdiction of a court refers to the kinds of cases which it may hear. The subject-matter jurisdiction of the Federal courts is limited by Article III of the Constitution.

Unlike state courts, which are usually courts of general jurisdiction (they can hear most kinds of cases) federal courts may only hear cases that are listed in Article III as within "the judicial power of the USA". The framers included only such cases in which it was felt that there was a special need for a federal, as opposed to a state court.

Federal courts may hear controversies between different states. Before the adoption of the Constitution, there had been disputes between the states, principally over borders, and it was thought necessary to have such cases decided by the Supreme Court.

The federal courts may also hear cases in which the USA is a party, in order to protect the interests of the USA from the possible bias of state courts.

Perhaps the most important grant of jurisdiction today is over cases "arising under the Constitution and laws of the USA" (often called "federal question" jurisdiction).

This gives federal courts the power to interpret and enforce the USA Constitution and all laws passed by Congress. This guarantees that all citizens will enjoy the same Constitutional rights as citizens in other states. Many cases brought to enforce Constitutional and civil rights have been brought in the federal courts, because the parties believe that a federal judge, serving for life, will be more likely to issue an unpopular opinion than would a state judge who will have to run for reelection.

Another, more controversial grant of jurisdiction to the federal courts is known as "diversity jurisdiction". This applies to controversies between citizens of different states and controversies between citizens of the USA and citizens of a foreign country. The main purpose of this grant of jurisdiction is to prevent bias against an out-of-state party in favor of an in-state party. The fact that federal judges are appointed by the President and are not subject to reelection is thought to minimize the possibility of local bias.

There is some question, however, about the extent of such bias, and therefore the need to have federal judges decide these cases.

In diversity cases, the governing substantive law will be state law, rather than federal law. Federal judges are required by the Constitution to apply state law where applicable.

Most grants of jurisdiction to the federal courts, including federal question and diversity, are concurrent, rather than exclusive. This means that the plaintiffs may bring such cases in either a federal or state court. It may happen, therefore, that a case raising a constitutional claim or based on a federal statute may end up in state court. Just as a federal judge may have to apply state law in a diversity case, a state judge may have to apply federal law. All judges, therefore, must be familiar with both federal and state law.

In concurrent jurisdiction cases, plaintiff has the original choice of whether to bring the case in federal or state court. If plaintiff properly brings the case in federal court, then the defendant may not transfer it to state court. If, however, plaintiff chooses to bring a case over which both the state and federal courts have concurrent jurisdiction in a state court, the defendant may have the case transferred, or “removed” to federal court. If neither party wants it heard in federal court, then it remains in state court.

In certain cases, Congress has chosen to make federal jurisdiction exclusive, rather than concurrent. These cases may only be brought and heard in federal court. This is usually reserved for situations where Congress wants the law decided only by federal courts to provide more uniformity than if the case might be heard in any one of fifty state courts.

Examples of grants of exclusive jurisdiction are cases involving admiralty and maritime law, bankruptcy, and trademark and copyright law.

With few exceptions, once a case starts in either state or federal court, the case remains in that court system throughout, including on appeal. Cases in federal court may be appealed first to the federal Court of Appeals for that particular circuit; then by writ of *certiorari* to the USA Supreme Court. Cases heard in a state court must be appealed through the state court system (usually to an intermediate appellate court and then to the state supreme court). Only if a case in state court contains a significant issue of federal law may it be appealed to the USA Supreme Court after being heard by the state supreme court.

All appeals to the USA Supreme Court, whether from a state Supreme Court or from a federal Court of Appeals, are discretionary. The person bringing the appeal (called the petitioner) files a petition for a writ of *certiorari* with the Supreme Court. The Court has total discretion as to whether it wants to hear a particular case or not. It takes four votes from the nine justices to grant the writ of certiorari and hear the case. The Court usually basis its decision on the importance of the legal issue involved to the country as a whole.

When issuing decisions, all courts must follow binding precedent – that is their decisions must follow any rulings made by courts above them.

On questions of the interpretation of the USA Constitution and statutes passed by Congress, the USA Supreme Court has the final say. All other courts, both federal and state, must follow any precedent set by the Supreme Court. All USA District Courts must follow the interpretation given by the Court of Appeal for the circuit in which it sits.

Sometimes, different circuits reach contradictory results on a particular issue.

This means that the Constitution may occasionally be interpreted differently in different states. Often, such a "split in the circuits" prompts the Supreme Court to grant *certiorari* on the issue involved, so that the law will be uniform throughout the country.

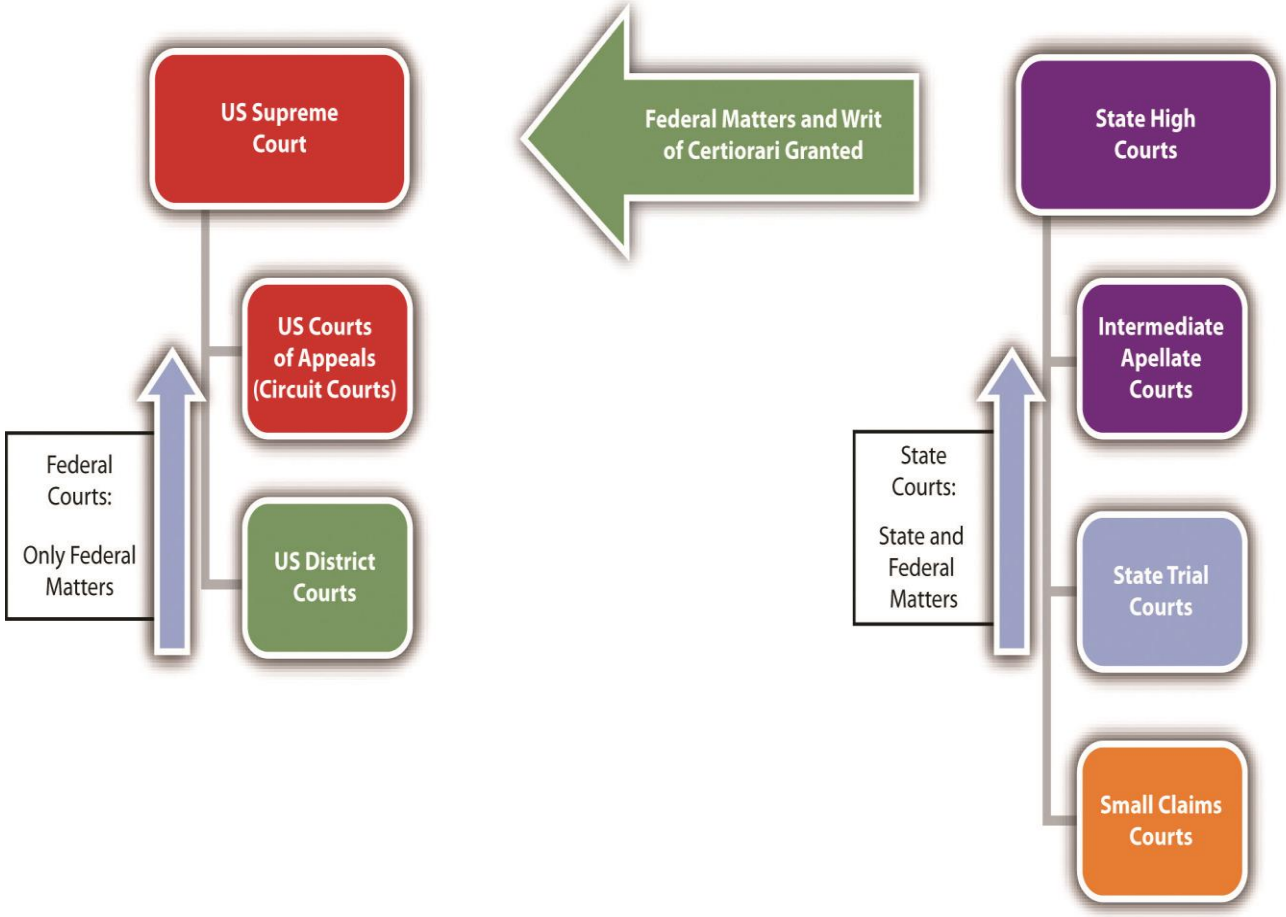
State courts are bound to follow precedent set by the Supreme Court and by the Courts of Appeals on issues of federal law, but not as to state law. Each state supreme court is free to interpret the laws of its state as it sees fit, as long as the interpretation does not violate the USA Constitution. All lower courts in the state must follow state supreme court precedent on issues of state law, and federal courts in the state must do likewise.

The doctrine of *stare decisis* is somewhat different than that of precedent. *Stare decisis* is the desire of most courts to follow their own precedent, even when they are not required to. Once the Supreme Court has decided an issue of federal law, they are free to change their mind in some later case.

But they are normally quite reluctant to do so, even if there has been a change of justices on the Court and the new members do not agree with the old ruling. They are much more likely to distinguish the older case when asked to apply it in a slightly different situation. In this way, the older doctrine may change, but more gradually, over time.

The Supreme Court has the power to and does occasionally completely reverse an existing precedent. Although they can do so both as to statutory and constitutional issues, they often state that they are less likely to do so in matters of statutory construction. This is because if Congress disagrees with the Court's interpretation of a statute, it may amend the law to change the result. If the Supreme Court feels strongly, however, that they have misinterpreted the Constitution, only they can change the result, unless the difficult cumbersome process of amending the Constitution is used quite rare.

Task 1. Analyze the information, which is in the highlight, & use it in practice.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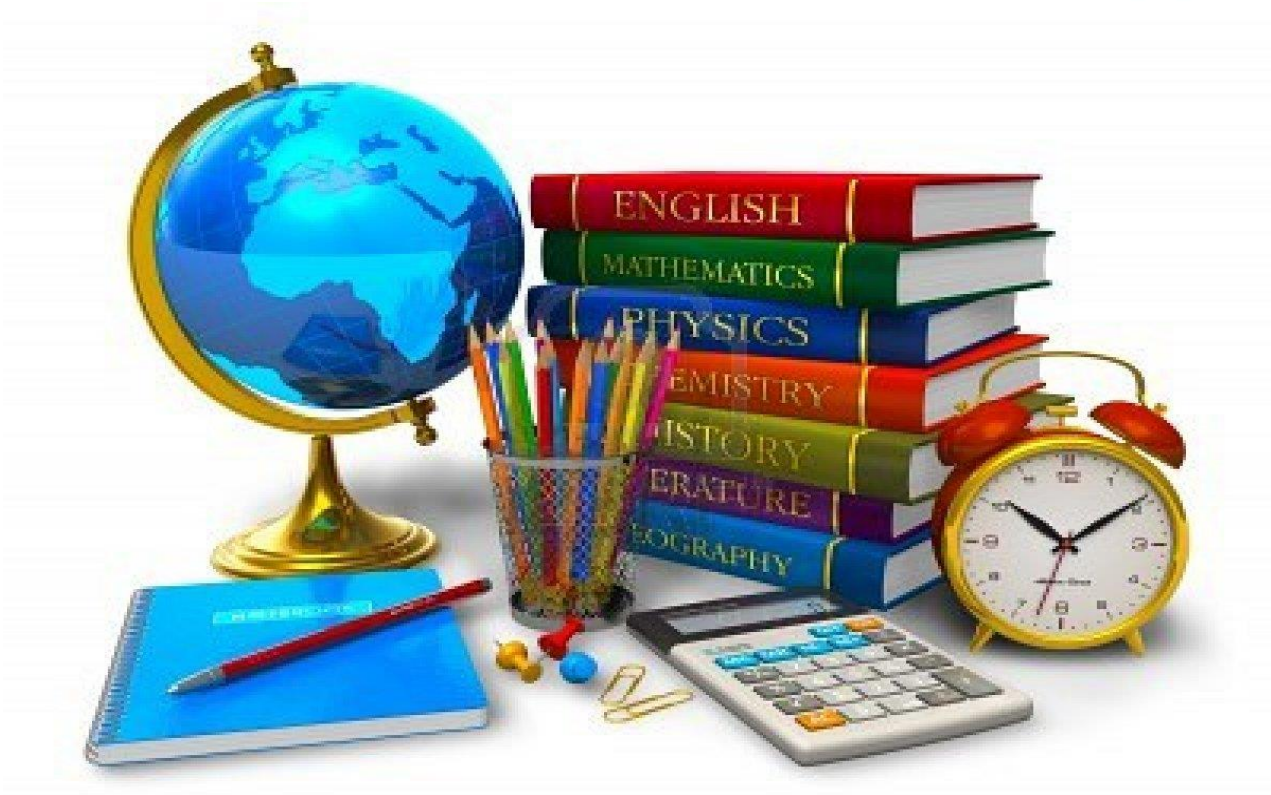
US District Courts
State Courts:
State and Federal Matters
State Trial Courts
Small Claims Courts


ENGLISH
MATHEMATICS
PHYSICS

CHAPTER IV. LEGAL SYSTEMS OF THE WORLD

INTRODUCTION

The contemporary legal systems of the world are generally based on one of four basic systems: civil law, common law, statutory law, religious law or combinations of these.

However, the legal system of each country is shaped by its unique history and so incorporates individual variations. The science that studies Law at the level of legal systems is called *Comparative Law*. Both *civil* (*Roman*) and *common law* systems can be considered the most widespread in the world: civil law because it is the most widespread by landmass, and common law because it is employed by the greatest number of people.

Civil law

The source of law that is recognized as authoritative is codifications in a constitution or statute passed by legislature, to amend a code. While the concept of codification dates back to the Code of Hammurabi in Babylonca in 1790 B.C. Civil law systems derive from the Roman Empire, more particularly, the *Corpus Juris Civilis* issued by the Emperor Justinian ca. A.D. 529. This was an extensive reform of the law in the Byzantine Empire, bringing it together into codified documents. Civil law was partly influenced by religious laws such as Canon law and Islamic law. Civil law today, in theory, is interpreted rather than developed or made by judges. Only legislative enactments (rather than legal precedents, as in common law) are considered legally binding. Scholars of comparative law and economists promoting the legal origins theory usually subdivide civil law into four distinct groups:

French civil law: in France, the Benelux countries, Italy, Romania, Spain and former colonies of those countries.

German civil law: in Germany, Austria, Russia, Switzerland, Estonia, Latvia, Bosnia & Herzegovina, Croatia, Kosovo, Macedonia, Montenegro, Slovenia, Serbia, Greece, Portugal & its former colonies, Turkey, & East Asian countries including Japan, South Korea & Taiwan (China).

Scandinavian civil law: in Denmark, Norway and Sweden. As historically integrated in the Scandinavian cultural sphere, Finland and Iceland also inherited the system.

Chinese law: a mixture of civil and socialist law in use in the People's Republic of China.

Some of these legal systems are often more correctly said to be of hybrid nature.

Napoleonic to Germanistic influence (Italian civil law)

The Italian civil code of 1942 replaced the original one of 1865, introducing germanistic elements due to the geopolitical alliances of the time. The Italian approach has been imitated by other countries including the Netherlands (1992), Argentina (2014), Brazil (2002), Portugal (1966). Most of them have innovations introduced by the Italian legislation, including the unification of the civil and commercial codes.

Germanistic to Napoleonic influence (Swiss civil law)

The Swiss civil code is considered mainly influenced by the German civil code and partly influenced by the French civil code. The civil code of the Republic of Turkey is a slightly modified version of the Swiss code, adopted in 1926.

ARGENTINE

The Spanish legal tradition had a great influence on the Civil Code of Argentina, basically a work of the Argentine jurist Dalmacio Vélez Sársfield, who dedicated five years of his life on this task. The Civil Code came into effect on 1 January 1871.

Beyond the influence of the Spanish legal tradition, the Argentinian Civil Code was also inspired by the Draft of the Brazilian Civil Code, the Draft of the Spanish Civil Code of 1851, the Napoleonic code and the Chilean Civil Code.

The sources of this Civil Code also include various theoretical legal works, mainly of the great French jurists of the 19th century. It was the first Civil Law that consciously adopted as its cornerstone the distinction between i. rights from obligations and ii. real property rights, thus distancing itself from the French model.

The Argentinian Civil Code was in effect in Paraguay, as per a Paraguayan law of 1880, until the new Civil Code went in force in 1987. In Argentina, this 1871 Civil Code remained in force until August 2015, when it was replaced by the new *Code.* During the second half of the 20th century, the German legal theory became increasingly influential in Argentina.

BRAZIL

Based on the German, Italian, French and Portuguese doctrine and codes. However, in 2004 the Federal Supreme Court (STF) have gained the authority to create binding precedents about Constitutional norms whose validity, interpretation and eficacy are controversial among the judiciary organs or among these and the public administration. Such controversy must cause juridical unsafety and relevant multiplication of prossecutions about an identical theme for a binding precedent to be created. The STF is the only court in Brazil with such attribution.

CHILE

Based on the Chilean Civil Law inspired by the Napoleonic Civil Law. The Spanish legal tradition exercised an especially great influence on the civil code of Chile. On its turn, the Chilean civil code influenced to a large degree the drafting of the civil codes of other Latin-American states. For instance, the codes of Ecuador (1861) and Colombia (1873) constituted faithful reproductions of the Chilean code, but for very few exceptions.

The compiler of the Civil Code of Chile, Venezuelan Andrés Bello, worked for its completion for almost 30 years, using elements, of the Spanish law on the one hand, and of other Western laws, especially of the French one, on the other. Indeed, it is noted that he consulted and used all of the codes that had been issued till then, starting from the era of Justinian. The Civil Code came into effect on 1 January 1857. The influence of the Napoleonic code and the Law of Castile of the Spanish colonial period, is great; it is observed however that e.g. in many provisions of property or contract law, the solutions of the French code civil were put aside in favour of pure Roman law or Castilian law.

COSTA RICA

Based on the Napoleonic Civil Law. First Civil Code (a part of the General Code or Carrillo Code) came into effect in 1841; its text was inspired by the South Peruvian Civil Code of Marshal Andres de Santa Cruz.

The present Civil Code went into effect 1 January 1888, and was influenced by the Napoleonic Code and the Spanish Civil Code of 1889 (from its 1851 draft version).

CROATIA

Based on the Germanic Civil Law. Croatian Law system is largely influenced by German and Austrian law systems. It is significantly influenced by the Civil Code of the Austrian Empire from 1811, known in Croatia as "General Civil Law".

OGZ was in force from 1853 to 1946. The Independent State of Croatia, a Nazi-controlled puppet state that was established in 1941 during World War II, used the OGZ as a basis for the 1943 "Base of the Civil Code for the Independent State of Croatia". After the War, Croatia become a member of the Yugoslav Federation which enacted in 1946 the "Law on immediate voiding of regulations passed before April 6, 1941 and during the enemy occupation". By this law OGZ was declared invalid as a whole, but implementation of some of its legal rules was approved.

During the post-War era, the Croatian legal system become influenced by elements of the socialist law. Croatian civil law was pushed aside, and it took norms of public law and legal regulation of the social ownership. After Croatia declared independence from Yugoslavia on June 25, 1991, the previous legal system was used as a base for writing new laws. "The Law on Obligations" was enacted in 2005. Today, Croatia as a European union member state implements elements of the EU acquis into its legal system.

CZECH REPUBLIC

Based on Germanic civil law. Descended from the Civil Code of the Austrian Empire (1811), influenced by German (1939-45) and Soviet (1947/68-89) legal codes during occupation periods, substantially reformed to remove Soviet influence and elements of socialist law after the Velvet Revolution (1989). The new Civil Code of the Czech Republic was introduced in 2014.

GREECE

Based on Germanic civil law. The Greek civil code of 1946, highly influenced by traditional Roman law and the German civil code of 1900 (Bürgerliches Gesetzbuch); the Greek civil code replaced the Byzantine-Roman civil law in effect in Greece since its independence Legal Provision of Eastern Mainland Greece, November 1821: The Social [Civil] Laws of the Dear Departed Christian Emperors of Greece [referring to the Byzantine Emperors] alone are in effect at present in Eastern Mainland Greece')

GUATEMALA

Based on Napoleonic civil law. Guatemala has had three Civil Codes: the first one from 1877, a new one introduced in 1933, and the one currently in force, which was passed in 1963. This Civil Code has suffered some reforms throughout the years, as well as a few derogations relating to areas which have subsequently been regulated by newer laws, such as the Code of Commerce and the Law of the National Registry of Persons. In general, it follows the tradition of the Roman-French system of civil codification.

Regarding the theory of "sources of law" in the Guatemalan legal system, the "Ley del Organismo Judicial" recognizes "the law" as the main legal source (in the sense of legislative texts), although it also establishes "jurisprudence" as a complementary source.

Although jurisprudence technically refers to judicial decisions in general, in practice it tends to be confused and identified with the concept of "legal doctrine", a qualified series of identical resolutions in similar cases pronounced by higher courts (the Constitutional Court acting as a "Tribunal de Amparo", and the Supreme Court acting as a "Tribunal de Casación") whose theses become binding for lower courts.

JAPAN

Based on Germanic civil law. Japanese civil code of 1895.

ITALY

Based on Germanic civil law, with elements of the Napoleonic civil code; civil code of 1942 replaced the original one of 1865

LATVIA

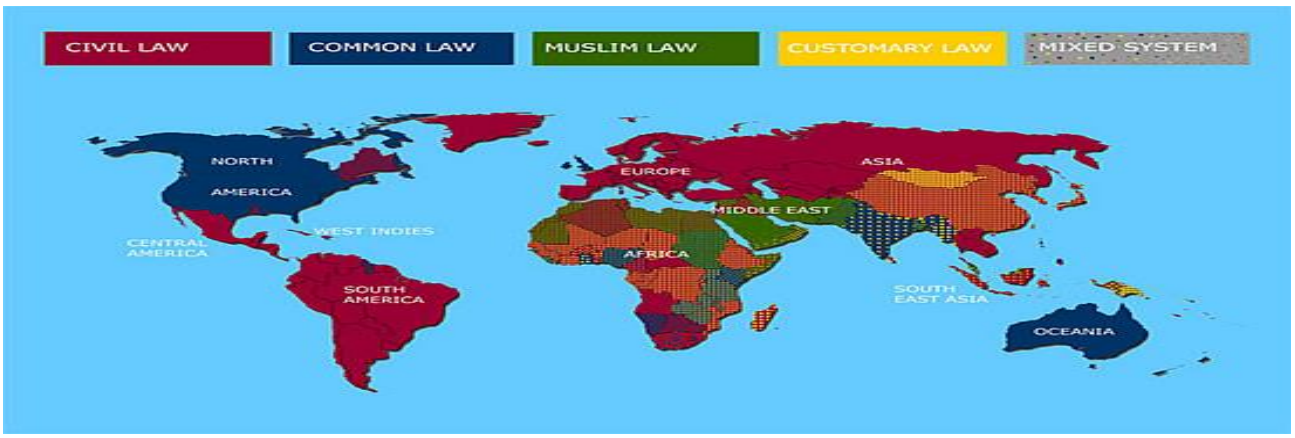
Based on Napoleonic and German civil law, as it was historically before the Soviet occupation. While general principles of law are prerequisites in making and interpreting the law, case law is also regularly applied to present legal arguments in courts and explain application of law in similar cases. Civil law largely modeled after Napoleonic code mixed with strong elements of German civil law. Criminal law retains Russian and German legal traditions, while criminal procedure law has been fully modeled after practice accepted in Western Europe. Civil law of Latvia enacted on 1937.

MEXICO

Based on Napoleonic civil law."The origins of Mexico's legal system are both ancient and classical, based on the Roman and French legal systems, and the Mexican system shares more in common with other legal systems throughout the world (especially those in Latin America and most of continental Europe) ..."

SWEDEN

Scandinavian-German civil law. Like all Scandinavian legal systems, it is distinguished by its traditional character and for the fact that it did not adopt elements of Roman law. It assimilated very few elements of foreign laws whatsoever. The Napoleonic Code had no influence in codification of law in Scandinavia. The historical basis of the law of Sweden, just as for all Nordic countries, is Old German law. Codification of the law started in Sweden during the 18th century, preceding the codifications of most other European countries. However, neither Sweden, nor any other Nordic state created a civil code of the kind of the Code Civil or the BGB.



CHAPTER V. THE FEDERAL LEGAL SYSTEM

INTRODUCTION

Every business day, courts throughout the USA render decisions that together affect many thousands of people. Some affect only the parties to a particular legal action, but others adjudicate rights, benefits, and legal principles that have an impact on virtually all Americans.

Inevitably, many Americans may welcome a given ruling while others – sometimes many others – disapprove. All, however, accept the legitimacy of these decisions, and of the courts' role as final interpreter of the law. There can be no more potent demonstration of the trust that Americans place in the rule of law and their confidence in the U.S. legal system. Much of the discussion explains how U.S. courts are organized and how they work. Courts are central to the legal system, but they are not the entire system.

Every day across America, federal, state, and local courts interpret laws, adjudicate disputes under laws, and at times even strike down laws as violating the fundamental protections that the Constitution guarantees all Americans. At the same time, millions of Americans transact their day-to-day affairs without turning to the courts. They, too, rely upon the legal system. All require the predictability and enforceable common norms that the rule of law provides and the U.S. legal system guarantees. This introduction seeks to familiarize readers with the basic structure and vocabulary of American law.

Subsequent chapters add detail, and afford a sense of how the U.S. legal system has evolved to meet the needs of a growing nation and its ever more complex economic and social realities. The American legal system has several layers, more possibly than in most other nations. One reason is the division between federal and state law.

To understand this, it helps to recall that the USA was founded not as one nation, but as a union of 13 colonies, each claiming independence from the British Crown.

The Declaration of Independence (1776) thus spoke of "the good People of these Colonies" but pronounced that "these United Colonies are, & of Right ought to be, FREE & INDEPENDENT STATES". The tension between people and several states is a perennial theme in American legal history. The U.S. Constitution (adopted 1787, ratified 1788) began a gradual and at times hotly contested shift of power and legal authority away from the states and toward the federal government. The Constitution fixed many of the boundaries between federal and state law. It divided federal power among legislative, executive, and judicial branches of government (thus creating a "separation of powers" between each branch and enshrining a system of "checks-and-balances" to prevent any one branch from overwhelming the others), each of which contributes distinctively to the legal system.

Within that system, the Constitution delineated the kinds of laws that Congress might pass. As if this were not sufficiently complex, U.S. law is more than the statutes passed by Congress. In some areas, Congress authorizes administrative agencies to adopt rules that add detail to statutory requirements. The entire system rests upon the traditional legal principles found in English Common Law. Although both the Constitution & statutory law supersede common law, courts continue to apply unwritten common law principles to fill in the gaps where the Constitution is silent & Congress has not legislated.

SOURCES & SUPREMACY OF FEDERAL LAW

During the period 1781-88, an agreement called the Articles of Confederation governed relations among the 13 states. It established a weak national Congress and left most authority with the states. The Articles made no provision for a federal judiciary, save a maritime court, although each state was enjoined to honor (afford "full faith and credit" to) the rulings of the others' courts. The drafting and ratification of the Constitution reflected a growing consensus that the federal government needed to be strengthened. The legal system was one of the areas where this was done.

Most significant was the "supremacy clause", found in Article VI: This Constitution, and the Laws of the USA which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the USA, 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.

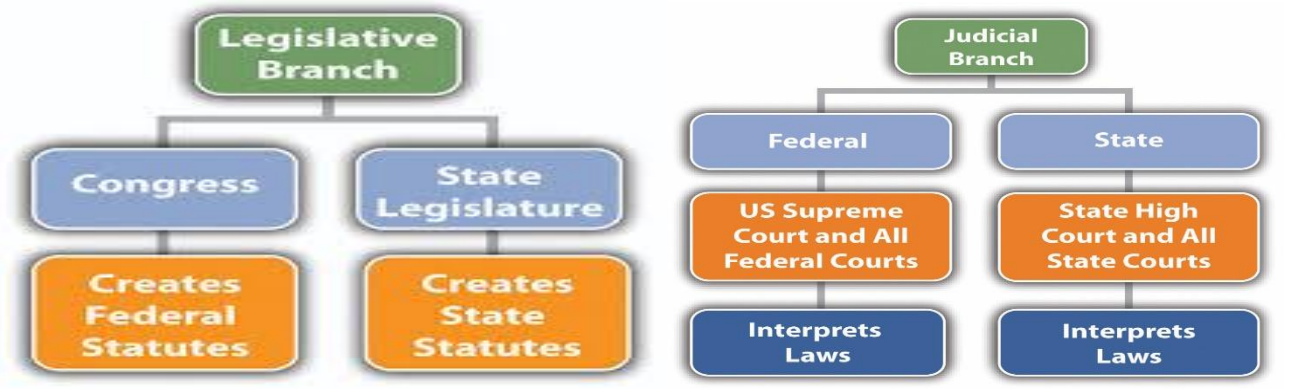
This paragraph established the first principle of American law: Where the federal Constitution speaks, no state may contradict it. Left unclear was how this prohibition might apply to the federal government itself, and the role of the individual state legal systems in areas not expressly addressed by the new Constitution. Amendments would supply part of the answer, history still more, but even today Americans continue to wrestle with the precise demarcations between the federal and state domains.

Each Branch Plays a Role in the Legal System While the drafters of the Constitution sought to strengthen the federal government, they feared strengthening it too much. One means of restraining the new regime was to divide it into branches. As James Madison explained in Federalist No. 51, "usurpations are guarded against by a division of the government into distinct and separate departments". Each of Madison's "departments", legislative, executive, and judiciary, received a measure of influence over the legal system.

Legislative. The Constitution vests in Congress the power to pass legislation.

A proposal considered by Congress is called a bill. If a majority of each house of Congress – two-thirds should the President veto it – votes to adopt a bill, it becomes law.

Federal laws are known as statutes. The USA Code is a "codification" of federal statutory law. The Code is not itself a law, it merely presents the statutes in a logical arrangement. Title 20, for instance, contains the various statutes pertaining to Education, and Title 22 those covering Foreign Relations. Congress' lawmaking power is limited. More precisely, it is delegated by the American people through the Constitution, which specifies areas where Congress may or may not legislate. Article I, Section 9 of the Constitution forbids Congress from passing certain types of laws.



Congress may not, for instance, pass an "ex post facto" law (a law that applies retroactively, or "after the fact "), or levy a tax on exports. Article I, Section 8 lists areas where Congress may legislate. Some of these ("To establish Post Offices") are quite specific but others, most notably, "To regulate Commerce with foreign Nations, and among the several States", are less so. Obviously the power to interpret the less precise delegations is extremely important. Early in the young republic's history, the judiciary branch assumed this role and thus secured an additional and extremely vital role in the U.S. legal system.

Judicial. As with the other branches, the U.S. judiciary possesses only those powers the Constitution delegates. The Constitution extended federal jurisdiction only to certain kinds of disputes. Article III, Section 2 lists them. Two of the most significant are cases involving a question of federal law ("all Cases in Law and Equity, arising under this Constitution, the Laws of the USA, and Treaties made… ") and "diversity" cases, or disputes between citizens of two different states. Diversity jurisdiction allows each party to avoid litigating his case before the courts of his adversary's state.

A second judicial power emerged in the Republic's early years. As explained in Chapter 2, the U.S. Supreme Court in the case of Marbury v. Madison (1803) interpreted its delegated powers to include the authority to determine whether a statute violated the Constitution and, if it did, to declare such a law invalid. A law may be unconstitutional because it violates rights guaranteed to the people by the Constitution, or because Article I did not authorize Congress to pass that kind of legislation.

The power to interpret the constitutional provisions that describe where Congress may legislate is thus very important. Traditionally, Congress has justified many statutes as necessary to regulate "commerce… among the several States", or interstate commerce.

This is an elastic concept, difficult to describe with precision. Indeed, one might for nearly any statute devise a plausible tie between its objectives and the regulation of interstate commerce. At times, the judicial branch interpreted the "commerce clause" narrowly. In 1935, for instance, the Supreme Court invalidated a federal law regulating the hours and wages of workers at a New York slaughterhouse because the chickens processed there all were sold to New York butchers and retailers and hence not part of interstate commerce. Soon after this, however, the Supreme Court began to afford President Franklin D. Roosevelt's New Deal programs more latitude, and today the federal courts continue to interpret broadly the commerce power, although not so broadly as to justify any legislation that Congress might pass.

Executive. Article II entrusts to the President of the USA "the executive Power". Under President George Washington (1789-1801), the entire executive branch consisted of the President, Vice President, and the Departments of State, Treasury, War, and Justice. As the nation grew, the executive branch grew with it.

Today there are 15 Cabinet-level Departments. Each houses a number of Bureaus, Agencies, and other entities. Still other parts of the executive branch lie outside these Departments. All exercise executive power delegated by the President and thus are responsible ultimately to him. In some areas, the relationship between the executive and the other two branches is clear. Suppose one or more individuals rob a bank.

Congress has passed a statute criminalizing bank robbery. The Federal Bureau of Investigation (FBI), a bureau within the Department of Justice, would investigate the crime.

When it apprehended one or more suspects, a Federal Prosecutor (Department of Justice) would attempt to prove the suspect's guilt in a trial conducted by a U.S. District Court. The bank robbery case is a simple one. But as the nation modernized and grew, the relationship of the three branches within the legal system evolved to accommodate the more complex issues of industrial and postindustrial society. The role of the executive branch changed most of all. In the bank robbery example, Congress needed little or no special expertise to craft a statute that criminalized bank robbery.

Suppose instead that lawmakers wished to ban "dangerous" drugs from the marketplace, or restrict the amount of "unhealthful" pollutants in the air.

Congress could, if it chose, specify precise definitions of these terms. Sometimes it does so, but increasingly Congress instead delegates a portion of its authority to administrative agencies housed in the executive branch.

The Food and Drug Administration (FDA) thus watches over the purity of the nation's food and pharmaceuticals and the Environmental Protection Agency (EPA) regulates how industries impact the earth, water, and air. Although agencies possess only powers that Congress delegates by statute, these can be quite substantial. They can include the authority to promulgate rules that define with precision more general statutory terms.

A law might proscribe "dangerous" amounts of pollutants in the atmosphere, while an EPA rule defines the substances and amounts of each that would be considered dangerous. Sometimes a statute empowers an agency to investigate violations of its rules, to adjudicate those violations, and even to assess penalties!

The courts will invalidate a statute that grants an agency too much power.

An important statute called the Administrative Procedure Act explains the procedures agencies must follow when promulgating rules, judging violations, and imposing penalties. It lays out how a party can seek judicial review of an agency's decision. Other Sources of Law The most obvious sources of American law are the statutes passed by Congress, as supplemented by administrative regulations. Sometimes these demarcate clearly the boundaries of legal and illegal conduct – the bank robbery example again – but no government can promulgate enough law to cover every situation. Fortunately, another body of legal principles and norms helps fill in the gaps, as explained below.

Common Law. Where no statute or constitutional provision controls, both federal and state courts often look to the common law, a collection of judicial decisions, customs, and general principles that began centuries ago in England and continues to develop today.

In many states, common law continues to hold an important role in contract disputes, as state legislatures have not seen fit to pass statutes covering every possible contractual contingency.

Judicial Precedent. Courts adjudicate alleged violations of and disputes arising under the law. This often requires that they interpret the law. In doing so, courts consider themselves bound by how other courts of equal or superior rank have previously interpreted a law. This is known as the principle of "stare decisis", or simply precedent. It helps to ensure consistency and predictability. Litigants facing unfavorable precedent, or case law, try to distinguish the facts of their particular case from those that produced the earlier decisions. Sometimes courts interpret the law differently.

The Fifth Amendment to the Constitution, for instance, contains a clause that "no person… shall be compelled in any criminal case to be a witness against himself".

DIFFERENT LAWS & DIFFERENT REMEDIES

From time to time, cases arose where an individual would decline to answer a subpoena or otherwise testify on the grounds that his testimony might subject him to criminal prosecution – not in the USA but in another country.

Would the selfincrimination clause apply here? The U.S. Court of Appeals for the Second Circuit ruled it did, but the Fourth and Eleventh Circuits held that it did not. This effectively meant that the law differed depending where in the country a case arose! Higher-level courts try to resolve these inconsistencies.

Given this growing body of law, it is useful to distinguish among different types of laws and of actions, or lawsuits, brought before the courts and of the remedies the law affords in each type of case. Civil/Criminal Courts hear two kinds of disputes: civil and criminal. A civil action involves two or more private parties, at least one of which alleges a violation of a statute or some provision of common law.

The party initiating the lawsuit is the plaintiff; his opponent the defendant.

A defendant can raise a counterclaim against a plaintiff or a cross-claim against a co-defendant, so long as they are related to the plaintiff's original complaint.

Courts prefer to hear in a single lawsuit all the claims arising from a dispute. Business litigations, as for breach of contract, or tort cases, where a party alleges he has been injured by another's negligence or willful misconduct, are civil cases. While most civil litigations are between private parties, the federal government or a state government is always a party to a criminal action. It prosecutes, in the name of the people, defendants charged with violating laws that prohibit certain conduct as injurious to the public welfare.

Two businesses might litigate a civil action for breach of contract, but only the government can charge someone with murder. The standards of proof and potential penalties also differ.

A criminal defendant can be convicted only upon the determination of guilt "beyond a reasonable doubt". In a civil case, the plaintiff need only show a "preponderance of evidence", a weaker formulation that essentially means "more likely than not".

A convicted criminal can be imprisoned, but the losing party in a civil case is liable only for legal or equitable remedies, as explained below.

Legal & Equitable Remedies

The U.S. legal system affords a wide but not unlimited range of remedies. The criminal statutes typically list for a given offense the range of fines or prison time a court may impose.

Other parts of the criminal code may in some jurisdictions allow stiffer penalties for repeat offenders. Punishment for the most serious offenses, or felonies, is more severe than for misdemeanors. In civil actions, most American courts are authorized to choose among legal and equitable remedies. The distinction means less today than in the past but is still worth understanding. In 13th century England, "courts of law" were authorized to decree monetary remedies only. If a defendant's breach of contract cost the plaintiff £50, such a court could order the defendant to pay that sum to the plaintiff. These damages were sufficient in many instances, but not in others, such as a contract for the sale of a rare artwork or a specific parcel of land. During the 13th and 14th centuries, "courts of equity" were formed.

These tribunals fashioned equitable remedies like specific performance, which compelled parties to perform their obligations, rather than merely forcing them to pay damages for the injury caused by their nonperformance.

THE ROLE OF STATE LAW IN THE FEDERAL SYSTEM

By the 19th century, most American jurisdictions had eliminated the distinction between law and equity. Today, with rare exceptions, U.S. courts can award either legal or equitable remedies as the situation requires.

The Constitution specifically forbade the states from adopting certain kinds of laws (entering into treaties with foreign nations, coining money). Also, the Article VI Supremacy Clause barred state laws that contradicted either the Constitution or federal law.

Even so, large parts of the legal system remained under state control. The Constitution had carefully specified the areas where Congress might enact legislation.

The Tenth Amendment to the Constitution (1791) made explicit that state law would control elsewhere: "The powers not delegated to the USA by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people". There nonetheless remained considerable tension between the federal government and the states – over slavery, and ultimately over the right of a state to leave the federal union.

The civil conflict of 1861-65 resolved both disputes. It also produced new restrictions on the state role within the legal system: Under the Fourteenth Amendment (1868), "No State shall… deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This amendment greatly expanded the federal courts' ability to invalidate state laws. Brown v. Board of Education (1954), which forbade racial segregation in the Arkansas state school system, relied upon this "equal protection clause".

Beginning in the mid-20th century, a number of the trends outlined above – the rise of the administrative state, a more forceful and expansive judicial interpretation of due process and equal protection, and a similar expansion of Congress' power to regulate commerce – combined to enhance the federal role within the legal system. Even so, much of that system remains within the state domain.

While no state may deny a citizen any right guaranteed by the federal Constitution, many interpret their own constitutions as bestowing even more generous rights and privileges. State courts applying state law continue to decide most contractual disputes.

The same is true of most criminal cases, and of civil tort actions. Family law, including such matters as marriage and divorce, is almost exclusively a state matter. For most Americans most of the time, the legal system means the police officers and courts of their own state, or of the various municipalities and other political subdivisions within that state.

CHAPTER VI. HISTORY & ORGANIZATION OF THE FEDERAL JUDICIAL SYSTEM

INTRODUCTION

One of the most important, most interesting, and, possibly, most confusing features of the judiciary in the USA 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, which sometimes causes friction. The federal courts are discussed in this chapter and the state courts in chapter

THE HISTORICAL CONTEXT

Prior to the adoption of the Constitution, the USA was governed by the Articles of Confederation. Under the Articles, almost all functions of the national government were vested in a singlechamber 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. Consequently, the delegates gathered at the Constitutional Convention in Philadelphia in 1787 expressed widespread agreement that a national judiciary should be established. A good deal of disagreement arose, however, on the specific form that the judicial branch should take.

The Constitutional Convention & 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.

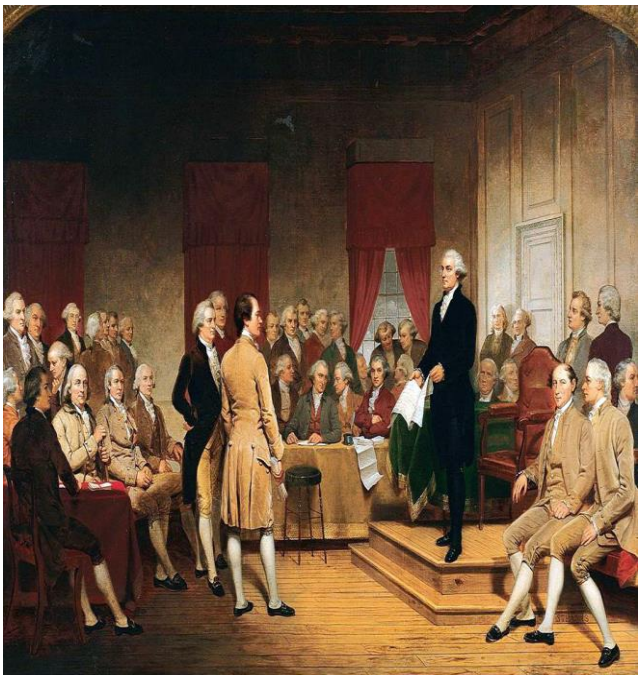
The compromise is found in Article III of the Constitution, which begins, "The judicial Power of the USA, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

The Judiciary Act of 1789. Once the Constitution was ratified, action on the federal judiciary came quickly. When the new Congress convened in 1789, its first major concern was judicial organization. Discussion of Senate Bill 1 involved many of the same participants and arguments as were involved in the Constitutional Convention's debates on the judiciary.

Once again, the question was whether lower federal courts should be created at all or whether federal claims should first be heard in state courts. Attempts to resolve this controversy split Congress into two distinct groups.

One group, which believed that federal law should be adjudicated in the state courts first and by the U.S. Supreme Court only on appeal, expressed the fear that the new government would destroy the rights of the states.

The other group of legislators, suspicious of the parochial prejudice of state courts, feared that litigants from other states and other countries would be dealt with unjustly. This latter group naturally favored a judicial system that included lower federal courts.



The law that emerged from this debate, the Judiciary Act of 1789, set up a judicial system composed of a Supreme Court, consisting of a chief justice and five associate justices; three circuit courts, each comprising two justices of the Supreme Court and a district judge; and 13 district courts, each presided over by one district judge.

The power to create inferior federal courts, then, was immediately exercised. Congress created not one but two sets of lower courts. Supreme Court Justice Charles Evans Hughes wrote in The Supreme Court of the USA (1966) that the Court "is distinctly American in conception and function, and owes little to prior judicial institutions". 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, finalinterpretation of federal laws could not be left to a state court and certainly not to several state tribunals, whose judgments might disagree. Thus, the Supreme Court must interpret federal legislation.

Another of the Founders' intentions was for the federal government to act directly upon individual citizens as well as upon the states. Given the Supreme Court's importance to the U.S. system of government, it was perhaps inevitable that the Court would evoke great controversy.

Charles Warren, a leading student of the Supreme Court, said in The Supreme Court in USA History: "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."

The Court's First Decade

George Washington, the first president of the USA, established two important traditions when he appointed the first Supreme Court justices. First, he began the practice of naming to the Court those with whom he was politically compatible.

Washington, the only president ever to have an opportunity to appoint the entire federal judiciary, filled federal judgeships, without exception, with faithful members of the Federalist Party. Second, Washington's appointees offered roughly equal geographic representation on the federal courts. His first six appointees to the Supreme Court included three Northerners and three Southerners. The chief justiceship was the most important appointment Washington made. The president felt that the man to head the first Supreme Court should be an eminent lawyer, statesman, executive, and leader. Many names were presented to Washington, and at least one person formally applied for the position.

Ultimately, Washington settled upon John Jay of New York. Although only 44 years old, Jay had experience as a lawyer, a judge, and a diplomat. In addition, he was the main drafter of his state's first constitution.

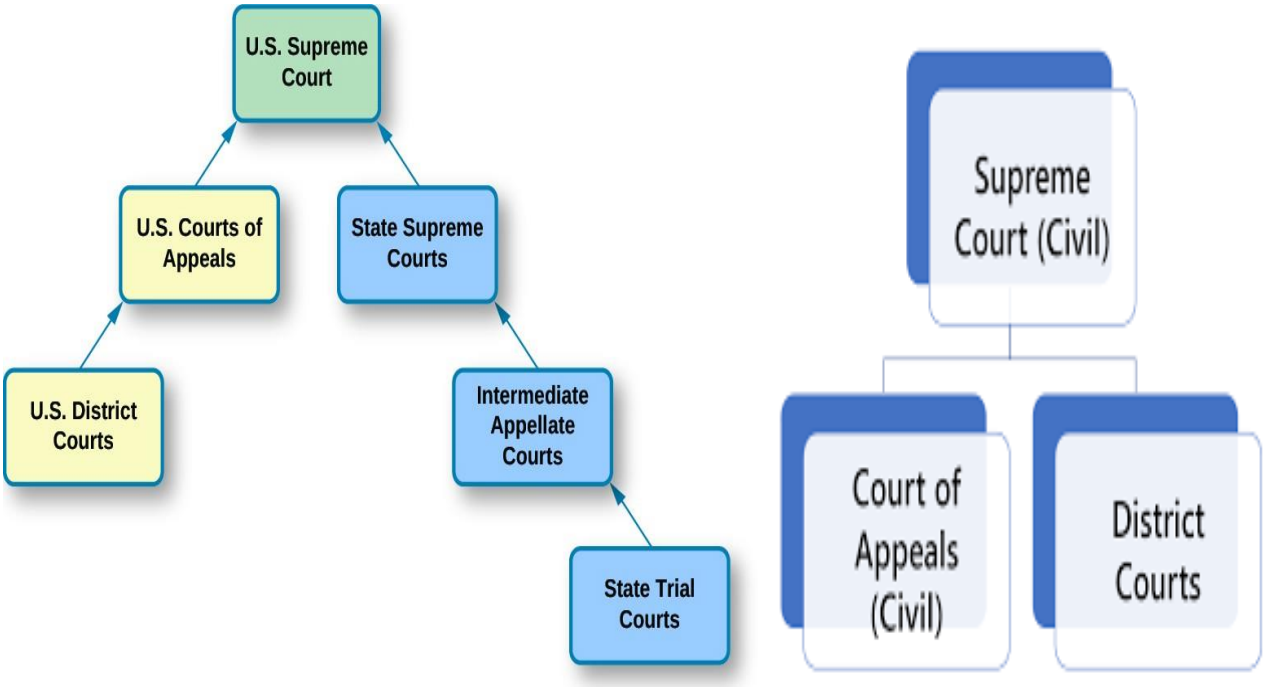
The Supreme Court met for the first time on Monday, February 1, 1790, in the Royal Exchange, a building located in the Wall Street section of New York City, and its first session lasted just 10 days. During this period the Court selected a clerk, chose a seal, and admitted several lawyers to practice before it in the future.

There were, of course, no cases to be decided; the Court did not rule on a single case during its first three years. In spite of this insignificant and abbreviated beginning, Charles Warren wrote, "The New York and the Philadelphia newspapers described the proceedings of this first session of the Court more fully than any other event connected with the new government; and their accounts were reproduced in the leading papers of all the states."

During its first decade the Court decided only about 50 cases. Given the scarcity of Supreme Court business in the early days, Chief Justice Jay's contributions may be traced primarily to his circuit court decisions and his judicial conduct. Perhaps the most important of Jay's contributions, however, was his insistence that the Supreme Court could not provide legal advice for the executive branch in the form of an advisory opinion.

Jay was asked by Treasury Secretary Alexander Hamilton to issue an opinion on the constitutionality of a resolution passed by the Virginia House of Representatives, and President Washington asked Jay for advice on questions relating to his Neutrality Proclamation.

In both instances, Jay's response was a firm "No" because Article III of the Constitution provides that the Court is to decide only cases pertaining to actual controversies.



THE IMPACT OF CHIEF JUSTICE MARSHALL

John Marshall served as chief justice from 1801 to 1835 and dominated the Court to a degree unmatched by any other justice. Marshall's dominance of the Court enabled him to initiate major changes in the way opinions were presented. Prior to his tenure, the justices ordinarily wrote separate opinions (called "seriatim" opinions – Latin for "one after the other") in major cases. Under Marshall's stewardship, the Court adopted the practice of handing down a single opinion. Marshall's goal was to keep dissension to a minimum.

Arguing that dissent undermined the Court's authority, he tried to persuade the justices to settle their differences privately and then present a united front to the public. Marshall also used his powers to involve the Court in the policy-making process.

Early in his tenure as chief justice the Court asserted its power to declare an act of Congress unconstitutional. This case had its beginnings in the presidential election of 1800, when Thomas Jefferson defeated John Adams in his bid for reelection. Before leaving office in March 1801, however, Adams and the lame-duck Federalist Congress created several new federal judgeships. To fill these new positions Adams nominated, and the Senate confirmed, loyal Federalists.

In addition, Adams named his outgoing secretary of state, John Marshall, to be the new chief justice of the Supreme Court. As secretary of state it had been Marshall's job to deliver the commissions of the newly appointed judges. Time ran out, however, and 17 of the commissions were not delivered before Jefferson's inauguration.

The new president ordered his secretary of state, James Madison, not to deliver the remaining commissions. One of the disappointed nominees was William Marbury. He and three of his colleagues, all confirmed as justices of the peace for the District of Columbia, decided to ask the Supreme Court to force Madison to deliver their commissions. They relied upon Section 13 of the Judiciary Act of 1789, which granted the Supreme Court the authority to issue writs of mandamus – court orders commanding a public official to perform an official, nondiscretionary duty. The case placed Marshall in a predicament.

Some suggested that he disqualify himself because of his earlier involvement as secretary of state. There was the question of the Court's power. If Marshall were to grant the writ, Madison (under Jefferson's orders) would be almost certain to refuse to deliver the commissions. The Supreme Court would then be powerless to enforce its order.

However, if Marshall refused to grant the writ, Jefferson would win by default.

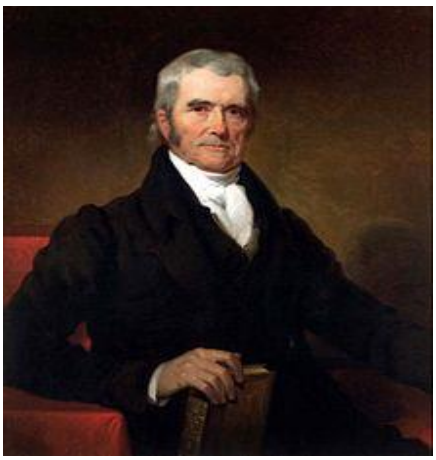
The decision Marshall fashioned from this seemingly impossible predicament was evidence of sheer genius. He declared Section 13 of the Judiciary Act of 1789 unconstitutional because it granted original jurisdiction to the Supreme Court in excess of that specified in Article III of the Constitution.

Thus the Court's power to review and determine the constitutionality of acts of Congress was established. This decision is rightly seen as one of the single most important decisions the Supreme Court has ever handed down. A few years later the Court claimed the right of judicial review over actions of state legislatures; during Marshall's tenure it overturned more than a dozen state laws on constitutional grounds.

Task 1. Analyze the information, which is in the highlight, & use it in practice.

Task 2. Choose the keywords that best convey the gist of the information.

Task 3. Read the text & pick up the essential details in the form of quick notes.




MARSHALL
JNO. T. MARSHALL
FEB. 12, 1854
OCT. 31, 1915
Blessed are the pure in heart for they shall see God.
JNO. R. MARSHALL
JUNE 17, 1832
JUNE 11, 1904
I have not seen the righteous forsaken, nor his seed begging bread.

THE CHANGING ISSUE EMPHASIS OF THE SUPREME COURT

Until approximately 1865 the legal relationship between the national and state governments, or cases of federalism, dominated the Court's docket. John Marshall believed in a strong national government and did not hesitate to restrict state policies that interfered with its activities. A case in point is Gibbons v. Ogden (1824), in which the Court overturned a state monopoly over steamboat transportation on the ground that it interfered with national control over interstate commerce.

Another good example of Marshall's use of the Court to expand the federal government's powers came in McCulloch v. Maryland (1819), in which the chief justice held that the Constitution permitted Congress to establish a national bank. The Court's insistence on a strong national government did not significantly diminish after Marshall's death. Roger Taney, who succeeded Marshall as chief justice, served from 1836 to 1864.

Although the Court's position during this period was not as uniformly favorable to the federal government, the Taney Court did not reverse the Marshall Court's direction.

During the period 1865-1937 issues of economic regulation dominated the Court's docket. The shift in emphasis from federalism to economic regulation was brought on by a growing number of national and state laws aimed at monitoring business activities. As such laws increased, so did the number of cases challenging their constitutionality.

Early in this period the Court's position on regulation was mixed, but by the 1920s the bench had become quite hostile toward government regulatory policy. Federal regulations were generally overturned on the ground that they were unsupported by constitutional grants of power to Congress, whereas state laws were thrown out mainly as violations of economic rights protected by the Fourteenth Amendment.

Since 1937 the Supreme Court has focused on civil liberties concerns – in particular, the constitutional guarantees of freedom of expression and freedom of religion. In addition, an increasing number of cases have dealt with procedural rights of criminal defendants. Finally, the Court has decided a great number of cases concerning equal treatment by the government of racial minorities and other disadvantaged groups.

Task 1. Transfer the given information from the passages onto a table.

№	Activity			
	Event	When	Where	Score
1.				

THE SUPREME COURT AS A POLICY MAKER

The Supreme Court's role as a policy maker derives from the fact that it interprets the law. Public policy issues come before the Court in the form of legal disputes that must be resolved. An excellent example may be found in the area of racial equality.

In the late 1880s many states enacted laws requiring the separation of African Americans and whites in public facilities. In 1890, Louisiana enacted a law requiring separate but equal railroad accommodations for African Americans and whites.

A challenge came two years later. Homer Plessy, who was one-eighth black, protested against the Louisiana law by refusing to move from a seat in the white car of a train traveling from New Orleans to Covington, Louisiana. Arrested and charged with violating the statute, Plessy contended that the law was unconstitutional.

The U.S. Supreme Court, in Plessy v. Ferguson (1896), upheld the Louisiana statute.

Thus the Court established the "separate-but equal" policy that was to reign for about 60 years. During this period many states required that the races sit in different areas of buses, trains, terminals, theaters; use different restrooms; and drink from different water fountains. African Americans were sometimes excluded from restaurants and public libraries.

Perhaps most important, African American students often had to attend inferior schools. Separation of the races in public schools was contested in the famous case Brown v. Board of Education (1954).

Parents of African American schoolchildren claimed that state laws requiring or permitting segregation deprived them of equal protection of the laws under the Fourteenth Amendment. The Supreme Court ruled that separate educational facilities are inherently unequal and, therefore, segregation constitutes a denial of equal protection.

In the Brown decision the Court laid to rest the separate-but-equal doctrine and established a policy of desegregated public schools. In an average year the Court decides, with signed opinions, between 80 and 90 cases.

Thousands of other cases are disposed of with less than the full treatment. Thus the Court deals at length with a very select set of policy issues that have varied throughout the Court's history. In a democracy, broad matters of public policy are presumed to be left to the elected representatives of the people – not to judicial appointees with life terms.

Thus, in principle U.S. judges are not supposed to make policy. However, in practice judges cannot help but make policy to some extent. The Supreme Court, however, differs from legislative and executive policy makers. Especially important is the fact that the Court has no selfstarting device. The justices must wait for problems to be brought to them; there can be no judicial policy making 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 policy makers, such as lowercourt judges, Congress, and the president. The Court depends upon others to implement or carry out its decisions.

Task 1. Analyze the information, which is in the highlight, and use it in practice.

Task 2. Choose the keywords that best convey the gist of the information.

Task 3. Read the text and pick up the essential details in the form of quick notes.

Task 4. Make notes of your new knowledge about the supreme court.

THE SUPREME COURT AS FINAL ARBITER

The Supreme Court has both original and appellate jurisdiction. Original jurisdiction means that a court has the power to hear a case for the first time. Appellate jurisdiction means that a higher court has the authority to review cases originally decided by a lower court. The Supreme Court is overwhelmingly an appellate court since most of its time is devoted to reviewing decisions of lower courts. It is the highest appellate tribunal in the country. As such, it has the final word in the interpretation of the Constitution, acts of legislative bodies, and treaties – unless the Court's decision is altered by a constitutional amendment or, in some instances, by an act of Congress.

Since 1925 a device known as "certiorari" has allowed the Supreme Court to exercise discretion in deciding which cases it should review. Under this method a person may request Supreme Court review of a lower court decision; then the justicesdetermine whether the request should be granted. If review is granted, the Court issues a writ of certiorari, which is an order to the lower court to send up a complete record of the case. When certiorari is denied, the decision of the lower court stands.

The Supreme Court at Work

The formal session of the Supreme Court lasts from the first Monday in October until the business of the term is completed, usually in late June or July. Since 1935 the Supreme Court has had its own building in Washington, D.C. The imposing five-story marble building has the words "Equal Justice Under Law" carved above the entrance. It stands across the street from the U.S. Capitol. Formal sessions of the Court are held in a large courtroom that seats 300 people.

At the front of the courtroom is the bench where the justices are seated. When the Court is in session, the chief justice, followed by the eight associate justices in order of seniority, enters through the purple draperies behind the bench and takes a seat.

Seats are arranged according to seniority with the chief justice in the center, the senior associate justice on the chief justice's right, the second-ranking associate justice on the left, and continuing alternately in declining order of seniority.

Near the courtroom are the conference room where the justices decide cases and the chambers that contain offices for the justices and their staffs.

The Court's term is divided into sittings of approximately two weeks each, during which it meets in open session and holds internal conferences, and recesses, during which the justices work behind closed doors as they consider cases and write opinions. The 80 to 90 cases per term that receive the Court's full treatment follow a fairly routine pattern.

Oral Argument. Oral arguments are generally scheduled on Monday through Wednesday during the sittings. The sessions run from 10:00 a.m. until noon and from 1:00 until 3:00 p.m. Because the procedure is not a trial or the original hearing of a case, no jury is assembled and no witnesses are called. Instead, the two opposing attorneys present their arguments to the justices.

The general practice is to allow 30 minutes for each side, although the Court may decide that additional time is necessary. The Court can normally hear four cases in one day.

Attorneys presenting oral arguments are frequently interrupted with questions from the justices. The oral argument is considered very important by both attorneys and justices because it is the only stage in the process that allows such personal exchanges.

The Conference. On Fridays preceding the two-week sittings the Court holds conferences; during sittings it holds conferences on Wednesday afternoon and all day Friday. At the Wednesday meeting the justices discuss the cases argued on Monday.

At the Friday conference 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. Prior to the Friday conference each justice is given a list of the cases that will be discussed.

The conference begins at about 9:30 or 10:00 a.m. and runs until 5:30 or 6:00 p.m.

As the justices enter the conference room they shake hands and take their seats around a rectangular table. They meet behind locked doors, and no official record is kept of the discussions. The chief justice presides over the conference and offers an opinion first in each case. The other justices follow in descending order of seniority.

A quorum for a decision on a case is six members; obtaining a quorum is seldom difficult. Cases are sometimesdecided 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 case 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 the Court's opinion to an individual justice. The chief justice, if voting with the majority, either writes the opinion or assigns it to another justice who voted with the majority. When the chief justice votes with the minority, the most senior justice in the majority makes the assignment. After the conference the justice who will write the Court's opinion begins work on an initial draft.

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

In most cases a single opinion does obtain majority support, although few rulings are unanimous. Those who disagree with the opinion of the Court are said to dissent.

A dissent does not have to be accompanied by an opinion; in recent years, however, it usually has been. Whenever more than one justice dissents, each may write an opinion or all may join in a single opinion. On occasion a justice will agree with the Court's decision but differ in his or her reason for reaching that conclusion. Such a justice may write what is called a concurring opinion. An opinion labeled "concurring and dissenting" agrees with part of a Court ruling but disagrees with other parts. Finally, the Court occasionally is sues a per curiam opinion – an unsigned opinion that is usually quite 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.

Task 1. Analyze the information, which is in the highlight, and use it in practice.

Task 2. Choose the keywords that best convey the gist of the information.

Task 3. Read the text and pick up the essential details in the form of quick notes.

THE U.S. COURTS OF APPEALS

The courts of appeals receive less media coverage than the Supreme Court, but they are very important in the U.S. judicial system. Considering that the Supreme Court hands down decisions with full opinions in only 80 to 90 cases each year, it is apparent that the 31 courts of appeals are the courts of last resort for most appeals in the federal court system.

Circuit Courts: 1789-1891 The Judiciary Act of 1789 created three circuit courts (courts of appeals), each composed of two justices of the Supreme Court and a district judge. The circuit court was to hold two sessions each year in each district within the circuit.

The district judge became primarily responsible for establishing the circuit court's workload. The two Supreme Court justices then came into the local area and participated in the cases. This practice tended to give a local rather than national focus to the circuit courts.

The circuit court system was regarded from the beginning as unsatisfactory, especially by Supreme Court justices, who objected to the traveling imposed upon them.

Attorney General Edmund Randolph and President Washington urged relief for the Supreme Court justices. Congress made a slight change in 1793 by altering the circuit court organization to include only one Supreme Court justice and one district judge. In the closing days of President John Adams's administration in 1801, Congress eliminated circuit riding by the Supreme Court justices, authorized the appointment of 16 new circuit judges, and greatly extended the jurisdiction of the lower courts.

The new administration of Thomas Jefferson strongly opposed this action, and Congress repealed it. The Circuit Court Act of 1802 restored circuit riding by Supreme Court justices and expanded the number of circuits. However, the legislation allowed the circuit court to be presided over by a single district judge.

Such a change may seem slight, but it proved to be of great importance. Increasingly, the district judges began to assume responsibility for both district and circuit courts.

In practice, then, original and appellate jurisdiction were both in the hands of the district judges. The next major step in the development of the courts of appeals did not come until 1869, when Congress approved a measure that authorized the appointment of nine new circuit judges and reduced the Supreme Court justices' circuit court duty to one term every two years. Still, the High Court was flooded with cases because there were no limitations on the right of appeal to the Supreme Court.

The Courts of Appeals: 1891 to the Present

On March 3, 1891, the Evarts Act was signed into law, creating new courts known as circuit courts of appeals. These new tribunals were to hear most of the appeals from district courts. The old circuit courts, which had existed since 1789, also remained.

The new circuit court of appeals was to consist of one circuit judge, one circuit court of appeals judge, one district judge, and a Supreme Court justice. Two judges constituted a quorum in these new courts. Following passage of the Evarts Act, the federal judiciary had two trial tribunals: district courts and circuit courts. It had two appellate tribunals: circuit courts of appeals and the Supreme Court. Most appeals of trial decisions were to go to the circuit court of appeals, although the act allowed direct review in some instances by the Supreme Court. In short, creation of the circuit courts of appeals released the Supreme Court from many petty types of cases.

Appeals could still be made, but the High Court would now have much greater control over its own workload. Much of its former caseload was thus shifted to the two lower levels of the federal judiciary. The next step in the evolution of the courts of appeals came in 1911. In that year Congress passed legislation abolishing the old circuit courts, which had no appellate jurisdiction and frequently duplicated the functions of district courts. Today the intermediate appellate tribunals are officially known as courts of appeals, but they continue to be referred to colloquially as circuit courts.

There are now 12 regional courts of appeals, staffed by 179 authorized courts of appeals judges. The courts of appeals are responsible for reviewing cases appealed from federal district courts (in some cases from administrative agencies) within the boundaries of the circuit. A specialized appellate court came into existence in 1982 when Congress established the Federal Circuit, a jurisdictional rather than a geographic circuit.

The Review Function of the Courts of Appeals

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. Because the courts of appeals have no control over which cases are brought to them, they deal with both routine and highly 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 as a whole, 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.

There are two purposes of review in the courts of appeals. The first is error correction. Judges in the various circuits are called upon 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 second function is sorting out and developing those few cases worthy of Supreme Court review. The circuit judges tackle the legal issues earlier than the Supreme Court justices and may help shape what they consider review-worthy claims. Judicial scholars have found that appealed cases often differ in their second hearing from their first.

The Courts of Appeals as Policy Makers

The Supreme Court's role as a policy maker derives from the fact that it interprets the law, and the same holds true for the courts of appeals. The scope of the courts of appeals' policy-making role takes on added importance, given that they are the ourts of last resort in the vast majority of cases. As an illustration of the farreaching impact of circuit court judges, consider the decision in a case involving the Fifth Circuit. For several years the University of Texas Law School (as well as many other law schools across the country) had been granting preference to African American and Mexican American applicants to increase the enrollment of minority students.

This practice was challenged in a federal district court on the ground that it discriminated against white and nonpreferred minority applicants in violation of the 14th Amendment.

On March 18, 1996, a panel of Fifth Circuit judges ruled in Hopwood v. Texas that the Fourteenth Amendment does not permit the school to discriminate in this way and that the law school may not use race as a factor in law school admissions. The U.S. Supreme Court denied a petition for a writ of certiorari in the case, thus leaving it the law of the land in Texas, Louisiana, and Mississippi, the states comprising the Fifth Circuit.

Although it may technically be true that only schools in the Fifth Circuit are affected by the ruling, an editorial in The National Law Journal indicates otherwise, noting that while some "might argue that Hopwood's impact is limited to three states in the South..., the truth is that across the country law school (and other) deans, fearing similar litigation, are scrambling to come up with an alternative to affirmative action."

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. Still, circuit judges have developed methods for using their time as efficiently as possible.

Screening. 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 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. These court personnel read petitions and briefs and then submit recommendations to the judges. As a result, many cases are disposed of without reaching the oral argument stage.

Three-Judge Panels. Those cases given the full treatment are normally considered by panels of three judges rather than by all the judges in the circuit. 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.

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" (Old French for high seat) procedure in which all the circuit's judges sit together on a panel and decide a case.

The exception to this general rule occurs in the large Ninth Circuit where assembling all the judges becomes too cumbersome. There, en banc panels normally consist of 11 judges. The *en banc* procedure may be used when the case concerns an issue of extraordinary importance.

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 (as little as 10 minutes) to discuss the points made in their written briefs and to answer questions from the judges.

The Decision. Following the oral argument, the judges may confer briefly and, if they are in agreement, may announce their decision immediately. Otherwise, a decision will be announced only after the judges confer at greater length. Following the conference, some decisions will be announced with a brief order or per curiam opinion of the court. A small portion of decisions will be accompanied by a longer, signed opinion and perhaps even dissenting and concurring opinions.

U.S. DISTRICT COURTS

The U.S. 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 U.S. 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 a large number of cases. The First District Courts Congress made the decision to create a national network of federal trial courts when it passed the Judiciary Act of 1789. Section 2 of the act established 13 district courts by making each of the 11 states then in the Union a district, and by making the parts of Massachusetts and Virginia that were to become Maine and Kentucky into separate districts. That organizational scheme established the practice, which still exists, of honoring state boundary lines in drawing districts.

The First District Judges

Each federal district court was to be presided over by a single judge who resided in the district. As soon as this became known, President Washington began receiving letters from individuals desiring appointment to the various judgeships.

Many asked members of Congress or Vice President John Adams to recommend them to President Washington. Personal applications were not necessarily successful and were not the only way in which names came to the president's attention.

Harry Innes was not an applicant for the Kentucky judgeship but received it after being recommended by a member of Congress from his state. As new states came into the Union, additional district courts were created. The additions, along with resignations, gave Washington an opportunity to offer judgeships to 33 people.

All of the judges he appointed were members of the bar, and all but seven had state or local legal experience as judges, prosecutors, or attorneys general. Presidents have continued to appoint lawyers with public service backgrounds to the federal bench.

Present Organization of the District Courts

As the country grew, new district courts were created. Eventually, Congress began to divide some states into more than one district.

California, New York, 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. There are now U.S. district courts serving the 50 states, the District of Columbia, Guam, Puerto Rico, the Virgin Islands, and the Northern Mariana Islands. The original district courts were each assigned one judge. With the growth in population and litigation, Congress has periodically had to add judges to most of the districts.

The Federal Judgeship Act of 1990 created 74 new district judgeships, bringing the current total to 649. Today all districts have more than one judge; the Southern District of New York, which includes Manhattan and the Bronx, currently has 28 judges and is thus the largest. Because each federal district court is normally presided over by a single judge, several trials may be in session within the district at any given time.

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 courts in which attorneys examine and crossexamine witnesses.

The factual record is thus established at this level. Subsequent appeals of the trial court decision focus on correcting errors rather than 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 both of questions of fact and of 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 men and women convened to determine whether there is probable cause to believe that a person has committed the federal crime of which he or she has been accused.

Grand jurors meet periodically to hear charges brought by the U.S. 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 12 jurors in criminal cases but permit fewer in civil cases. The federal district courts generally use six-person juries in civil cases.

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 practicing norm enforcement. Because cases of this type rarely allow the judge to escape the strict restraints of legal and procedural requirements, he or she has little chance to make new law or develop new policy. In civil cases, too, judges are often confined to norm enforcement, because such litigation generally arises from a private dispute whose outcome is of interest only to the parties in the suit.

The district courts also play a policy-making role, however. As Americans have become more litigationconscious, 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".

Task 1. Transfer the given information from the passages onto a table.

№	Activity			
	Event	**When**	**Where**	**Score**

Types of Federal Courts

The Inferior Courts

The Constitutional Courts

Also called Article III Courts or Regular Courts. As permitted by the Constitution, Congress created these courts, which exercise the broad "judicial Power of the United States," as stated in Article III.

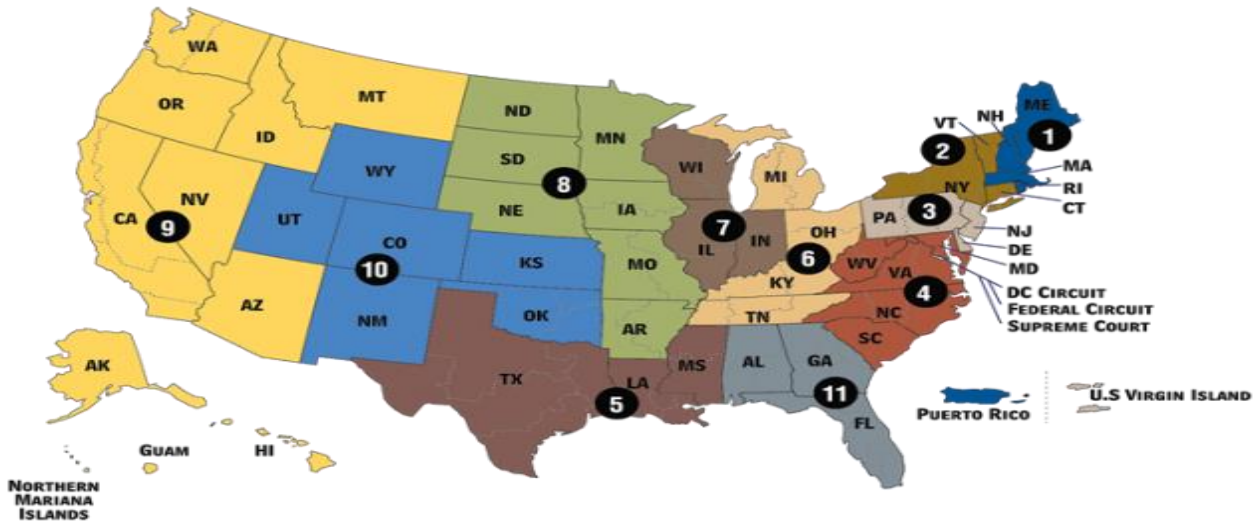
- 94 District Courts
- 12 U.S. Courts of Appeals
- U.S. Court of Appeals for the Federal Circuit
- U.S. Court of International Trade

The Special Courts

Also called the Legislative Courts or Article I Courts. Created by Congress under the power given to it in Article I "to constitute Tribunals inferior to the supreme Court," these courts have narrowly defined powers.

- U.S. Court of Federal Claims
- Territorial Courts *
- Courts of the District of Columbia
- U.S. Tax Court
- U.S. Court of Appeals for the Armed Forces
- U.S. Court of Appeals for Veterans Claims

*in Guam, the Virgin Islands, and the Northern Marianas, similar to local courts



CONSTITUTIONAL & LEGISLATIVE COURTS

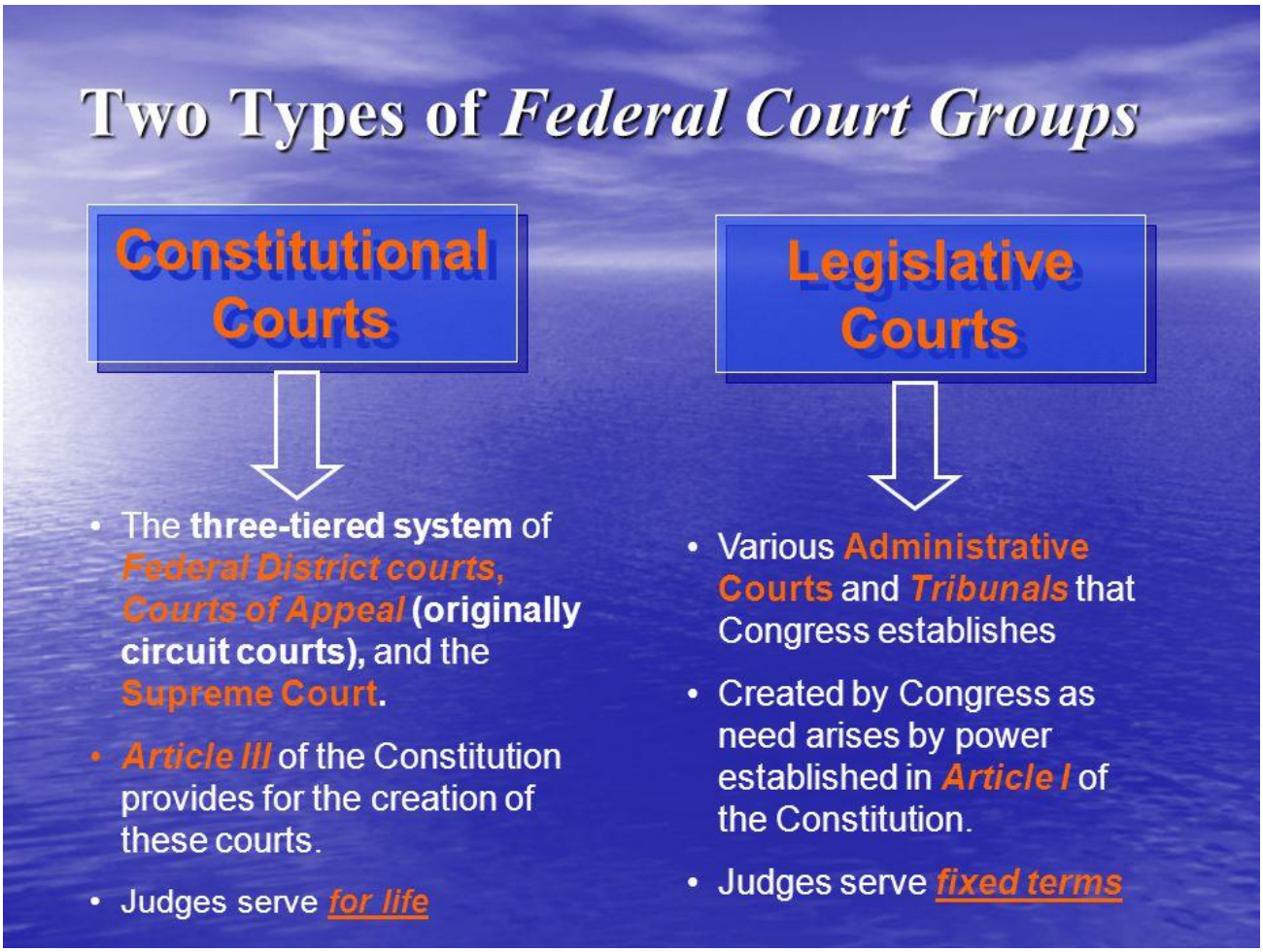
The Judiciary Act of 1789 established the three levels of the federal court system in existence today. Periodically, however, Congress has exercised its power, based on Article III and Article I of the Constitution, to create other federal courts.

Courts established under Article III are known as constitutional courts and those created under Article I are called legislative courts. The Supreme Court, courts of appeals, and federal district courts are constitutional courts. Legislative courts include the U.S. Court of Military Appeals, the USA Tax Court, and the Court of Veterans Appeals. 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 for the express purpose of helping to administer a specific congressional statute.

Constitutional courts are tribunals established to handle litigation.

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 goodbehavior tenure, Congress may set specific terms of office for them. In sum, the constitutional courts have a greater degree of independence from the other two branches of government than the legislative courts.



ADMINISTRATIVE & STAFF SUPPORT IN THE FEDERAL JUDICIARY

Although judges are the most visible actors in the judicial system, a large supporting cast is also at work. Their efforts are necessary 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 – U.S. magistrate judges – are assigned to a particular court.

Still others may be employees of an agency, such as the Administrative Office of the USA Courts, that serves the entire judicial system.

U.S. Magistrate Judges

In an effort to help federal district judges deal with increased workloads, Congress in 1968 created a system of magistrate judges that responds to each district court's specific needs and circumstances.

Magistrate judges are appointed by the judges of the district court for eight-year terms of office, although they can be removed before the expiration of the term for "good cause". Within guidelines set by the Congress, the judges in each district court establish the duties and responsibilities of their magistrate judges.

The legislation permits a magistrate judge, with the consent of the involved parties, to conduct all proceedings in a jury or nonjury civil matter and 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.

Because the decision to delegate responsibilities to a magistrate judge is still made by the district judge, however, a magistrate judge's participation in the processing of cases may be more narrow than that permitted by statute.

Law Clerks

The first use of law clerks by an American judge is generally traced to Horace Gray of Massachusetts. In the summer of 1875, while serving as chief justice of the Massachusetts Supreme Court, he employed, at his own expense, a highly ranked new graduate of the Harvard Law School. Each year, he employed a new clerk from Harvard.

When Gray was appointed to the U.S. Supreme Court in 1882, he brought a law clerk with him to the nation's highest court. Justice Gray's successor on the High Court was Oliver Wendell Holmes, who also adopted the practice of annually hiring honor graduates of Harvard Law School as his clerks. When William Howard Taft, a former law professor at Yale, became chief justice, he secured a new law clerk annually from the dean of the Yale Law School. Harlan Fiske Stone, former dean of the Columbia Law School, joined the Court in 1925 and made it his practice to hire a Columbia graduate each year.

Since these early beginnings there has been a steady growth in the use of law clerks by all federal courts. More than 2,000 law clerks now work for federal judges, and more than 600 serve bankruptcy judges and U.S. magistrate judges. 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 he or she works. They also vary according to the type of court.

Law clerks for federal district judges often serve primarily as research assistants. They spend 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 memorandums for the judges. Because their work is devoted to the earliest stages of the litigation process, they may have a substantial amount of contact with attorneys and witnesses. Law clerks at this level may be involved in the initial drafting of opinions.

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. The courts of appeals do not have the same discretion to accept or reject a case that the Supreme Court has, and they 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.

A number of cases are scheduled for oral argument, and the clerk may be called upon to assist the judge in preparing for it. Intensive analysis of the record by judges prior to oral argument is not always possible. They seldom have time to do more than scan pertinent portions of the record called to their attention by law clerks.

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 (references to a statute, precedentsetting case, or legal textbook, in a brief or argument in court) in an opinion written by the judge. The work of the law clerk for a Supreme Court justice roughly parallels that of a clerk in the other appellate courts. Clerks play an indispensable role in helping justices decide which cases should be heard.

At the suggestion of Justice Lewis F. Powell, Jr., in 1972, a majority of the Court's members began to participate in a "certpool"; the justices pool their clerks, divide up all filings, and circulate a single clerk's certiorari memo to all those participating in the pool.

The memo summarizes the facts of the case, the questions of law presented, and the recommended course of action - that is, whether the case should be granted a full hearing, denied, or dismissed. Once the justices have voted to hear a case, the law clerks, like their counterparts in the courts of appeals, prepare bench memorandums 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 U.S. Courts

The administration of the federal judicial system as a whole is managed by the Administrative Office of the U.S. Courts.

Since its creation in 1939 it has handled everything from distributing supplies to 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 serves the Judicial Conference of the USA, the central administrative policy-making 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.

The office acts as liaison for both the federal judicial system and the Judicial Conference, serving as advocate for the judiciary in its dealings with Congress, the executive branch, professional groups, and the general 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

It created in 1967, is the federal courts' agency for continuing education and research. Its duties fall generally into three categories: conducting research on the federal courts, making recommendations to improve the administration and management of the federal courts, and developing educational and training programs for personnel of the judicial branch. Since its inception, judges have benefited from orientation sessions and other educational programs put on by the Federal Judicial Center.

In recent years, magistrate judges, bankruptcy judges, and administrative personnel have been the recipients of educational programs. The Federal Judicial Center's extensive use of videos and satellite technology allows it to reach large numbers of people.

Federal Court Workload

The workload of the courts is heavy for all three levels of the federal judiciary – U.S. district courts, courts of appeals, and the Supreme Court. For fiscal year 2002 slightly more than 340,000 cases were commenced in the federal district courts. Criminal filings alone have risen 43 % since 1993. In 1995, 50,072 appeals were filed in one of the regional circuit courts. This figure increased every year, to a high of 60,847 appeals in 2003.

However, the number of appeals terminated by the courts of appeals has also been steadily increasing, from 49,805 in 1995 to 56,586 in 2002. The overall caseload of the Supreme Court is large by historical standards; there were 8,255 cases on the docket for the 2002 term. The Supreme Court, however, has discretion to decide which cases merit its full attention. As a result, the number of cases argued before the Court has declined rather dramatically over the years. In the 2002 term only 84 cases were argued and 79 were disposed of in 71 signed opinions.

CHAPTER VII. HISTORY & ORGANIZATION OF STATE JUDICIAL SYSTEMS

INTRODUCTION

Even prior to the Articles of Confederation and the writing of the U.S. Constitution in 1787, the colonies, as sovereign entities, already had written constitutions. Thus, the development of state court systems can be traced from the colonial period to the present.

Historical Development of State Courts

No two states are exactly alike when it comes to the organization of courts. Each state is free to adopt any organizational scheme it chooses, create as many courts as it wishes, name those courts whatever it pleases, and establish their jurisdiction as it sees fit.

Thus, the organization of state courts does not necessarily resemble the clear-cut, three-tier system found at the federal level. For instance, in the federal system the trial courts are called district courts and the appellate tribunals are known as circuit courts. However, in well over a dozen states the circuit courts are trial courts.

Several other states use the term superior court for their major trial courts. Perhaps the most bewildering situation is found in New York, where the major trial courts are known as supreme courts. Although confusion surrounds the organization of state courts, no doubt exists about their importance. Because statutory law is more extensive in the states than at the federal level, covering everything from the most basic personal relationships to the state's most important public policies, the state courts handle a wide variety of cases, and the number of cases litigated annually in the state courts far exceeds those decided in the federal tribunals.

The Colonial Period

During the colonial period, political power was concentrated in the hands of the governor appointed by the king of England. Because the governors performed executive, legislative, and judicial functions, an elaborate court system was not necessary.

The lowest level of the colonial judiciary consisted of local judges called justices of the peace or magistrates. They were appointed by the colony's governor. At the next level in the system were the county courts, the general trial courts for the colonies.

Appeals from all courts were taken to the highest level – the governor and his council.

Grand and petit juries were introduced during this period and remain prominent features of the state judicial systems. By the early 18th century the legal profession had begun to change. Lawyers trained in the English Inns of Court became more numerous, and as a consequence colonial court procedures were slowly replaced by more sophisticated English common law.

Following the American Revolution (1775-83), the powers of the govern ment were not only taken over by legislative bodies but also greatly reduced. The former colonists were not eager to see the development of a large, independent judiciary given that many of them harbored a distrust of lawyers and the common law.

The state legislatures carefully watched the courts and in some instances removed judges or abolished specific courts because of unpopular decisions. Increasingly, a distrust of the judiciary developed as courts declared legislative actions unconstitutional.

Conflicts between legislatures and judges, often stemming from opposing interests, became more prominent. Legislators seemed more responsive to policies that favored debtors, whereas courts generally reflected the views of creditors. These differences were important because "out of this conflict over legislative and judicial power the courts gradually emerged as an independent political institution", according to David W. Neubauer in America's Courts and the Criminal Justice System.

Modern State Courts

From the Civil War (1861-65) to the early 20th century, the state courts were beset by other problems. Increasing industrialization and the rapid growth of urban areas created new types of legal disputes and resulted in longer and more complex court cases. The state court systems, largely fashioned to handle the problems of a rural, agrarian society, were faced with a crisis of backlogs as they struggled to adjust. One response was to create new courts to handle the increased volume of cases.

Often, courts were piled on top of each other. Another strategy was the addition of new courts with jurisdiction over a specific geographic area. Still another response was to create specialized courts to handle one particular type of case. Small claims courts, juvenile courts, and domestic relations courts, for example, became increasingly prominent.

The largely unplanned expansion of state and local courts to meet specific needs led to a situation many have referred to as fragmentation. A multiplicity of trial courts was only one aspect of fragmentation, however. Many courts had very narrow jurisdiction.

Furthermore, the jurisdictions of the various courts often overlapped.

Early in the 20th century, people began to speak out against the fragmentation in the state court systems. The program of reforms that emerged in response is generally known as the court unification movement. The first well-known legal scholar to speak out in favor of court unification was Roscoe Pound, dean of the Harvard Law School.

Pound and others called for the consolidation of trial courts into a single set of courts or two sets of courts, one to hear major cases and one to hear minor cases. A good deal of opposition has arisen to court unification.

Many trial lawyers who are in court almost daily become accustomed to existing court organizations and, therefore, are opposed to change. Judges and other personnel associated with the courts are sometimes opposed to reform. Their opposition often grows out of fear – of being transferred to new courts, of having to learn new procedures, or of having to decide cases outside their area of specialization. The court unification movement, then, has not been as successful as many would like. On the other hand, proponents of court reform have secured victories in some states.

Task 1. Transfer the given information from the passages onto a table.

№	Activity			
	Court	**When**	**Where**	**Score**
1.				

STATE COURT ORGANIZATION

Some states have moved in the direction of a unified court system, whereas others still operate with a bewildering complex of courts with overlapping jurisdiction. The state courts may be divided into four general categories or levels: trial courts of limited jurisdiction, trial courts of general jurisdiction, intermediate appellate courts, and courts of last resort.

Trial Courts of Limited Jurisdiction

Trial courts of limited jurisdiction handle the bulk of litigation in the USA each year and constitute about 90 % of all courts. They have a variety of names: justice of the peace courts, magistrate courts, municipal courts, city courts, county courts, juvenile courts, domestic relations courts, and metropolitan courts, to name the more common ones.

The jurisdiction of these courts is limited to minor cases. In criminal matters, for example, state courts deal with three levels of violations: infractions (the least serious), misdemeanors (more serious), and felonies (the most serious). Trial courts of limited jurisdiction handle infractions and misdemeanors. They may impose only limited fines (no more than $1,000) and jail sentences (generally no more than one year).

In civil cases these courts are usually limited to disputes under a certain amount.

In addition, these types of courts are limited to certain kinds of matters: traffic violations, domestic relations, or cases involving juveniles. Another difference from trial courts of general jurisdiction is that these limited courts are not courts of record.

Since their proceedings are not recorded, appeals of their decisions usually go to a trial court of general jurisdiction for what is known as a trial "de novo" (new trial). Yet another distinguishing characteristic of trial courts of limited jurisdiction is that the presiding judges of such courts are often not required to have any formal legal training.

Many of these courts suffer from a lack of resources. Often, they have no permanent courtroom, meeting instead in grocery stores, restaurants, or private homes.

Clerks are frequently not available to keep adequate records. The results are informal proceedings and the processing of cases on a mass basis. Full-fledged trials are rare and cases are disposed of quickly. Finally, trial courts of limited jurisdiction are used in some states to handle preliminary matters in felony criminal cases. They often hold arraignments, set bail, appoint attorneys for indigent defendants, and conduct preliminary examinations.

The case is then transferred to a trial court of general jurisdiction for such matters as hearing pleas, holding trials, and sentencing.

Trial Courts of General Jurisdiction

Most states have one set of major trial courts that handle the more serious criminal and civil cases. In addition, in many states, special categories – such as juvenile criminal offenses, domestic relations cases, and probate cases – are under the jurisdiction of the general trial courts. In most states these courts also have an appellate function. They hear appeals in certain types of cases that originate in trial courts of limited jurisdiction. These appeals are often heard in a trial de novo or tried again in the court of general jurisdiction. General trial courts are usually divided into judicial districts or circuits. Although the practice varies by state, the general rule is to use existing political boundaries, such as a county or a group of counties, in establishing the district or circuit. In rural areas the judge may ride circuit and hold court in different parts of the territory according to a fixed schedule.

In urban areas, however, judges hold court in a prescribed place throughout the year. In larger counties the group of judges may be divided into specializations. Some may hear only civil cases; others try criminal cases exclusively.

The courts at this level have a variety of names. The most common are district, circuit, and superior. The judges at this level are required by law in all states to have law degrees.

These courts also maintain clerical help because they are courts of record.

Intermediate Appellate Courts

The intermediate appellate courts are relative newcomers to the state judicial scene.

Only 13 such courts existed in 1911, whereas 39 states had created them by 1995.

Their basic purpose is to relieve the workload of the state's highest court. In most instances these courts are called courts of appeals, although other names are occasionally used. Most states have one court of appeals with statewide jurisdiction.

The size of intermediate courts varies from state to state. The court of appeals in Alaska has only three judges. At the other extreme, Texas has 80 courts of appeals judges.

In some states the intermediate appeals courts sit en banc, whereas in other states they sit in permanent or rotating panels.

Courts of Last Resort

Every state has a court of last resort. The states of Oklahoma and Texas have two highest courts. Both states have a supreme court with jurisdiction limited to appeals in civil cases and a court of criminal appeals for criminal cases.

Most states call their highest courts supreme courts; other designations are the court of appeals (Maryland, New York), the supreme judicial court (Maine, Massachusetts), and the supreme court of appeals (West Virginia).

The courts of last resort range in size from three to nine judges (or justices in some states). They typically sit *en banc* and usually, although not necessarily, convene in the state capital. The highest courts have jurisdiction in matters pertaining to state law and are, of course, the final arbiters in such matters. In states that have intermediate appellate courts, the Supreme Court's cases come primarily from these mid-level courts.

In this situation the high court typically is allowed to exercise discretion in deciding which cases to review. Thus, it is likely to devote more time to cases that deal with the important policy issues of the state. When there is no intermediate court of appeals, cases generally go to the state's highest court on a mandatory review basis.

In most instances, then, the state courts of last resort resemble the U.S. Supreme Court in that they have a good deal of discretion in determining which cases will occupy their attention. Most state supreme courts also follow procedures similar to those of the U.S. Supreme Court. That is, when a case is accepted for review the opposing parties file written briefs and later present oral arguments. Then, upon reaching a decision, the judges issue written opinions explaining that decision.

Juvenile Courts

Americans are increasingly concerned about the handling of cases involving juveniles, and states have responded to the problem in a variety of ways. Some have established a statewide network New York and Maryland call their highest courts the "court of appeals".

Pictured left to right are New York State Court of Appeals Judge George Bundy Smith, Chief Judge Judith S. Kaye, and Judge Howard A. Levine, as they listen to arguments in a death penalty case. of courts specifically to handle matters involving juveniles.

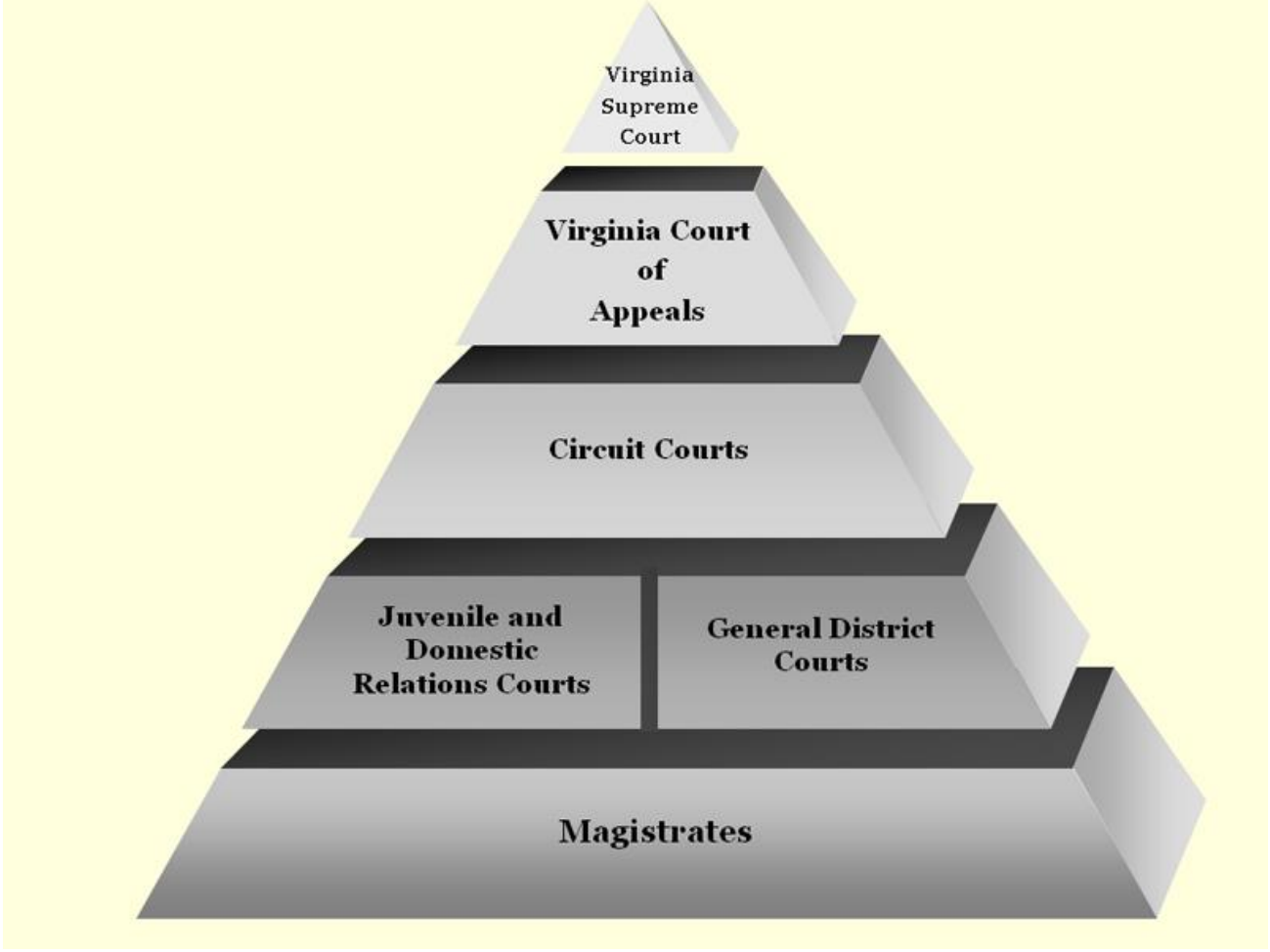
Two states – Rhode Island and South Carolina – have family courts, which handle domestic relations matters as well as those involving juveniles.

The most common approach is to give one or more of the state's limited or general trial courts jurisdiction to handle situations involving juveniles.

In Alabama the circuit courts (trial courts of general jurisdiction) have jurisdiction over juvenile matters. In Kentucky, however, exclusive juvenile jurisdiction is lodged in trial courts of limited jurisdiction – the district courts. Finally, some states apportion juvenile jurisdiction among more than one court.

The state of Colorado has a juvenile court for the city of Denver and has given jurisdiction over juveniles to district courts (general trial courts) in the other areas of the state. Also, some variation exists among the states as to when jurisdiction belongs to an adult court. States set a standard age at which defendants are tried in an adult court.

In addition, many states require that more youthful offenders be tried in an adult court if special circumstances are present. In Illinois, for instance, the standard age at which juvenile jurisdiction transfers to adult courts is 17. The age limit drops to 15, however, for first-degree murder, aggravated criminal sexual assault, armed robbery, robbery with a firearm, and unlawful use of weapons on school grounds.



ADMINISTRATIVE & STAFF SUPPORT IN THE STATE JUDICIARY

The daily operation of the federal courts requires the efforts of many individuals and organizations. This is no less true for the state court systems.

Magistrates

State magistrates, who may be known in some states as commissioners or referees, are often used to perform some of the work in the early stages of civil and criminal case processing. In this way they are similar to U.S. magistrate judges. In some jurisdictions they hold bond hearings and conduct preliminary investigations in criminal cases. They are also authorized in some states to make decisions in minor cases.

Law Clerks

In the state courts, law clerks are likely to be found, if at all, in the intermediate appellate courts and courts of last resort. Most state trial courts do not utilize law clerks, and they are practically unheard of in local trial courts of limited jurisdiction.

As at the national level, some law clerks serve individual judges while others serve an entire court as a staff attorney.

Administrative Office of the Courts

Every state now has an administrative office of courts or a similarly titled agency that performs a variety of administrative tasks for that state's court system. Among the tasks more commonly associated with administrative offices are budget preparation, data processing, facility management, judicial education, public information, research, personnel management.

Juvenile and adult probation are the responsibility of administrative offices in a few states, as is alternative dispute resolution.

Court Clerks & Court Administrators

The clerk of the court has traditionally handled the day-to-day routines of the court.

This includes making courtroom arrangements, keeping records of case proceedings, preparing orders and judgments resulting from court actions, collecting court fines and fees, and disbursing judicial monies. In the majority of states these officials are elected and may be referred to by other titles. The traditional clerks of court have been replaced in many areas by court administrators. In contrast to the State courts handle millions of cases a year, at times in facilities like the Berkeley County Courthouse in Martinsburg, West Virginia, which some call "historic" or "charming" and others describe as "inadequate".

Court clerk, who traditionally managed the operations of a specific courtroom, the modern court administrator may assist a presiding judge in running the entire courthouse.

State Court Workload

The lion's share of the nation's judicial business exists at the state, not the national, level. The fact that federal judges adjudicate several hundred thousand cases a year is impressive; the fact that state courts handle several million a year is overwhelming, even if the most important cases are handled at the federal level.

While justice of the peace and magistrate courts at the state level handle relatively minor matters, some of the biggest judgments in civil cases are awarded by ordinary state trial court juries. The National Center for State Courts has compiled figures on the caseloads of state courts of last resort and intermediate appellate courts in 1998.

CHAPTER VIII.

JURISDICTION & POLICYMAKING BOUNDARIES

INTRODUCTION

In setting the jurisdictions of courts, Congress and the U.S. Constitution – and their state counterparts – mandate the types of cases each court may hear. This chapter considers how Congress, in particular, can influence judicial behavior by redefining the types of cases judges may hear. It discusses judicial self-restraint, examining 10 principles, derived from legal tradition and constitutional and statutory law, that govern a judge's decision about whether to review a case.

FEDERAL COURTS

The federal court system is divided into three separate levels: the trial courts, the appellate tribunals, and the U.S. Supreme Court. U.S. District Courts Congress has set forth the jurisdiction of the federal district courts. These tribunals have original jurisdiction in federal criminal and civil cases; that is, by law, the cases must be first heard in these courts, no matter who the parties are or how significant the issues.

Criminal Cases

These cases commence when the local U.S. attorneys have reason to believe that a violation of the U.S. Penal Code has occurred. After obtaining an indictment from a federal grand jury, the U.S. attorney files charges against the accused in the district court in which he or she serves. Criminal activity as defined by Congress covers a wide range of behavior, including interstate theft of an automobile, illegal importation of narcotics, assassination of a president, conspiracy to deprive persons of their civil rights, and even the killing of a migratory bird out of season. After charges are filed against an accused, and if no plea bargain has been made, a trial is conducted by a U.S. district judge.

In court the defendant enjoys all the privileges and immunities granted in the Bill of Rights (such as the right to a speedy and public trial) or by congressional legislation or Supreme Court rulings (for instance, a 12-person jury must render a unanimous verdict).

Defendants may waive the right to a trial by a jury of their peers. A defendant who is found not guilty of the crime is set free and may never be tried again for the same offense (the Fifth Amendment's protection against double jeopardy). If the accused is found guilty, the district judge determines the appropriate sentence within a range set by Congress.

The length of a sentence cannot be appealed so long as it is in the range prescribed.

A verdict of not guilty may not be appealed by the government, but convicted defendants may appeal if they believe that the judge or jury made an improper legal determination.

Civil Cases

A majority of the district court caseload is civil in nature: suits between private parties or between the U.S. government, acting in a nonprosecutorial capacity, and a private party. They may be placed in several categories.

The first is litigation concerning the interpretation or application of the Constitution, acts of Congress, or U.S. treaties. Examples of cases in this category include the following: a petitioner claims that one of his or her federally protected civil rights has been violated, a litigant alleges that he or she is being harmed by a congressional statute that is unconstitutional, and a plaintiff argues that he or she is suffering injury from a treaty that is improperly affecting him. The key point is that a federal question must be raised in order for the U.S. trial courts to have jurisdiction.

Traditionally, some minimal dollar amounts had to be in controversy in some types of cases before the trial courts would hear them, but such amounts have been waived if the case falls into one of several general categories.

An alleged violation of a civil rights law, such as the Voting Rights Act of 1965, must be heard by the federal rather than the state judiciary.

Other types of cases in this category are patent and copyright claims, passport and naturalization proceedings, admiralty and maritime disputes, and violations of the U.S. postal laws. Another broad category of cases over which the U.S. trial courts exercise general original jurisdiction includes what are known as diversity of citizenship disputes.

These are disputes between parties from different states or between an American citizen and a foreign country or citizen.

Federal district courts also have jurisdiction over petitions from convicted prisoners who contend that their incarceration (or perhaps their denial of parole) is in violation of their federally protected rights. In the vast majority of these cases prisoners ask for a writ of "habeas corpus" (Latin for "you should have the body"), an order issued by a judge to determine whether a person has been lawfully imprisoned or detained.

The judge would demand that the prison authorities either justify the detention or release the petitioner. Prisoners convicted in a state court must argue that a federally protected right was violated – the right to be represented by counsel at trial.

Otherwise, the federal courts would have no jurisdiction. Federal prisoners have a somewhat wider range for their appeals since all their rights and options are within the scope of the U.S. Constitution. Finally, the district courts have the authority to hear any other cases that Congress may validly prescribe by law.

U.S. Courts of Appeals

The U.S. appellate courts have no original jurisdiction whatsoever; every case or controversy that comes to one of these intermediate level panels has been first argued in some other forum. These tribunals, like the district courts, are the creations of Congress, and their structure and functions have varied considerably over time.

Basically, Congress has granted the circuit courts appellate jurisdiction over two general categories of cases. The first of these are ordinary civil and criminal appeals from the federal trial courts. In criminal cases the appellant is the defendant because the government is not free to appeal a verdict of not guilty.

In civil cases the party that lost in the trial court is usually the appellant, but the winning party may appeal if it is not satisfied with the lower-court judgment. The second broad category of appellate jurisdiction includes appeals from certain federal administrative agencies and departments and from independent regulatory commissions, such as the Securities and Exchange Commission and the National Labor Relations Board.

U.S. Supreme Court

The U.S. Supreme Court is the only federal court mentioned by name in the Constitution, which spells out the general contours of the High Court's jurisdiction.

Although the Supreme Court is usually thought of as an appellate tribunal, it does have some general original jurisdiction. Probably the most important subject of such jurisdiction is a suit between two or more states. Judges from the Appellate Division of the New York State Supreme Court in Rochester, New York, hear motion arguments. A dispute must be real and current before a court will agree to accept it for adjudication.

The High Court shares original jurisdiction (with the U.S. district courts) in certain cases brought by or against foreign ambassadors or consuls, in cases between the USA and a state, and in cases commenced by a state against citizens of another state or another country. In situations such as these, where jurisdiction is shared, the courts are said to have concurrent jurisdiction. Cases over which the Supreme Court has original jurisdiction are often important, but they do not constitute a sizable proportion of the overall caseload.

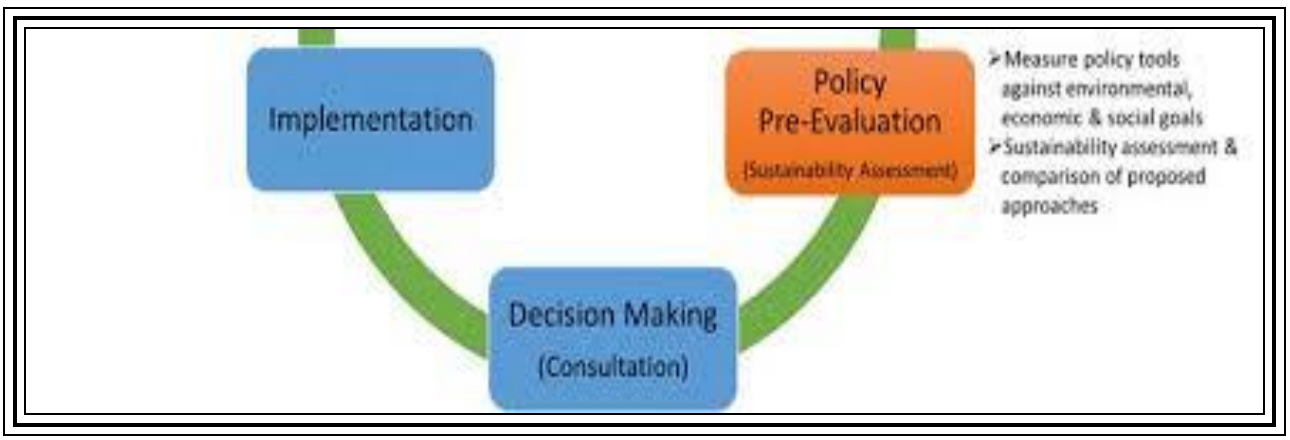
In recent years less than 1 % of the High Court's docket consisted of cases heard on original jurisdiction. The U.S. Constitution declares that the Supreme Court "shall have appellate Jurisdiction...under such Regulations as the Congress shall make".

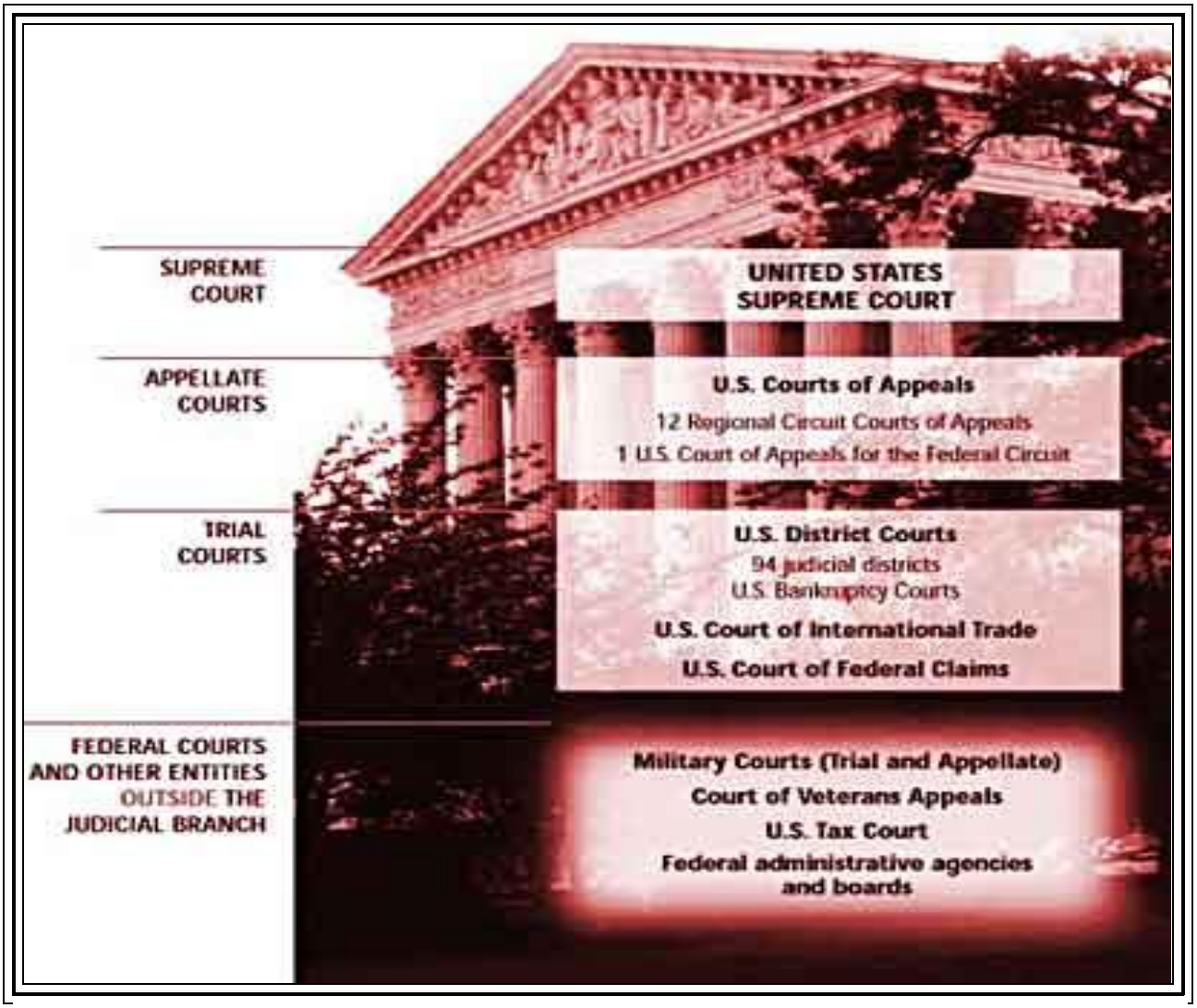
Over the years Congress has passed much legislation setting forth the "Regulations" determining which cases may appear before the nation's most august judicial body.

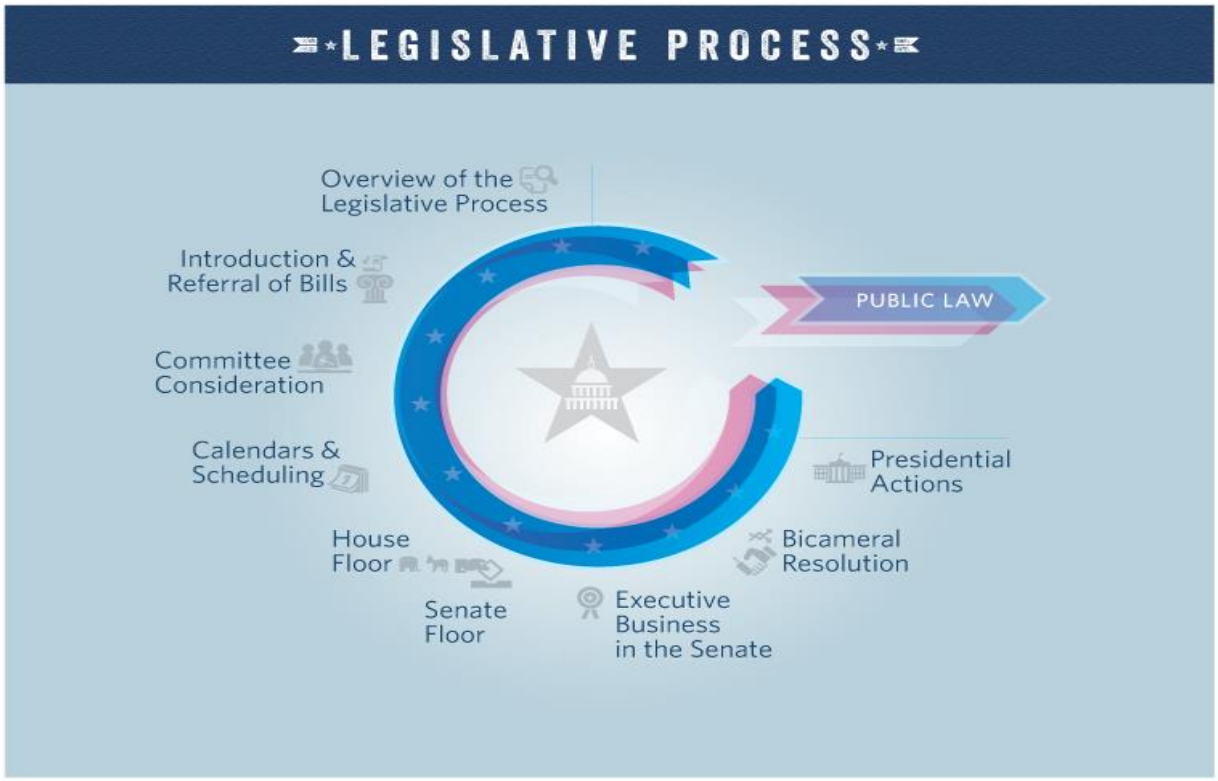
Appeals may reach the Supreme Court through two main avenues. First, there may be appeals from all lower federal constitutional and territorial courts and also from most, but not all, federal legislative courts. Second, the Supreme Court may hear appeals from the highest court in a state – as long as there is a substantial federal question.

Most of the High Court's docket consists of cases in which it has agreed to issue a writ of certiorari – a discretionary action. Such a writ (which must be supported by at least four justices) is an order from the Supreme Court to a lower court demanding that it send up a complete record of a case so that the Supreme Court can review it.

Historically, the Supreme Court has agreed to grant the petition for a writ of certiorari in only a tiny proportion of cases – usually less than 10 % of the time, and in recent years the number has been closer to 1 %. Another method by which the Supreme Court exercises its appellate jurisdiction is certification. This procedure is followed when one of the appeals courts asks the Supreme Court for instructions regarding a question of law. The justices may choose to give the appellate judges binding instructions, or they may ask that the entire record be forwarded to the Supreme Court for review and final judgment.




SUPREME COURT
UNITED STATES SUPREME COURT
APPELLATE COURTS
U.S. Courts of Appeals
12 Regional Circuit Courts of Appeals
1 U.S. Court of Appeals for the Federal Circuit
TRIAL COURTS
U.S. District Courts
94 judicial districts
U.S. Bankruptcy Courts
U.S. Court of International Trade
U.S. Court of Federal Claims
FEDERAL COURTS AND OTHER ENTITIES OUTSIDE THE JUDICIAL BRANCH
Military Courts (Trial and Appellate)
Court of Veterans Appeals
U.S. Tax Court
Federal administrative agencies and boards


LEGISLATIVE PROCESS
Overview of the Legislative Process
Introduction & Referral of Bills
Committee Consideration
Calendars & Scheduling
House Floor
Senate Floor
Executive Business in the Senate
Bicameral Resolution
Presidential Actions
PUBLIC LAW

JURISDICTION & POLICYMAKING OF STATE COURTS

The jurisdictions of the 50 separate state court systems in the USA are established in virtually the same manner as those within the national court system.

Each state has a constitution that sets forth the authority and decision-making powers of its trial and appellate judges. Likewise, each state legislature passes laws that further detail the specific powers and prerogatives of judges and the rights and obligations of those who bring suit in the state courts. Because no two state constitutions or legislative bodies are alike, the jurisdictions of individual state courts vary from one state to another. State courts are extremely important in terms of policy making in the USA.

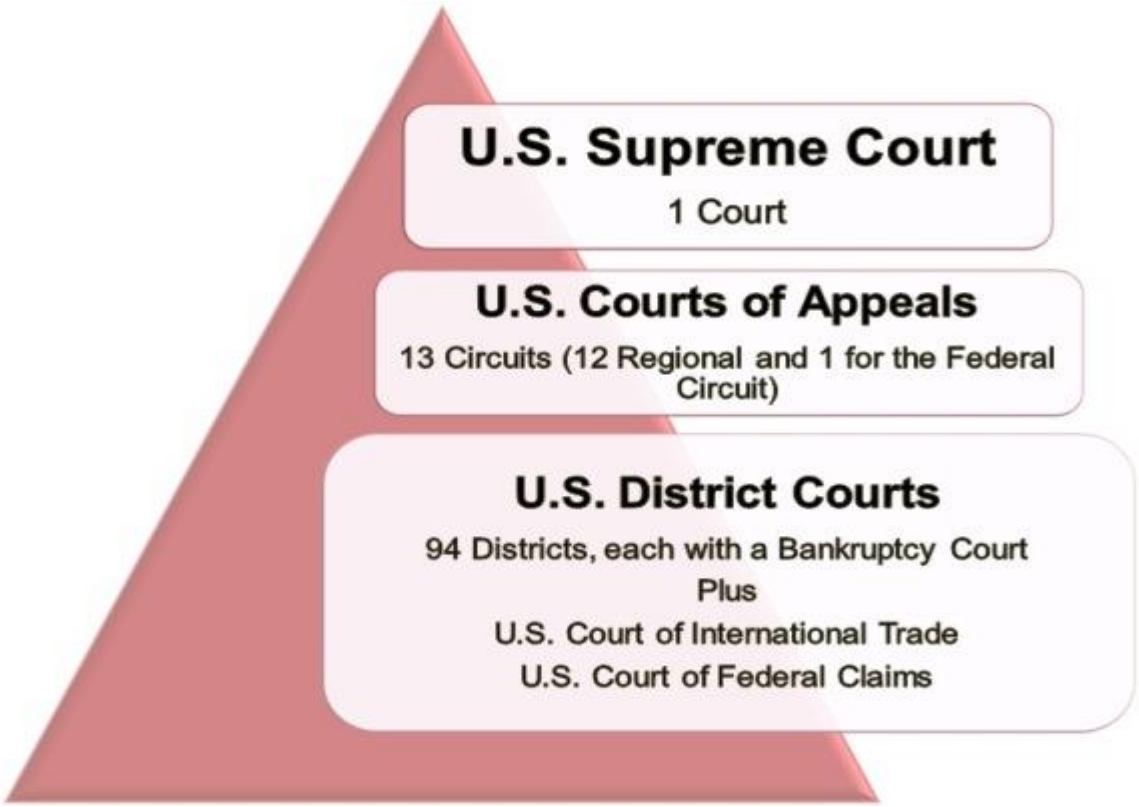
Well over 99 % of the judicial workload in the USA consists of state, not federal, cases, and 95 % of all judges in the USA work at the state level. Moreover, the decisions of state jurists frequently have a great impact on public policy.

During the 1970s a number of suits were brought into federal court challenging the constitutionality of a state's spending vastly unequal sums on the education of its schoolchildren. (This occurred because poorer school districts could not raise the same amount of money as could wealthy school districts.)

The litigants claimed that children in the poorer districts were victims of unlawful discrimination in violation of their equal protection rights under the U.S. Constitution.

The Supreme Court said they were not, however, in a five-to-four decision in San Antonio Independent School District v. Rodriguez (1973). But the matter did not end there.

Litigation was instituted in many states arguing that unequal educational opportunities were in violation of various clauses in the state constitutions. Since Rodriguez such suits have been brought 28 times in 24 states. In 14 of these cases, state supreme courts invalidated their state's method of financing education, thus requiring the reallocation of billions of dollars.



Some judges and judicial scholars argue that the U.S. Constitution and the respective state documents confer a certain inherent jurisdiction upon the judiciaries in some key areas, independent of the legislative will.

Nevertheless, the jurisdictional boundaries of American courts are also a product of legislative judgments – determinations often influenced by politics. Congress may advance a particular cause by giving courts the authority to hear cases in a public policy realm that previously had been forbidden territory for the judiciary. For example, when Congress passed the Civil Rights Act of 1968, it gave judges the authority to penalize individuals who interfere with "any person because of his race, color, religion or national origin and because he is or has been traveling in interstate commerce".

Prior to 1968 the courts had no jurisdiction over incidents that stemmed from interference by one person with another's right to travel.

Likewise, Congress may discourage a particular social movement by passing legislation to make it virtually impossible for its advocates to have any success in the courts.

The jurisdictions of state courts, like their federal counterparts, also are very much governed by – and the political product of – the will of the state legislatures.

Judicial Self-Restraint

The activities that judges are forbidden to engage in, or at least discouraged from engaging in, deal not so much with jurisdiction as with justiciability – the question of whether judges in the system ought to hear or refrain from hearing certain types of disputes.

Ten principles of judicial self-restraint, discussed below, serve to check and contain the power of American judges. These maxims originate from a variety of sources – the U.S. Constitution and state constitutions, acts of Congress and of state legislatures, and the common law. Some apply more to appellate courts than to trial courts; most apply to federal and state judicial systems.

A Definite Controversy Must Exist

The U.S. Constitution states that "the judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the USA, and Treaties made...under their Authority" (Article III, Section 2). The key word here is cases. Since 1789 the federal courts have chosen to interpret the term in its most literal sense: There must be an actual controversy between legitimate adversaries who have met all the technical legal standards to institute a suit. The dispute must concern the protection of a meaningful, nontrivial right or the prevention or redress of a wrong that directly affects the parties to the suit.

There are three corollaries to this general principle. The first is that the federal courts do not render advisory opinions, rulings about situations that are hypothetical or that have not caused an actual clash between adversaries. A dispute must be real and current before a court will agree to accept it for adjudication.

A second corollary is that the parties to the suit must have proper standing. This notion deals with the matter of who may bring litigation to court. The person bringing suit must have suffered (or be immediately about to suffer) a direct and significant injury.

As a general rule, a litigant cannot bring a claim on behalf of others (except for parents of minor children or in special types of suits called class actions).

In addition, the alleged injury must be personalized and immediate – not part of some generalized complaint. The third corollary is that courts ordinarily will not hear a case that has become moot – when the basic facts or the status of the parties have significantly changed between the time when the suit was first filed and when it comes before the judge(s). The death of a litigant or the fact that the litigants have ceased to be warring parties would render a case moot in most tribunals.

However, sometimes judges may decide that it is necessary to hear a case, even though the status of the facts and parties would seem to have radically altered.

Examples include cases where someone has challenged a state's refusal to permit an abortion or to permit the life-support system of a terminally ill person to be switched off.

(In such cases, by the time the suit reaches an appellate court, the woman may already have given birth or the moribund person may have died.) In these cases judges have believed that the issues were so important that they needed to be addressed by the court. To declare such cases moot would, practically speaking, prevent them from ever being heard in time by an appellate body. Although federal judges do not rule on abstract, hypothetical issues, many state courts are permitted to do so in some form or other.

Federal legislative courts may give advisory opinions as well.

American judges are empowered to render declaratory judgments, which define the rights of various parties under a statute, a will, or a contract. The judgments do not entail any type of coercive relief. The federal courts were given the authority to act in this capacity in the Federal Declaratory Judgment Act of 1934, and about three-fourths of the states grant their courts this power.

Although a difference exists between an abstract dispute that the federal courts must avoid and a situation where a declaratory judgment is in order, in the real world the line between the two is often a difficult one for jurists to draw.

A Plea Must Be Specific

Another constraint upon the federal judiciary is that judges will hear no case on the merits unless the petitioner is first able to cite a specific part of the Constitution as the basis of the plea. For example, the First Amendment forbids government from making a law "respecting an establishment of religion".

In 1989 the state of New York created a special school district solely for the benefit of the Satmar Hasids, a group of Hasidic Jews with East European roots that strongly resists assimilation into modern society. Most of the children attended parochial schools in the Village of Kiryas Joel, but these private schools weren't able to accommodate retarded and disabled students, and the Satmars claimed that such children within their community would be traumatized if forced to attend a public school. Responding to this situation, the state legislature created a special district encompassing a single school that served only handicapped children from the Hasidic Jewish community. This arrangement was challenged by the association representing New York state's school boards.

In June 1994 the U.S. Supreme Court ruled that the creation of the one-school district effectively delegated political power to the orthodox Jewish group and therefore violated the First Amendment's ban on governmental "establishment of religion". Whether or not everyone agrees that the New York law was constitutional, few, if any, would doubt that the school board association met the specific criteria for securing judicial review:

The Constitution clearly forbids the government from delegating political power to a specific religious entity. The government here readily acknowledged that it had passed a law for the unique benefit of a singular religious community.

However, if one went into court and contended that a particular law or official action "violated the spirit of the Bill of Rights" or "offended the values of the Founders", a judge surely would dismiss the proceeding. For if judges were free to give concrete, substantive meaning to vague generalities such as these, there would be little check on what they could do. In the real world this principle is not as simple and clear-cut as it sounds, because the Constitution contains many clauses that are open to a wide variety of interpretations, giving federal judges sufficient room to maneuver and make policy.

Beneficiaries May Not Sue

A third aspect of judicial self-restraint is that a petitioner who has been the beneficiary of a law or an official action may not subsequently challenge that law.

For example, suppose that a farmer has long been a member of a program under which he agreed to take part of his land out of production and periodically was paid a subsidy by the federal government. After years as a participant, the farmer learns that a neighbor is also drawing regular payments for letting all of his farmland lie fallow.

The idea that the neighbor is getting something for nothing offends the farmer, and he questions the program's constitutionality. The farmer challenges the legality of the program in the local federal district court. As soon as it is brought to the judge's attention that the farmer had himself been a member of the program and had gained financially from it, the suit is dismissed: One may not benefit from a particular governmental endeavor or official action and subsequently attack it in court.

Appellate Courts Rule on Legal – Not Factual – Questions

A working proposition of state and federal appellate court practice is that these courts will generally not hear cases if the grounds for appeal are that the trial judge or jury wrongly amassed and identified the basic factual elements of the case. It is not that trial judges and juries always do a perfect job of making factual determinations.

Rather, there is the belief that they are closer to the actual parties and physical evidence of the case, and, therefore, they will do a much better job of making factual assessments than would an appellate body reading a transcript of the case some months or years after the trial. However, legal matters – which laws to apply to the facts of a case or how to assess the facts in light of the prevailing law – are appropriate for appellate review.

The Supreme Court Is Not Bound (Technically) by Precedents

If the High Court is free to overturn or circumvent past and supposedly controlling precedents when it decides a case, this might appear to be an argument for judicial activism – not restraint. However, this practice is one of the principles of self-restraint.

If the Supreme Court were inescapably bound by the dictates of its prior rulings, it would have very little flexibility.

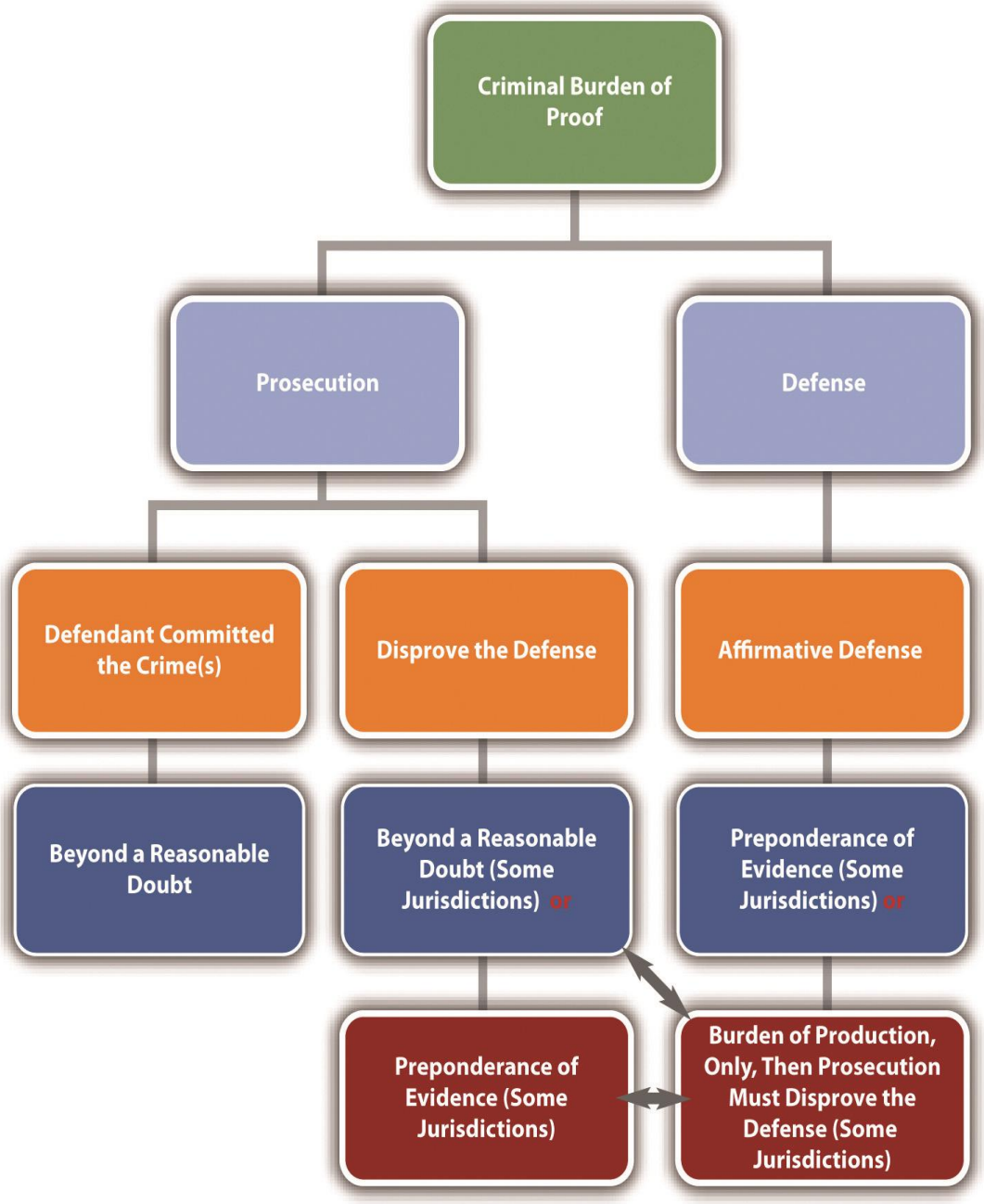
By occasionally allowing itself the freedom to overrule a past decision or to ignore a precedent that would seem to be controlling, the Supreme Court establishes a corner of safety to which it can retreat if need be. When wisdom dictates that the Court change direction or at least keep an open mind, this principle of self-restraint is put to use.

Other Remedies Must Be Exhausted

Another principle of self-restraint often frustrates the anxious litigant but is essential to the orderly administration of justice: Courts in the USA will not accept a case until all other remedies, legal and administrative, have been exhausted.

In its simplest form this doctrine means that one must work up the ladder with one's legal petitions. Federal cases must first be heard by the U.S. trial courts, then reviewed by one of the appellate tribunals, and finally heard by the U.S. Supreme Court. This orderly procedure of events must occur despite the importance of the case or of the petitioners who filed it. In certain circumstances, however, the appellate process can be shortened.

Exhaustion of remedies refers to possible administrative relief as well as to adherence to the principle of a three-tiered judicial hierarchy. Such relief might be in the form of an appeal to an administrative officer, a hearing before a board or committee, or formal consideration of a matter by a legislative body.



Courts Do Not Decide "Political Questions"

To U.S. judges, the executive and the legislative branches of government are political in that they are elected by the people for the purpose of making public policy. The judiciary, in contrast, was not designed by the Founders to be an instrument manifesting the popular will and is therefore not political. According to this line of reasoning, then, a political question is one that ought properly to be resolved by one of the other two branches of government. When the state of Oregon gave its citizens the right to vote on popular statewide referendums & initiatives around 1900, the Pacific States Telephone & Telegraph Company objected. (The company feared that voters would bypass the more business-oriented legislature and pass laws restricting its rates and profits.)

The company claimed that Article IV, Section 4, of the Constitution guarantees to each state "a Republican Form of Government" – a term that supposedly means that laws are to be made only by the elected representatives of the people, not by the citizens directly.

The High Court refused to rule on the merits of the case, declaring the issue to be a political question. The Court reasoned that since Article IV primarily prescribes the duties of Congress, it follows that the Founders wanted Congress – not the courts – to oversee the forms of government in the several states.

In recent decades an important political versus nonpolitical dispute has concerned the matter of reapportionment of legislative districts. Prior to 1962, a majority on the Supreme Court refused to rule on the constitutionality of legislative districts with unequal populations, saying that such matters were "nonjusticiable" and that the Court dared not enter what Justice Felix Frankfurter called "the political thicket".

According to traditional Supreme Court thinking, the Founders wanted legislatures to redistrict themselves – perhaps with input from the electorate. However, with the Supreme Court's decision in Baker v. Carr (1962), the majority reversed that thinking. Since then the Court has held in scores of cases that the equal-protection clause of the Fourteenth Amendment requires legislative districts to be of equal population size and, furthermore, that the courts should see to it that this mandate is carried out.

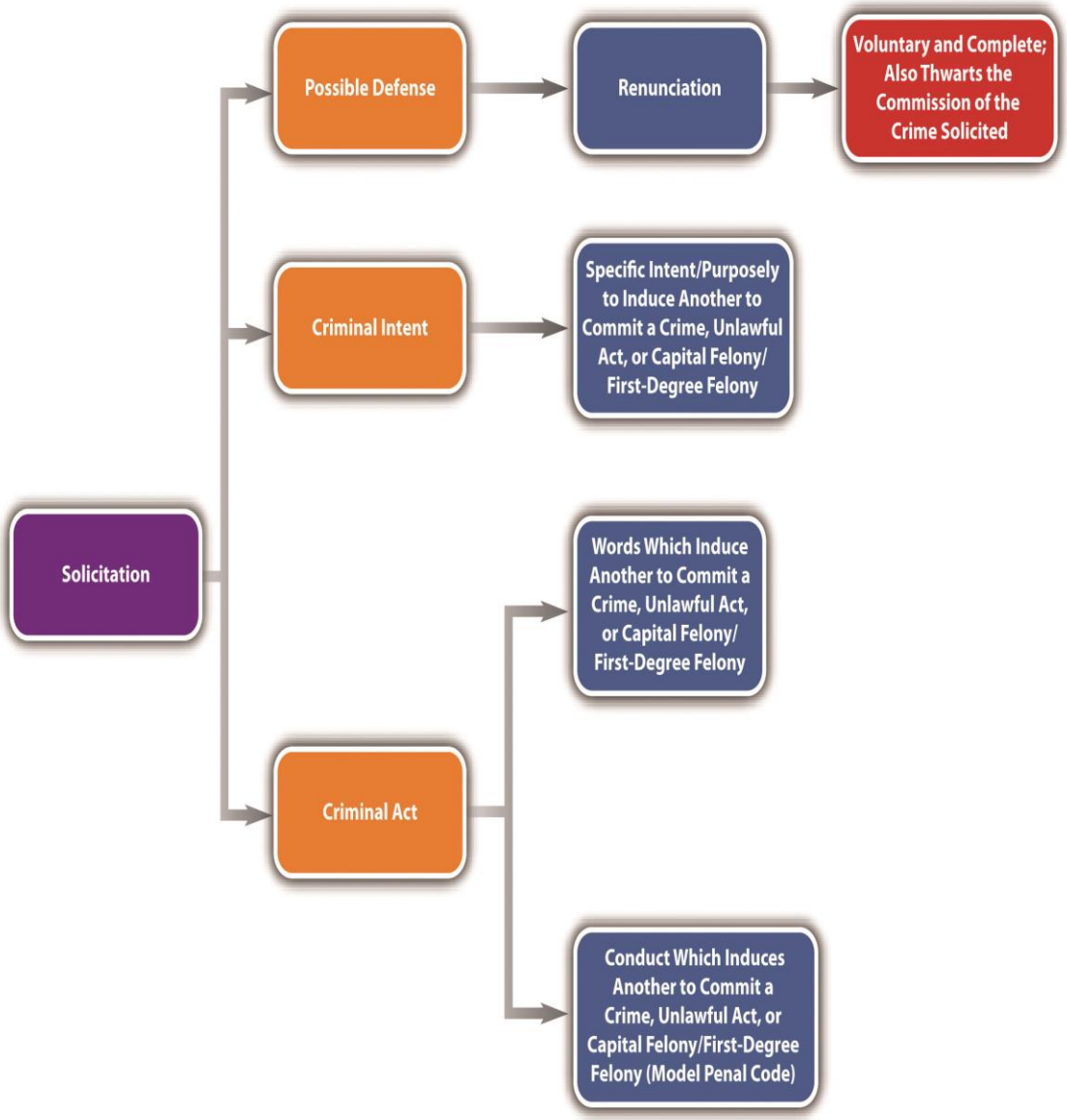
The Burden of Proof is on the Petitioner

The nation's jurists generally agree that an individual who would challenge the constitutionality of a statute bears the burden of proof. Thus, if someone were to attack a particular statute, he or she would have to do more than demonstrate that it was "questionable or of doubtful constitutionality"; the petitioner would have to persuade the court that the evidence against the law was clear-cut and overwhelming. The only exception to this burden of proof principle is in the realm of civil rights and liberties.

Some jurists who are strong civil libertarians have long contended that when government attempts to restrict basic human freedoms the burden of proof should shift to the government.

In several specific areas of civil rights jurisprudence that philosophy now prevails.

The U.S. Supreme Court has ruled in a variety of cases that laws that treat persons differently according to their race or gender are automatically subject to "special scrutiny". This means that the burden of proof shifts to the government to demonstrate a compelling or overriding need to differentiate persons according to their ethnic origins or sex. The government has long argued (successfully) that some major restrictions can be placed on women in the armed forces that prevent them from being assigned to full combat duty.



Laws are overturned on the Narrowest Grounds only

Sometimes during a trial a judge clearly sees that the strictures of the Constitution have been offended by a legislative or executive act.

Even here, however, a jurist may proceed with caution. First, a judge may have the option of invalidating an official action on what is called statutory, instead of constitutional, grounds. Statutory invalidation means that a judge overturns an official's action because the official acted beyond the authority delegated to him or her by the law.

Such a ruling has the function of saving the law itself while still nullifying the official's misdeed. Second, judges may, if possible, invalidate only that portion of a law they find constitutionally defective instead of overturning the entire statute.

No Rulings are made on the "Wisdom" of Legislation

If followed strictly, this principle means that the only basis for declaring a law or an official action unconstitutional is that it literally violates the Constitution. Statutes do not offend the Constitution merely because they are unfair, are fiscally wasteful, or constitute bad public policy.

If taken truly to heart, this means that judges and justices are not free to invoke their own personal notions of right and wrong or of good and bad public policy when they examine the constitutionality of legislation. Another spinoff of this principle is that a law may be passed that all agree is good and wise but that is nevertheless unconstitutional; conversely, a statute may legalize the commission of an official deed that all know to be bad and dangerous but that still does not offend the Constitution.

The principle of not ruling on the "wisdom" of a law is difficult to follow in the real world. This is so because the Constitution, a rather brief document, is silent on many areas of public life and contains a number of phrases and admonitions that are open to a variety of interpretations. The Constitution says that Congress may regulate interstate commerce.

But what exactly is commerce, and how extensive does it have to be before it is of an "interstate" character? As human beings, judges have differed in the way they have responded to this question.

The Constitution guarantees a person accused of a crime the right to a defense attorney. But does this right continue if one appeals a guilty verdict and, if so, for how many appeals? Strict constructionists and loose constructionists have responded differently to these queries. In all, despite the inevitable intrusion of judges' personal values into their interpretation of many portions of the Constitution, virtually every jurist subscribes to the general principle that laws can be invalidated only if they offend the Constitution – not the personal preferences of the judges.

Task 1. Analyze the information, which is in the highlight, and use it in practice.

Task 2. Choose the keywords that best convey the gist of the information.

Task 3. Read the text and pick up the essential details in the form of quick notes.

Task 4. Transfer the given information from the passages onto a table.

№	Activity			
	Court	When	Where	Score
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CHAPTER IX.

LAWYERS & LITIGANTS IN THE JUDICIAL PROCESS

INTRODUCTION

This chapter focuses on three crucial actors in the judicial process: lawyers, litigants, and interest groups. Judges in the USA make decisions only in the context of cases that are brought to the courts by individuals or groups who have some sort of disagreement or dispute with each other.

These adversaries, commonly called litigants, sometimes argue their own cases in such minor forums as small claims courts, but they are always represented by lawyers in the more important judicial arenas. Following an examination of the legal profession, the chapter discusses the role of individual litigants and interest groups in the judicial process.

LAWYERS & THE LEGAL PROFESSION

The training of attorneys and the practice of law have evolved over time in the USA.

Today American lawyers practice in a variety of settings and circumstances.

During the colonial period in America (1607-1776), there were no law schools to train those interested in the legal profession. Some young men went to England for their education and attended the Inns of Court.

The Inns were not formal law schools, but were part of the English legal culture and allowed students to become familiar with English law. Those who aspired to the law during this period generally performed a clerkship or apprenticeship with an established lawyer. After the American Revolution (1775-83), the number of lawyers increased rapidly, because neither legal education nor admission to the bar was very strict.

The apprenticeship method continued to be the most popular way to receive legal training, but law schools began to come into existence. The first law schools grew out of law offices that specialized in training clerks or apprentices.

The earliest such school was the Litchfield School in Connecticut, founded in 1784.

This school, which taught by the lecture method, placed primary emphasis on commercial law. Eventually, a few colleges began to teach law as part of their general curriculum, and in 1817 an independent law school was established at Harvard University.

During the second half of the 19th century, the number of law schools increased dramatically, from 15 schools in 1850 to 102 in 1900. The law schools of that time and those of today have two major differences. First, law schools then did not usually require any previous college work. Second, in 1850 the standard law school curriculum could be completed in one year. Later in the 1800s many law schools instituted two-year programs.

In 1870 major changes began at Harvard that were to have a lasting impact on legal training. Harvard in stituted stiffer entrance requirements; a student who did not have a college degree was required to pass an entrance test. The law school course was increased to two years in 1871 and to three years in 1876. Students were required to pass first-year final examinations before proceeding to the second-year courses.

The most lasting change, however, was the introduction of the case method of teaching.

This method replaced lectures and textbooks with casebooks.

The casebooks (collections of actual case reports) were designed to explain the principles of law, what they meant, and how they developed. Teachers then used the Socratic method to guide the students to a discovery of legal concepts found in the cases.

Other schools eventually adopted the Harvard approach, and the case method remains the accepted method of teaching in many law schools today.

As the demand for lawyers increased during the late 1800s, there was a corresponding acceleration in the creation of new law schools. Opening a law school was not expensive, and a number of night schools, using lawyers and judges as part-time faculty members, sprang into existence. Standards were often lax and the curriculum tended to emphasize local practice. These schools' major contribution lay in making training more readily available to poor, immigrant, and working-class students.

In the 20th century, the number of people wanting to study law increased dramatically.

By the 1960s the number of applicants to law schools had grown so large that nearly all schools became more selective. At the same time, in response to social pressure and litigation, many law schools began actively recruiting female and minority applicants.

By the 1960s, the curriculum in some law schools had been expanded to include social concerns such as civil rights law and law-and-poverty issues. International law courses became available. A more recent trend in law schools is an emphasis on the use of computers for everything from registration to classroom instruction to accessing court forms to student services. Noteworthy is that more and more law schools are offering courses or special programs in intellectual property law, a field of specialization that has grown considerably in recent years. Finally, the increasing use of advertising by lawyers has had a profound impact on the legal profession. On television stations across the country one can now see lawyers making appeals to attract new clients. Furthermore, legal clinics, established to handle the business generated by the increased use of advertising, have spread rapidly.

Growth & Stratification

The number of lawyers in the USA has increased steadily over the past half century and is currently estimated at more than 950,000. Where do all the attorneys in the USA find work? The Law School Admission Council provides some answers in The Official Guide to U.S. Law Schools, 2001 Edition. Almost three-fourths (72.9 %) of America's lawyers are in private practice, some in small, oneperson offices and some in much larger law firms.

About 8.2 % of the legal profession's members work for government agencies, roughly 9.5 % work for private industries and associations as lawyers or managers, about 1.1 % work for legal aid associations or as public defenders, representing those who cannot afford to pay a lawyer, and 1 % are in legal education. Some 5 % of the nation's lawyers are retired or inactive. America's lawyers apply their professional training in a variety of settings.

Some environments are more profitable and prestigious than others. This situation has led to what is known as professional stratification. One of the major factors influencing the prestige level is the type of legal specialty and the type of clientele served. Lawyers with specialties who serve big business and large institutions occupy the top hemisphere; those who represent individual interests are in the bottom hemisphere. At the top of the prestige ladder are the large national law firms.

Attorneys in these firms have traditionally been known less for court appearances than for the counseling they provide their clients. The clients must be able to pay for this high-powered legal tal ent; thus they tend to be major corporations rather than individuals. However, many of these large national firms often provide "pro bono" (Latin for "the public good", or free) legal services to further civil rights, civil liberties, consumer interests, and environmental causes. The large national firms consist of partners and associates. Partners own the law firm and are paid a share of the firm's profits.

The associates are paid salaries and in essence work for the partners. These large firms compete for the best graduates from the nation's law schools. The most prestigious firms have 250 or more lawyers and also employ hundreds of other people as paralegals (nonlawyers who are specially trained to handle many of the routine aspects of legal work), administrators, librarians, and secretaries. A notch below those working in the large national firms are those employed as attorneys by large corporations.

Many corporations use national law firms as outside counsel. Increasingly, however, corporations are hiring their own salaried attorneys as in-house counsel. The legal staff of some corporations rivals those of private firms in size. Further, these corporations compete with the major law firms for the best law school graduates. Instead of representing the corporation in court (a task usually handled by outside counsel when necessary), the legal division handles the multitude of legal problems faced by the modern corporation.

The legal division monitors the company's personnel practices to ensure compliance with federal and state regulations concerning hiring and removal procedures.

The corporation's attorneys may advise the board of directors about such things as contractual agreements, mergers, stock sales, and other business practices. The company lawyers may help educate other employees about the laws that apply to their specific jobs and make sure that they are in compliance with them. The legal division of a large company also serves as a liaison with outside counsel. Most of the nation's lawyers work in a lower hemisphere of the legal profession in terms of prestige and do not command the high salaries associated with large national law firms and major corporations.

However, they are engaged in a wider range of activities and are much more likely to be found, day in and day out, in the courtrooms of the USA. These are the attorneys who represent clients in personal injury suits, who prosecute and defend persons accused of crimes, who represent husbands and wives in divorce proceedings, who help people conduct real estate transactions, and who help people prepare wills, to name just a few activities.

Attorneys who work for the government are generally included in the lower hemisphere.

Some, such as the U.S. attorney general and the solicitor general of the USA, occupy quite prestigious positions, but many toil in rather obscure and poorly paid positions.

A number of attorneys opt for careers as judges at the federal or state level. Another distinction in terms of specialization in the legal profession is that between plaintiffs and defense attorneys. The former group initiates lawsuits, whereas the latter group defends those accused of wrongdoing in civil and criminal cases.

Federal Prosecutors

Government attorneys work at all levels of the judicial process, from trial courts to the highest state and federal appellate courts. Each federal judicial district has one U.S. attorney and one or more assistant U.S. attorneys.

They are responsible for prosecuting defendants in criminal cases in the federal district courts and for defending the USA when it is sued in a federal trial court. U.S. attorneys are appointed by the president and confirmed by the Senate.

Nominees must reside in the district to which they are appointed and must be lawyers.

They serve a formal term of four years but can be reappointed indefinitely or removed at the president's discretion. The assistant U.S. attorneys are formally appointed by the U.S. attorney general, although in practice they are chosen by the U.S. attorney for the district, who forwards the selection to the attorney general for ratification. Assistant U.S. attorneys may be fired by the attorney general.

In their role as prosecutors, U.S. attorneys have considerable discretion in deciding which criminal cases to prosecute. They also have the authority to determine which civil cases to try to settle out of court and which ones to take to trial. U.S. attorneys, therefore, are in a very good position to influence the federal district court's docket. Because they engage in more litigation in the district courts than anyone else, the U.S. attorneys and their staffs are vital participants in policy making in the federal trial courts.

Prosecutors at the State Level

Those who prosecute persons accused of violating state criminal statutes are commonly known as district attorneys. In most states they are elected county officials; however, in a few states they are appointed. The district attorney's office usually employs a number of assistants who do most of the actual trial work. Most of these assistant district attorneys are recent graduates of law school, who gain valuable trial experience in these positions.

Many later enter private practice, often as criminal defense attorneys. Others will seek to become district attorneys or judges after a few years. The district attorney's office has a great deal of discretion in the handling of cases. Given budget and personnel constraints, not all cases can be afforded the same amount of time and attention.

Therefore, some cases are dismissed, others are not prosecuted, and still others are prosecuted vigorously in court. Most cases, however, are subject to plea bargaining.

This means that the district attorney's office agrees to accept the defendant's plea of guilty to a reduced charge or to drop some charges against the defendant in exchange for pleas of guilty to others.

Public Defenders

Often the person charged with violating a state or federal criminal statute is unable to pay for the services of a defense attorney. In some areas a government official known as a public defender bears the responsibility for representing indigent defendants. Thus, the public defender is a counterpart of the prosecutor.

Unlike the district attorney, however, the public defender is usually appointed rather than elected. In some parts of the country there are statewide public defender systems; in other regions the public defender is a local official, usually associated with a county government.

Like the district attorney, the public defender employs assistants and investigative personnel. At both the state and federal levels, some government attorneys are better known for their work in appellate courts than in trial courts. Each state has an attorney general who supervises a staff of attorneys.

They are charged with the responsibility of handling the legal affairs of the state. At the federal level the Department of Justice has similar responsibilities on behalf of the USA.

The U.S. Department of Justice

Although the Justice Department is an agency of the executive branch of the government, it has a natural association with the judicial branch. Many of the cases heard in the federal courts involve the national government in one capacity or another. Sometimes the government is sued; in other instances the government initiates the lawsuit. In either case, an attorney must represent the government.

Most of the litigation involving the federal government is handled by the Justice Department, although a number of other government agencies have attorneys on their payrolls.

The Justice Department's Office of the Solicitor General is extremely important in cases argued before the Supreme Court. The department also has several legal divisions, each with a staff of specialized lawyers and headed by an assistant attorney general.

The legal divisions supervise the handling of litigation by the U.S. attorneys, take cases to the courts of appeals, and aid the solicitor general's office in cases argued before the Supreme Court.

U.S. Solicitor General

The solicitor general of the USA, the thirdranking official in the Justice Department, is assisted by five deputies and about 20 assistant solicitors general. The solicitor general's primary function is to decide, on behalf of the USA, which cases will and will not be presented to the Supreme Court for review.

Whenever an executive branch department or agency loses a case in one of the courts of appeals & wishes a Supreme Court review, that department or agency will request that the Justice Department seek certiorari. The solicitor general will determine whether to appeal the lower court decision.

Many factors must be taken into account when making such a decision. Perhaps the most important consideration is that the Supreme Court is limited in the number of cases it can hear in a given term. Thus, the solicitor general must determine whether a particular case deserves extensive consideration by the Court. In addition to deciding whether to seek Supreme Court review, the solicitor general personally argues most of the government's cases heard by the High Court.

State Attorneys General

Each state has an attorney general who serves as its chief legal official. In most states this official is elected on a partisan statewide ballot. The attorney general oversees a staff of attorneys who primarily handle the civil cases involving the state.

Although the prosecution of criminal defendants is generally handled by the local district attorneys, the attorney general's office often plays an important role in investigating statewide criminal activities. Thus, the attorney general and his or her staff may work closely with the local district attorney in preparing a case against a particular defendant.

The state attorneys general also issue advisory opinions to state and local agencies.

Often, these opinions interpret an aspect of state law not yet ruled on by the courts.

Although an advisory opinion might eventually be overruled in a case brought before the courts, the attorney general's opinion is important in determining the behavior of state and local agencies.

Private Lawyers in the Judicial Process

In criminal cases in the USA the defendant has a constitutional right to be represented by an attorney. Some jurisdictions have established public defender's offices to represent indigent defendants. In other areas, some method exists of assigning a private attorney to represent a defendant who cannot afford to hire one. Those defendants who can afford to hire their own lawyers will do so. In civil cases neither the plaintiff nor the defendant is constitutionally entitled to the services of an attorney. However, in the civil arena the legal issues are often so complex as to demand the services of an attorney. Various forms of legal assistance are usually available to those who need help.

Assigned Defense Counsel

When a private lawyer must be appointed to represent an indigent defendant, the assignment usually is made by an individual judge on an ad hoc basis. Local bar associations or lawyers themselves often provide the courts with a list of attorneys who are willing to provide such services.

Private Defense Counsel

Some attorneys in private practice specialize in criminal defense work. Although the lives of criminal defense attorneys may be depicted as glamorous on television and in movies, the average real-life criminal defense lawyer works long hours for low pay and low prestige.

The Courtroom Workgroup

Rather than functioning as an occasional gathering of strangers who resolve a particular conflict and then go their separate ways, lawyers and judges who work in a criminal court room become part of a workgroup.

The most visible members of the courtroom workgroup – judges, prosecutors, and defense attorneys – are associated with specific functions: Prosecutors push for convictions of those accused of criminal offenses against the government, defense attorneys seek acquittals for their clients, judges serve as neutral arbiters to guarantee a fair trial.

Despite their different roles, members of the courtroom workgroup share certain values and goals and are not the fierce adversaries that many people imagine. Cooperation among judges, prosecutors, and defense attorneys is the norm. The most important goal of the courtroom workgroup is to handle cases expeditiously.

Judges and prosecutors are interested in disposing of cases quickly to present a picture of accomplishment and efficiency. Because private defense attorneys need to handle a large volume of cases to survive financially, resolving cases quickly works to their advantage.

Public defenders seek quick dispositions simply because they lack adequate resources to handle their caseloads. A second important goal of the courtroom workgroup is to maintain group cohesion.

Conflict among the members makes work more difficult and interferes with the expeditious handling of cases. Finally, the courtroom workgroup is interested in reducing or controlling uncertainty. In practice this means that all members of the workgroup strive to avoid trials. Trials, especially jury trials, produce a great deal of uncertainty given that they require substantial investments of time and effort without any reasonable guarantee of a desirable outcome. To attain these goals, workgroup members employ several techniques.

Although unilateral decisions and adversarial proceedings occur, negotiation is the most commonly used technique in criminal courtrooms. The members negotiate over a variety of issues – continuances (delays in the court proceedings), hearing dates, and exchange of information, for example. Plea bargaining, however, is the most critical tool of negotiation.

Legal Services for the Poor

Although criminal defendants are constitutionally entitled to be represented by a lawyer, those who are defendants in a civil case or who wish to initiate a civil case do not have the right to representation. Therefore, those who do not have the funds to hire a lawyer may find it difficult to obtain justice. To deal with this problem, legal aid services are now found in many areas. Legal aid societies were established in New York and Chicago as early as the late 1880s, and many other major cities followed suit in the 20th century.

Task 1. Analyze the information, which is in the highlight, & use it in practice.

Task 2. Choose the keywords that best convey the gist of the information.

Task 3. Read the text & pick up the essential details in the form of quick notes.

Task 4. Transfer the given information from the passages onto a table.

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Although some legal aid societies are sponsored by bar associations, most are supported by private contributions. Legal aid bureaus also are associated with charitable organizations in some areas, and many law schools operate legal aid clinics to provide both legal assistance for the poor and value. In addition, many lawyers provide legal services "pro bono publico" (Latin for "for the public good") because they see it as a professional obligation.

In some cases taken before the courts, the litigants are individuals, whereas in other cases one or more of the litigants may be a government agency, a corporation, a union, an interest group, or a university. What motivates a person or group to take a grievance to court? In criminal cases the answer to this question is relatively simple. A state or federal criminal statute has allegedly been violated, and the government prosecutes the party charged with violating the statute. In civil cases the answer is not quite so easy.

Although some persons readily take their grievances to court, many others avoid this route because of the time and expense involved. Political scientist Phillip Cooper points out that judges are called upon to resolve two kinds of disputes: private law cases and public law controversies. Private law disputes are those in which one private citizen or organization sues another. In public law controversies, a citizen or organization contends that a government agency or official has violated a right established by a constitution or statute.

In Hard Judicial Choices, Cooper writes that "legal actions, whether public law or private law contests, may either be policy oriented or compensatory".

A classic example of private, or ordinary, compensation-oriented litigation is when a person injured in an automobile accident sues the driver of the other car in an effort to win monetary damages as compensation for medical expenses incurred. This type of litigation is personal and is not aimed at changing governmental or business policies. Some private law cases, however, are policy oriented or political in nature.

Personal injury suits and product liability suits may appear on the surface to be simply compensatory in nature but may be used to change the manufacturing or business practices of the private firms being sued. A case litigated in North Carolina provides a good example.

The case began in 1993 after a five-year-old girl got stuck on the drain of a wading pool after another child had removed the drain cover.

Such a powerful suction was created that, before she could be rescued, the drain had sucked out most of her large and small intestines. As a result, the girl will have to spend about 11 hours per day attached to intravenous feeding tubes for the rest of her life.

In 1997 a jury awarded the girl's family $25 million in compensatory damages and, before the jury was to have considered punitive damages, the drain manufacturer and two other defendants settled the case for $30.9 million. The plaintiff's attorney said that the lawsuit revealed similar incidents in other areas of the country and presented a stark example of something industry insiders knew but others did not.

Not only did the family win its lawsuit, but the North Carolina legislature also passed a law requiring multiple drains to prevent such injuries in the future. Most political or policy-oriented lawsuits are public law controversies. That is, they are suits brought against the government primarily to stop allegedly illegal policies or practices. They may also seek damages or some other specific form of relief. A case decided by the U.S. Supreme Court, Lucas v. South Carolina Coastal Council, provides a good example.

South Carolina's Beachfront Management Act forbade David H. Lucas from building single-family houses on two beachfront lots he owned. A South Carolina trial court ruled that Lucas was entitled to be compensated for his loss. The South Carolina Supreme Court reversed the trial court decision, however, and Lucas appealed to the U.S. Supreme Court.

The High Court ruled in Lucas's favor, saying that if a property owner is denied all economically viable use of his or her property, a taking has occurred and the Constitution requires that he or she get compensation.

Political or policy-oriented litigation is more prevalent in the appellate courts than in the trial courts and is most common in the U.S. Supreme Court.

Ordinary compensatory litigation is often terminated early in the judicial process because the litigants find it more profitable to settle their dispute or accept the verdict of a trial court. However, litigants in political cases generally do little to advance their policy goals by gaining victories at the lower levels of the judiciary.

Instead, they prefer the more widespread publicity that is attached to a decision by an appellate tribunal. Pursuing cases in the appellate courts is expensive. Therefore, many lawsuits that reach this level are supported in one way or another by interest groups.

Task 1. Make up some dialogues from the information above.

Task 2. Choose the keywords that best convey the gist of the information.

Task 3. Read the text and pick up the essential details in the form of quick notes.

Task 4. Transfer the given information from the passages onto a table.

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INTEREST GROUPS IN THE JUDICIAL PROCESS

Although interest groups are probably better known for their attempts to influence legislative and executive branch decisions, they also pursue their policy goals in the courts.

Some groups have found the judicial branch to be more receptive to their efforts than either of the other two branches of government. Interest groups that do not have the economic resources to mount an intensive lobbying effort in Congress or a state legislature may find it much easier to hire a lawyer and find some constitutional or statutory provision upon which to base a court case.

Likewise, a small group with few registered voters among its members may lack the political clout to exert much influence on legislators and executive branch officials. Large memberships and political clout are not prerequisites for filing suits in the courts, however.

Interest groups may also turn to the courts because they find the judicial branch more sympathetic to their policy goals than the other two branches.

Throughout the 1960s interest groups with liberal policy goals fared especially well in the federal courts. In addition, the public interest law firm concept gained prominence during this period. The public interest law firms pursue cases that serve the public interest in general – including cases in the areas of consumer rights, employment discrimination, occupational safety, civil liberties, and environmental concerns.

In the 1970s and 1980s conservative interest groups turned to the federal courts more frequently than they had before. This was in part a reaction to the successes of liberal interest groups. It was also due to the increasingly favorable forum that the federal courts provided for conservative viewpoints. Interest group involvement in the judicial process may take several different forms depending upon the goals of the particular group.

However, two principal tactics stand out: involvement in test cases and presentation of information before the courts through "amicus curiae" (in Latin "friend of the court") briefs.

Test Cases

Because the judiciary engages in policy making only by rendering decisions in specific cases, one tactic of interest groups is to make sure that a case appropriate for obtaining its policy goals is brought before the court.

In some instances this means that the interest group will initiate and sponsor the case by providing all the necessary resources. The best-known example of this type of sponsorship is Brown v. Board of Education (1954). In that case, although the suit against the Board of Education of Topeka, Kansas, was filed by the parents of Linda Brown, the National Association for the Advancement of Colored People (NAACP) supplied the legal help and money necessary to pursue the case all the way to the Supreme Court.

Thurgood Marshall, who later became a U.S. Supreme Court justice, argued the suit on behalf of the plaintiff and the NAACP. As a result, the NAACP gained a victory through the Supreme Court's decision that segregation in the public schools violates the equal protection clause of the 14th Amendment. Interest groups may provide assistance in a case initiated by someone else, but which nonetheless raises issues of importance to the group.

A good example of this situation may be found in a freedom of religion case, Wisconsin v. Yoder. That case was initiated by the state of Wisconsin when it filed criminal complaints charging Jonas Yoder and others with failure to send their children to school until the age of 16 as required by state law.

Yoder and the others, members of the Amish faith, believed that education beyond the eighth grade led to the breakdown of the values they cherished and to "worldly influences on their children". An organization known as the National Committee for Amish Religious Freedom (NCARF) came to the defense of Yoder and the others.

Following a decision against the Amish in the trial court, the NCARF appealed to a Wisconsin circuit court, which upheld the trial court's decision. An appeal was made to the Wisconsin Supreme Court, which ruled in favor of the Amish, saying that the compulsory school attendance law violated the free exercise of religion clause of the First Amendment.

As these examples illustrate, interest group involvement in litigation has focused on cases concerning major constitutional issues that have reached the Supreme Court.

Because only a small percentage of cases ever reaches the nation's highest court, however, most of the work of interest group lawyers deals with more routine work at the lower levels of the judiciary. Instead of fashioning major test cases for the appellate courts, these attorneys may simply be required to deal with the legal problems of their groups' clientele. During the civil rights movement in the 1950s and 1960s public interest lawyers not only litigated major civil rights questions; they also defended African Americans and civil rights workers who ran into difficulties with the local authorities.

These interest group attorneys, then, performed many of the functions of a specialized legal aid society: They provided legal representation to those involved in an important movement for social change. Furthermore, they performed the important function of drawing attention to the plight of African Americans by keeping cases before the courts.

Amicus Curiae Briefs

Submission of amicus curiae briefs is the easiest method by which interest groups can become involved in cases. This method allows a group to get its message before the court even though it does not control the case. Provided it has the permission of the parties to the case or the permission of the court, an interest group may submit an amicus brief to supplement the arguments of the parties. The filing of amicus briefs is a tactic used in appellate rather than trial courts, at both the federal and the state levels.

Sometimes these briefs are aimed at strengthening the position of one of the parties in the case. When the Wisconsin v. Yoder case was argued before the U.S. Supreme Court, the cause of the Amish was supported by amicus curiae briefs filed by the General Conference of Seventh Day Adventists, the National Council of Churches of Christ in the USA, the Synagogue Council of America, the American Jewish Congress, the National Jewish Commission on Law and Public Affairs, and the Mennonite Central Committee.

Sometimes friend-of-the-court briefs are used not to strengthen the arguments of one of the parties but to suggest to the court the group's own view of how the case should be resolved. Amicus curiae briefs are often filed in an attempt to persuade an appellate court to either grant or deny review of a lower-court decision.

A study of the U.S. Supreme Court found that the presence of amicus briefs significantly increased the chances that the Court would give full treatment to a case.

Unlike private interest groups, all levels of the government can submit amicus briefs without obtaining permission.

The solicitor general of the USA is especially important in this regard, and in some instances the Supreme Court may invite the solicitor general to present an amicus brief.

CHAPTER X. THE CRIMINAL COURT PROCESS

INTRODUCTION

The criminal process begins when a law is first broken and extends through the arrest, indictment, trial, and appeal. There is no single criminal, or civil, court process in the USA.

Instead, the federal system has a court process at the national level, and each state and territory has its own set of rules and regulations that affect the judicial process. Norms and similarities do exist among all of these governmental entities, but no two states have identical judicial systems and no state's system is identical to that of the national government.

THE NATURE & SUBSTANCE OF CRIME

An act is not automatically a crime because it is hurtful or sinful. An action constitutes a true crime only if it specifically violates a criminal statute duly enacted by Congress, a state legislature, or some other public authority. A crime, then, is an offense against the state punishable by fine, imprisonment, or death. A crime is a violation of obligations due the community as a whole and can be punished only by the state.

The sanctions of imprisonment and death cannot be imposed by a civil court or in a civil action (although a fine may be a civil or a criminal penalty).

In the USA most crimes constitute sins of commission, such as aggravated assault or embezzlement; a few consist of sins of omission, such as failing to stop and render aid after a traffic accident or failing to file an income tax return.

The state considers some crimes serious, such as murder and treason, this seriousness is reflected in the corresponding punishments, such as life imprisonment or the death penalty.

The state considers others crimes only mildly reprehensible, such as double parking or disturbing the peace, and consequently punishments of a light fine or a night in the local jail are akin to an official slap on the wrist.

Some crimes, such as kidnapping or rape, constitute actions that virtually all citizens consider outside the sphere of acceptable human conduct, whereas other crimes constitute actions about which opinion would be divided.

The most serious crimes in the USA are felonies. In a majority of the states a felony is any offense for which the penalty may be death (in states that allow it) or imprisonment in the penitentiary (a federal or state prison); all other offenses are misdemeanors or infractions.

Thus, felonies are distinguished in some states according to the place where the punishment occurs; in some states and according to the federal government, the length of the sentence is the key factor. Examples of felonies include murder, forcible rape, and armed robbery. Misdemeanors are regarded as petty crimes by the state, and their punishment usually consists of confinement in a city or county jail for less than a year. Public drunkenness, small-time gambling, and vagrancy are common examples of misdemeanor offenses.

Some states have a third category of offense known as infractions. Often they include minor traffic offenses, such as parking violations, and the penalty is a small fine.

Fines may also be part of the penalty for misdemeanors and felonies.

CATEGORIES OF CRIME

Five broad categories that comprise the primary criminal offenses in the USA today are conventional, economic, syndicated, political, and consensual.

Conventional Crimes

Property crimes make up the lion's share of the 31.3 million conventional crimes committed annually in the USA. Property crimes are distinguished by the government from crimes of violence, although the two often go hand in glove. For example, the thief who breaks into a house and inadvertently confronts a resistant owner may harm the owner and thus be involved in more than just the property crime of burglary. The less numerous, but more feared, conventional crimes are those against the person.

These crimes of violence include murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault.

Economic Crimes

There are four broad categories of economic crimes:

• Personal crimes consist of nonviolent criminal activity that one person inflicts on another with the hope of monetary gain. Examples include intentionally writing a bad check, cheating on one's income tax, and committing welfare fraud.

• Abuse of trust occurs when business or government employees violate their fidelity to their employer or clients and engage in practices such as commercial bribery, theft and embezzlement from the workplace, and filling out false expense accounts.

• Business crimes are crimes that are not part of the central purpose of the business enterprise but are incidental to (or in furtherance of) it. Misleading advertising, violations of the antitrust laws, and false depreciation figures computed for corporate income tax purposes are all business crimes.

• Con games are white-collar criminal activities committed under the guise of a business.

Syndicated /Organized Crimes

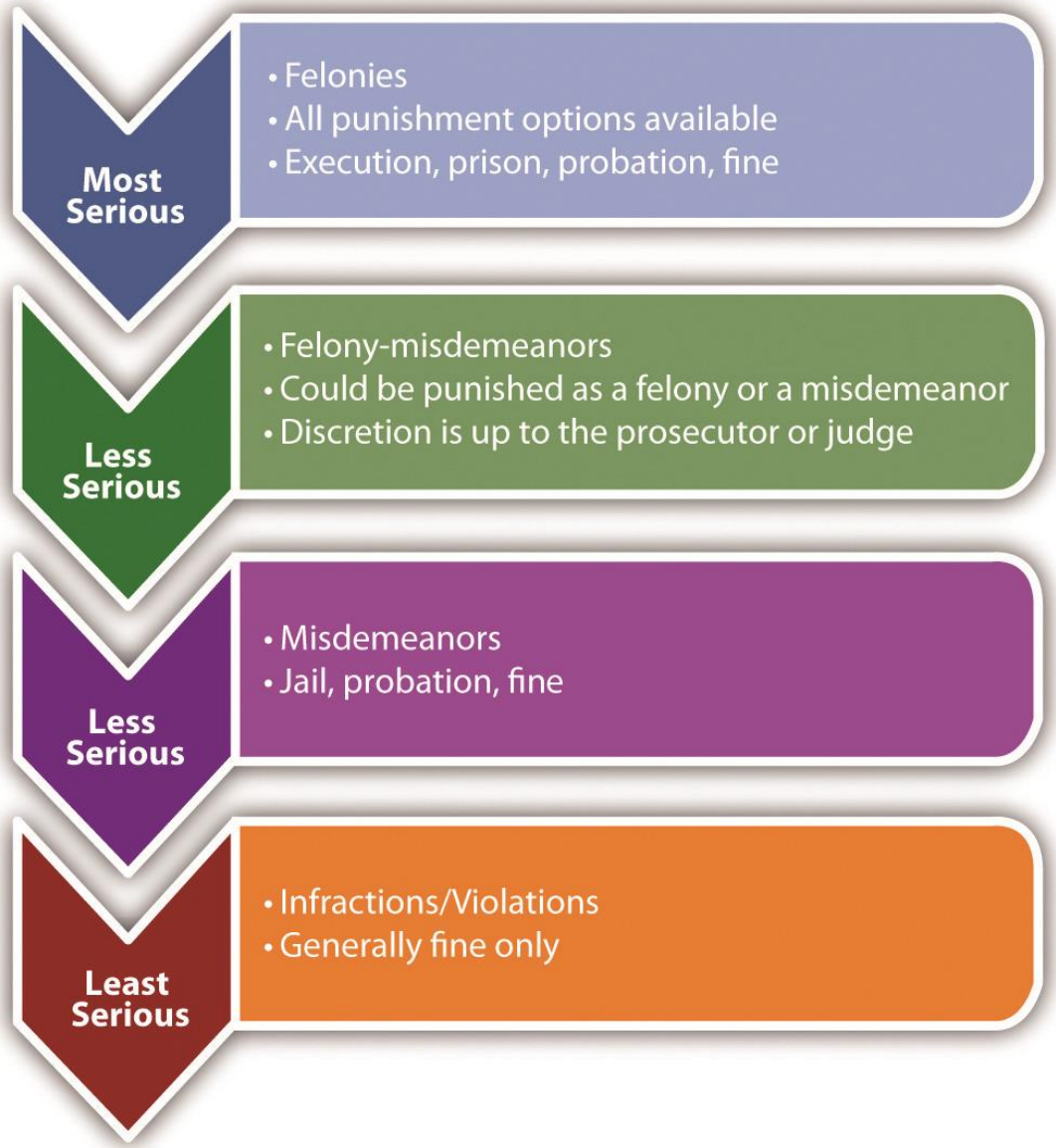
Syndicated crime is engaged in by groups of people and is often directed on some type of hierarchical basis. It represents an ongoing activity that is inexorably entwined with fear and corruption. Organized crime tends to focus on areas that are particularly lucrative, such as trafficking in illegal drugs, gambling, prostitution, and loan-sharking (money-lending at exorbitant interest rates and high repayment rates).

Political Crimes

Political crime usually constitutes an offense against the government: treason, armed rebellion, assassination of public officials, and sedition. However, the term has come to include crimes committed by the government against individual citizens, dissident groups, and foreign governments or nationals – illegal wiretaps conducted by the government of politically dissident groups or the refusal of the military to investigate incidents of sexual harassment.

Consensual Crimes

So-called victimless crime, such as prostitution, gambling, illegal drug use, and unlawful sexual practices between consenting adults, is called consensual because both perpetrator and client desire the forbidden activity.


Most Serious
• Felonies
• All punishment options available
• Execution, prison, probation, fine
Less Serious
• Felony-misdemeanors
• Could be punished as a felony or a misdemeanor
• Discretion is up to the prosecutor or judge
Less Serious
• Misdemeanors
• Jail, probation, fine
Least Serious
• Infractions/Violations
• Generally fine only


ABILITY
For a Crime to occur, you need these 3 elements
OPPORTUNITY
DESIRE


ABILITY
DESIRE
Crime must have three elements to be complete
OPPORTUNITY

ELEMENTS OF A CRIME

Every crime has several distinct elements, and unless the state is able to demonstrate in court the existence of these essential elements there can be no conviction. Although the judicial process in the courtroom may not focus separately and distinctly on each of these elements, they are implicit throughout the entire process of duly convicting someone of a criminal offense.

A Law Defining the Crime & the Punishment

If an act is to be prohibited or required by the law, a duly constituted authority (usually Congress or a state legislature) must properly spell out the matter so that the citizenry can know in advance what conduct is prohibited or required. Lawmakers must set forth the penalties to be imposed upon the individual who engages in the harmful conduct.

There are several corollaries to this general principle.

One is that the U.S. Constitution forbids criminal laws that are ex post facto, that is, laws that declare certain conduct to be illegal after the conduct takes place. Likewise, the state may not pass bills of attainder, which are laws that single out a particular person or group of persons and declare that something is criminal for them but legal for everyone else. A final corollary is that a law defining a crime must be precise so that the average person can determine in advance what conduct is prohibited or required.

The Actus Reus

"Actus reus" is the Latin phrase meaning the criminal action committed by the accused that gives rise to the legal prosecution. The actus reus is the material element of the crime. This element may be the commission of an action that is forbidden (assault and battery), or it may be the failure to perform an action that is required (for instance, a person's refusal to stop and render aid to a motor vehicle accident victim).

The Mens Rea

The "mens rea" (a Latin term) is the essential mental element of the crime.

The U.S. legal system has always made a distinction between harm that was caused intentionally and harm that was caused by simple negligence or accident. Thus, if one person takes the life of another, the state does not always call it murder. If the killing was done with malice aforethought by a sane individual, it will likely be termed "murder in the first degree". But if the killing occurred in the passion of a barroom brawl, it would more likely be called "second-degree murder", which carries a lesser penalty.

Reckless driving on the highway that results in the death of another would correspondingly be considered "negligent homicide" – a wrong, to be sure, but not as serious in the eyes of the state as the intentional killing of another.

An Injury or Result

A crime consists of a specific injury or a wrong perpetrated by one person against another. The crime may harm society at large, such as selling military secrets to a foreign government, or the injury may be inflicted upon an individual and, because of its nature, is considered to offend society as a whole. The nature of the injury, as with the mens rea, often determines the nature of the crime itself. Consider two drivers who have been cutting each other off in traffic. Finally they both stop their cars and come out fighting.

Suppose one of them hits the other so hard he dies. The crime may be murder (of some degree). If the man does not die but suffers serious bodily harm, the crime is aggravated assault. If the injury is minor, the charge may be simple assault.

Because the nature of the injury often determines the offense, it is frequently asserted that the nature of the injury is the key legal element of the crime. Some actions may be criminal even though no injury is actually inflicted.

Most crimes of criminal conspiracy fall into this category. For instance, if several persons were to plan to assassinate a judge or to bribe jurors in an attempt to keep a criminal from being convicted, the crime would be conspiracy to obstruct justice.

This would be a crime even if the judge went unharmed and no money was ever passed to the jurors. All that is required is that the crime be planned and intended and that some specific, overt act be taken by one of the conspirators in furtherance of their plan (such as the purchase of a weapon or possession of a map of the route that the judge takes between his home and the courtroom).

A Causal Relationship Between the Action and the Resultant Injury

Before there can be a conviction for a criminal offense, the state must prove that the accused, acting in a natural and continuous sequence, produced the harmful situation. Usually proving a causal relationship is not difficult. If "Bill" stabs "John" with a knife and inflicts a minor wound, there is no doubt that Bill is guilty of assault with a deadly weapon.

But what if John does not obtain proper medical care for the wound, develops an infection, and subsequently dies? Is Bill now guilty of manslaughter or murder? Or what if after being stabbed, John stumbles across a third party and causes injury to her? Is Bill to blame for this, too? Resolution of questions such as these are often difficult for judges and juries. The law requires that all circumstances be taken into account. The accused can be convicted only if the state can prove that his or her conduct is the direct, immediate, or determining cause of the resultant harm to the victim.

Task 1. Choose the keywords that best convey the gist of the information.

Task 2. Read the text and pick up the essential details in the form of quick notes.

Task 3. Remember the notions.

Amicus curiae [æ'mɪkəsˌkjuərɪə] **–** "друг суда" независимый эксперт в суде (представляет суду информацию и доводы, которые могут помочь при принятии решения; его положение не связано с позицией ни одной из тяжущихся сторон по делу)

Amicus curiae brief – экспертное заключение, основанное на результате сравнительных правовых исследований; заключение друзей суда, свидетельство.

Amicus curiae – Краткая записка "друга суда" (краткое заявление с дополнительными данными по существу спора, предоставляющаяся на рассмотрение судебными органами стороной, непосредственно не участвующей в споре; дополнительные данные по существу торгового спора, представляемые на рассмотрение механизма по урегулированию споров ВТО неправительственной организацией или каким-л. другим лицом, непосредственно не участвующем в споре).

Mens rea [ˌmɛnz ˈriːə] **–** the intention or knowledge of wrongdoing that constitutes part of a crime, as opposed to the action or conduct of the accused.

Actus reus [ˌaktəs ˈreɪəs] **–** action or conduct which is a constituent element of a crime, as opposed to the mental state of the accused.

PROCEDURES BEFORE A CRIMINAL TRIAL

Before a criminal trial can be held, federal and state laws require a series of procedures and events. Some of these stages are mandated by the U.S. Constitution and state constitutions, some by court decisions, and others by legislative enactments.

Custom and tradition often account for the rest. Although the exact nature of these procedural events varies from federal to state practice – and from one state to another – there are similarities throughout the country. These procedures, however, are not as automatic or routine as they might appear; rather, the judicial system's decision makers exercise discretion at all stages according to their values, attitudes, and views of the world.

The Arrest

The arrest is the first substantial contact between the state and the accused.

The U.S. legal system provides for two basic types of arrest – those with a warrant and those without. A warrant is issued after a complaint, filed by one person against another, has been presented and reviewed by a magistrate who has found probable cause for the arrest.

Arrests without a warrant occur when a crime is committed in the presence of a police officer or when an officer has probable cause to believe that someone has committed (or is about to commit) a crime. Such a belief must later be established in a sworn statement or testimony.

In the USA up to 95 % of all arrests are made without a warrant. An officer's decision whether to make an arrest is far from simple or automatic. To be sure, the officer who witnesses a murder will make an arrest on the spot if possible.

But most lawbreaking incidents are not that simple or clear-cut, and police officials possess – and exercise – wide discretion about whether to take someone into custody.

Sufficient resources are simply not available to the police for them to proceed against all activities that Congress and the legislatures have forbidden. Consequently, discretion must be exercised in determining how to allocate the time and resources that do exist. Police discretion is at a maximum in several areas.

Trivial Offenses

Many police manuals advise their officers that when minor violations of the law are concerned, a warning is a more appropriate response than an arrest.

Traffic violations, misconduct by juveniles, drunkenness, gambling, and vagrancy all constitute less serious crimes and entail judgment calls by police.

Victim Will Not Seek Prosecution

Nonenforcement of the law is also the rule in situations where the victim of a crime will not cooperate with the police in prosecuting a case. In the instance of minor property crimes, for example, the victim is often satisfied if restitution occurs and the victim cannot afford the time to testify in court. Unless the police have expended considerable resources in investigating a particular property crime, they are generally obliged to abide by the victim's wishes. When the victim of a crime is in a continuing relationship with the criminal, the police often decline to make an arrest. Such relationships include landlord and tenant, one neighbor and another, and, until recently, husband and wife. In this last case, however, heightened awareness of domestic violence has had a significant impact on police procedures. Rape and child molestation constitute another major category of crimes for which there are often no arrests because the victims will not or cannot cooperate with the police.

Oftentimes the victim is personally acquainted with, or related to, the criminal, and the fear of reprisals or of ugly publicity inhibits the victim from pressing a complaint.

Victim involved in Misconduct

When police officers perceive that the victim of a crime is also involved in some type of improper or questionable conduct, the officers frequently opt not to make an arrest.

Appearance before a Magistrate

After a suspect is arrested for a crime, he or she is booked at the police station; that is, the facts surrounding the arrest are recorded and the accused may be fingerprinted and photographed. Next the accused appears before a lower-level judicial official whose title may be judge, magistrate, or commissioner.

Such an appearance is supposed to occur "without unnecessary delay"; in 1991 the U.S. Supreme Court ruled that police may detain an individual arrested without a warrant for up to 48 hours without a court hearing on whether the arrest was justified.

This appearance in court is the occasion of several important events in the criminal justice process. First, the accused must have been informed of the precise charges and must be informed of all constitutional rights and guarantees.

Among others, these rights include those of the now famous Miranda v. Arizona decision handed down in 1966 by the Supreme Court. The accused "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning".

(Such warnings must also be given by the arresting officer if the officer questions the suspect about the crime.)

In some states the accused must be informed about other rights that are provided for in the state's Bill of Rights, such as the right to a speedy trial and the right to confront hostile witnesses. Second, the magistrate will determine whether the accused is to be released on bail and, if so, what the amount of bail is to be. Constitutionally, the only requirement for the amount is that it shall not be "excessive".

Bail is considered to be a privilege – not a right – and it may be denied altogether in capital punishment cases for which the evidence of guilt is strong or if the magistrate believes that the accused will flee from prosecution no matter what the amount of bail.

An alternative to bail is to release the defendant on recognizance, basically on a pledge by the defendant to return to court on the appointed date for trial. In minor cases the accused may be asked to plead guilty or not guilty.

If the plea is guilty, a sentence may be pronounced on the spot. If the defendant pleads not guilty, a trial date is scheduled. However, in the typical serious (felony) case, the next primary duty of the magistrate is to determine whether the defendant requires a preliminary hearing. If such a hearing is appropriate, the matter is adjourned by the prosecution and a subsequent stage of the criminal justice process begins.

The Grand Jury Process or the Preliminary Hearing

At the federal level all persons accused of a crime are guaranteed by the Fifth Amendment to have their cases considered by a grand jury. However, the Supreme Court has refused to make this right binding on the states.

Today about half of the states use grand juries; in some of these for only special types of cases. Those states that do not use grand juries employ a preliminary hearing or an examining trial. (A few states use both procedures.) Regardless of which method is used, the primary purpose of this stage in the criminal justice process is to determine whether there is probable cause for the accused to be subjected to a formal trial.

The Grand Jury

Grand juries consist of 16 to 23 citizens, usually selected at random from the voter registration lists, who render decisions by a majority vote. Their terms may last anywhere from one month to one year, and some may hear more than a thousand cases during their term. The prosecutor alone presents evidence to the grand jury. Not only are the accused and his or her attorney absent from the proceedings, but usually they also have no idea which grand jury is hearing the case or when. If a majority believes probable cause exists, then an indictment, or true bill, is brought. Otherwise the result is a no bill.

Historically two arguments have been made in favor of grand juries. One is that grand juries serve as a check on a prosecutor who might be using the office to harass an innocent person for political or personal reasons. Ideally an unbiased group of citizens would interpose themselves between an unethical prosecutor and the defendant.

A second justification for grand juries is to make sure that the district attorney has secured enough evidence to warrant the trouble and expense – for both the state and the accused – of a full-fledged trial.

The Preliminary Hearing

In the majority of states that have abolished the grand jury system, a preliminary hearing is used to determine whether there is probable cause for the accused to be bound over for trial. At this hearing the prosecution presents its case, and the accused has the right to cross-examine witnesses and to produce favorable evidence. Usually the defense elects not to fight at this stage of the criminal process; in fact, a preliminary hearing is waived by the defense in the vast majority of cases. If the examining judge determines that there is probable cause for a trial or if the preliminary hearing is waived, the prosecutor must file a bill of information with the court where the trial will be held. This serves to outline precisely the charges that will be adjudicated in the new legal setting.

The Arraignment

Arraignment is the process in which the defendant is brought before the judge in the court where he or she is to be tried to respond to the grand jury indictment or the prosecutor's bill of information. The prosecutor or a clerk usually reads in open court the charges that have been brought against the accused.

The defendant is informed that he or she has a constitutional right to be represented by an attorney and that a lawyer will be appointed without charge if necessary.

The defendant has several options about how to plead to the charges. The most common pleas are guilty and not guilty. But the accused may plead not guilty by reason of insanity, former jeopardy (having been tried on the same charge at another time), or "nolo contendere" (from the Latin, no contest). Nolo contendere means that the accused does not deny the facts of the case but claims that he or she has not committed any crime, or it may mean that the defendant does not understand the charges.

The nolo contendere plea can be entered only with the consent of the judge (and sometimes the prosecutor as well). Such a plea has two advantages. It may help the accused save face vis-à-vis the public because he or she can later claim that technically no guilty verdict was reached even though a sentence or a fine may have been imposed.

The plea may spare the defendant from certain civil penalties that might follow a guilty plea (for example, a civil suit that might follow from conviction for fraud or embezzlement). If the accused pleads not guilty, the judge will schedule a date for a trial.

If the plea is guilty, the defendant may be sentenced on the spot or at a later date set by the judge. Before the court will accept a guilty plea, the judge must certify that the plea was made voluntarily and that the defendant was aware of the implications of the plea. A guilty plea is to all intents and purposes the equivalent to a formal verdict of guilty.

The Possibility of a Plea Bargain

At both the state and federal levels at least 90 % of all criminal cases never go to trial. That is because before the trial date a bargain has been struck between the prosecutor and the defendant's attorney concerning the official charges to be brought and the nature of the sentence that the state will recommend to the court. In effect, some form of leniency is promised in exchange for a guilty plea. Because plea bargaining virtually seals the fate of the defendant before trial, the role of the judge is simply to ensure that the proper legal and constitutional procedures have been followed. There are three (not mutually exclusive) types of plea bargains.

Reduction of Charges

The most common form of agreement between a prosecutor and a defendant is a reduction of the charge to one less serious than that supported by the evidence. This exposes the criminal to a substantially reduced range of sentence possibilities. A second reason for a defendant to plead guilty to a reduced charge is to avoid a record of conviction for an offense that carries a social stigma. Another possibility is that the defendant may wish to avoid a felony record altogether and would be willing to plead guilty to almost any misdemeanor offered by the prosecutor rather than face a felony charge.

Deletion of Tangent Charges

A second form of plea bargain is the agreement of the district attorney to drop other charges pending against an individual. There are two variations on this theme.

One is an agreement not to prosecute "vertically" – that is, not more serious charges filed against the individual.

The second type of agreement is to dismiss "horizontal" charges; that is to dismiss additional indictments for the same crime pending against the accused. Another variation of this type of plea bargaining is the agreement in which a repeater clause is dropped from an indictment. At the federal level and in many states, a person is considered a habitual criminal upon the third conviction for a violent felony anywhere in the USA.

The mandatory sentence for the habitual criminal is life imprisonment. In state courts the habitual criminal charge often is dropped in exchange for a plea of guilty.

Another plea bargain of this type is the agreement in which indictments in different courts are consolidated into one court in order that the sentences may run concurrently.

As indictments or preliminary hearing rulings are handed down in many jurisdictions, they are placed on a trial docket on a rotation system. This means that a defendant charged with four counts of forgery and one charge of possession of a forged instrument might be placed on the docket of five different courts. Generally it is common practice in such multicourt districts to transfer all of a person's indictments to the first court listed.

This gives the presiding judge the discretion of allowing all of the defendant's sentences to run concurrently. Sentence Bargaining. A third form of plea bargaining concerns a plea of guilty from the defendant in exchange for a prosecutor's agreement to ask the judge for a lighter sentence. The strength of the sentence negotiation is based upon the realities of the limited resources of the judicial system.

At the state level, at least, prosecutors are able to promise the defendant a fairly specific sentence with confidence that the judge will accept the recommendation. If the judge were not to do so, the prosecutor's credibility would quickly begin to wane, and many of the defendants who had been pleading guilty would begin to plead not guilty and take their chances in court. The result would be a gigantic increase in court dockets that would overwhelm the judicial system and bring it to a standstill. Prosecutors and judges understand this reality, and so do the defense attorneys.

Constitutional & Statutory Restrictions on Plea Bargaining

At both the state and federal levels, the requirements of due process of law mean that plea bargains must be made voluntarily and with comprehension.

This means that the defendant must be admonished by the court of the consequences of a guilty plea (the defendant waives all opportunities to change his or her mind at a later date), that the accused must be sane, and that, as one state puts it, "It must plainly appear that the defendant is uninfluenced by any consideration of fear or by any persuasion, or delusive hope of pardon prompting him to confess his guilt". For the first two types of plea bargains – reduction of charges and deletion of tangent charges – some stricter standards govern the federal courts.

One is that the judge may not actually participate in the process of plea bargaining; at the state level judges may play an active role in this process.

Likewise, if a plea bargain has been made between the U.S. attorney and the defendant, the government may not renege on the agreement. If the federal government does so, the federal district judge must withdraw the guilty plea.

Finally, the Federal Rules of Criminal Procedure require that before a guilty plea may be accepted, the prosecution must present a summary of the evidence against the accused, and the judge must agree that there is strong evidence of the defendant's guilt.

Arguments for & against Plea Bargaining

For the defendant the obvious advantage of the bargain is that he or she is treated less harshly than would be the case if the accused were convicted and sentenced under maximum conditions. The absence of a trial often lessens publicity on the case, and because of personal interests or social pressures, the accused may wish to avoid the length and publicity of a formal trial. Finally, some penologists (professionals in the field of punishment and rehabilitation) argue that the first step toward rehabilitation is for a criminal to admit guilt and to recognize his or her problem. Plea bargaining also offers some distinct advantages for the state and for society as a whole.

The most obvious is the certainty of conviction, because no matter how strong the evidence may appear, an acquittal is a possibility as long as a trial is pending.

The district attorney's office and judges are saved an enormous amount of time and effort by their not having to prepare and preside over cases in which there is no real contention of innocence or that are not suited to the trial process.

Finally, when police officers are not required to be in court testifying in criminal trials, they have more time to devote to preventing and solving crimes. Plea bargains do have a negative side as well. The most frequent objection to plea bargaining is that the defendant's sentence may be based upon nonpenological grounds. With the large volume of cases making plea bargaining the rule, the sentence often bears no relation to the specific facts of the case, to the correctional needs of the criminal, or to society's legitimate interest in vigorous prosecution of the case.

A second defect is that if plea bargaining becomes the norm of a particular system, then undue pressure may be placed upon even innocent persons to plead guilty.

Studies have shown that, in some jurisdictions, the less the chance for conviction, the harder the bargaining may be because the prosecutor wants to get at least some form of minimal confession out of the accused. A third disadvantage of plea bargaining is the possibility of the abuse called overcharging – the process whereby the prosecutor brings charges against the accused more severe than the evidence warrants, with the hope that this will strengthen his or her hand in subsequent negotiations with the defense attorney.

Another flaw with the plea bargaining system is its very low level of visibility.

Bargains between prosecutor and defense attorney are not made in open court presided over by a neutral jurist and for all to observe. The conscience of the two lawyers is the primary guide. Finally, the system has the potential to circumvent key procedural and constitutional rules of evidence. Because the prosecutor need not present any evidence or witnesses in court, a bluff may result in a conviction even though the case might not be able to pass the muster of the due process clause. The defense may be at a disadvantage because the rules of discovery in some states limit the defense counsel's case preparation to the period after the plea bargain has occurred. Thus the plea bargain may deprive the accused of basic constitutional rights.

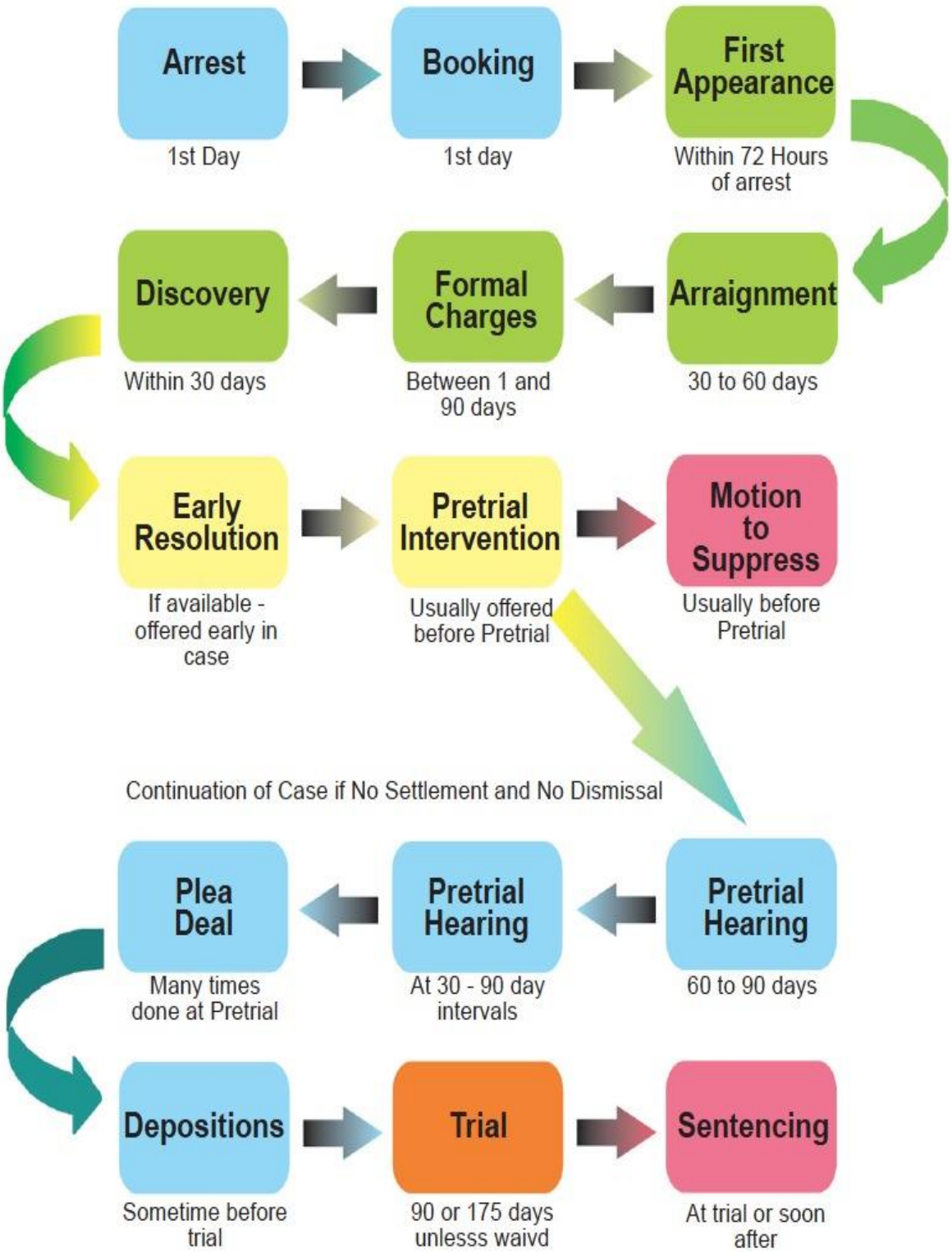
The Adversarial Process

The adversarial model is based on the assumption that every case or controversy has two sides to it: In criminal cases the government claims a defendant is guilty while the defendant contends innocence; in civil cases the plaintiff asserts that the person he or she is suing has caused some injury while the respondent denies responsibility.

In the courtroom each party provides his or her side of the story as he or she sees it.

The theory (or hope) underlying this model is that the truth will emerge if each party is given unbridled opportunity to present the full panoply of evidence, facts, and arguments before a neutral and attentive judge (and jury). The lawyers representing each side are the major players in this courtroom drama.

The judge acts more as a passive, disinterested referee whose primary role is to keep both sides within the accepted rules of legal procedure and courtroom decorum. The judge eventually determines which side has won in accordance with the rules of evidence, but only after both sides have had a full opportunity to present their case.


Arrest
1st Day
Booking
1st day
First Appearance
Within 72 Hours of arrest
Arraignment
30 to 60 days
Formal Charges
Between 1 and 90 days
Discovery
Within 30 days
Early Resolution
If available - offered early in case
Pretrial Intervention
Usually offered before Pretrial
Motion to Suppress
Usually before Pretrial
Continuation of Case if No Settlement and No Dismissal
Pretrial Hearing
60 to 90 days
Pretrial Hearing
At 30 - 90 day intervals
Plea Deal
Many times done at Pretrial
Sentencing
At trial or soon after
Trial
90 or 175 days unlesss waivd
Depositions
Sometime before trial

PROCEDURES DURING A CRIMINAL TRIAL

Assuming that no plea bargain has been struck and the accused maintains his or her innocence, a formal trial will take place. This is a right guaranteed by the Sixth Amendment to all Americans charged with federal crimes and a right guaranteed by the various state constitutions – and by the 14th Amendment – to all persons charged with state offenses.

The accused is provided many constitutional and statutory rights during the trial. The following are the primary rights that are binding on both the federal and state courts.

Basic Rights Guaranteed During the Trial Process

The Sixth Amendment says, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial". The Founders emphasized the word speedy so that an accused would not languish in prison for a long time prior to the trial or have the determination of his or her fate put off for an unduly long period of time. But how soon is speedy?

Although this word has been defined in various ways by the Supreme Court, Congress gave new meaning to the term when it passed the Speedy Trial Act of 1974.

The act mandated time limits, ultimately reaching 100 days, within which criminal charges must either be brought to trial or dismissed. Most states have similar measures on the statute books, although the precise time period varies from one jurisdiction to another.

By "public trial" the Founders meant to discourage the notion of secret proceedings whereby an accused could be tried without public knowledge and whisked off to some unknown detention camp. The Sixth Amendment also guarantees Americans the right to an impartial jury. At the least this has meant that the prospective jurors must not be prejudiced one way or the other before the trial begins.

For example, a potential juror may not be a friend or relative of the prosecutor or the crime victim; nor may someone serve who believes that anyone of the defendant's race or ethnic ancestry is "probably the criminal type".

What the concept of an impartial jury of one's peers has come to mean in practice is that jurors are to be selected randomly from the voter registration lists – supplemented in an increasing number of jurisdictions by lists based on automobile registrations, driver's licenses, telephone books, welfare rolls, and so on. Although this system does not provide a perfect cross-section of the community, because not all persons are registered to vote, the Supreme Court has said that this method is good enough.

The High Court has also ruled that no class of persons (African Americans or women) may be systematically excluded from jury service. Besides being guaranteed the right to be tried in the same locale where the crime was committed and to be informed of the charges, defendants have the right to be confronted with the witnesses against them. They have the right to know who their accusers are and what they are charging so that a proper defense may be formulated. The accused is also guaranteed the opportunity "to have the Assistance of Counsel for his defense". Prior to the 1960s this meant that one had this right (at the state level) only for serious crimes and only if one could pay for an attorney.

However, because of a series of Supreme Court decisions, the law of the land guarantees one an attorney if tried for any crime that may result in a prison term, and the government must pay for the legal defense for an indigent defendant. This is the rule at both the national and state levels.

The Fifth Amendment to the U.S. Constitution declares that no person shall "be subject for the same offence to be twice put in jeopardy of life and limb".

This is the double jeopardy clause and means that no one may be tried twice for the same crime by any state government or by the federal government. It does not mean that a person may not be tried twice for the same action if that action has violated both national and state laws. For example, someone who robs a federally chartered bank in New Jersey runs afoul of both federal and state law. That person could be legally tried and acquitted for that offense in a New Jersey court and subsequently be tried for that same action in federal court. Another important right guaranteed to the accused at both the state and federal levels is not to "be compelled in any criminal case to be a witness against himself".

This has been interpreted to mean that the fact that someone elects not to testify on his or her own behalf in court may not be used against the person by judge and jury.

This guarantee serves to reinforce the principle that under the U.S. judicial system the burden of proof is on the state; the accused is presumed innocent until the government proves otherwise beyond a reasonable doubt.

Finally, the Supreme Court has interpreted the guarantee of due process of law to mean that evidence procured in an illegal search and seizure may not be used against the accused at trial. The source of this so-called exclusionary rule is the Fourth Amendment to the U.S. Constitution; the Supreme Court has made its strictures binding on the states as well. The Court's purpose was to eliminate any incentive the police might have to illegally obtain evidence against the accused.

Selection of Jurors

If the accused elects not to have a bench trial – that is, not to be tried and sentenced by a judge alone – his or her fate will be determined by a jury. At the federal level 12 persons must render a unanimous verdict.

At the state level such criteria apply only to the most serious offenses. In many states a jury may consist of fewer than 12 persons and render verdicts by other than unanimous decisions. A group of potential jurors is summoned to appear in court. They are questioned in open court about their general qualifications for jury service in a process known as "voir dire" (from Old French, meaning "to say the truth").

The prosecutor and the defense attorney ask general and specific questions of the potential jurors. Are they citizens of the state? Can they comprehend the English language? Have they or anyone in their family ever been tried for a criminal offense? Have they read about or formed any opinions about the case at hand? In conducting the voir dire, the state and the defense have two goals. The first is to eliminate all members of the panel who have an obvious reason why they might not render an impartial decision in the case.

Common examples might be someone who is excluded by law from serving on a jury, a juror who is a friend or relative of a participant in the trial, and someone who openly admits a strong bias in the case at hand. Objections to jurors in this category are known as challenges for cause, and the number of such challenges is unlimited. It is the judge who determines whether these challenges are valid. The second goal that the opposing attorneys have in questioning prospective jurors is to eliminate those who they believe would be unfavorable to their side even though no overt reason is apparent for the potential bias.

Each side is allowed a number of peremptory challenges – requests to the court to exclude a prospective juror with no reason given. Most states customarily give the defense more peremptory challenges than the prosecution.

At the federal level one to three challenges per jury are usually permitted each side, depending on the nature of the offense; as many as 20 are allowed in capital cases.

The use of peremptory challenges is more of an art than a science and is usually based on the hunch of the attorneys. In the past attorneys were able to exclude potential jurors via the peremptory challenge for virtually any reason whatsoever.

In recent years the Supreme Court has interpreted the Fourteenth Amendment's equal protection clause to restrict this discretion by prohibiting prosecutors from using their challenges to exclude African Americans or women from serving on a criminal jury.

The process of questioning and challenging prospective jurors continues until all those duly challenged for cause are eliminated, the peremptory challenges are either used up or waived, and a jury of 12 (six in some states) has been created. In some states alternate jurors are also chosen. They attend the trial but participate in deliberations only if one of the original jurors is unable to continue in the proceedings. Once the panel has been selected, they are sworn in by the judge or the clerk of the court.

Opening Statements

After the formal trial begins, both the prosecution and the defense make an opening statement (although in no state is the defense compelled to do so). Long and detailed statements are more likely to be made in jury trials than in bench trials. The purpose of opening statements is to provide members of the jury – who lack familiarity with the law and with procedures of criminal investigation – with an outline of the major objectives of each side's case, the evidence that is to be presented, the witnesses that are to be called, and what each side seeks to prove. If the opening statements are well presented, the jurors will find it easier to grasp the meaning and significance of the evidence and testimony.

The usual procedure is for the state to make its opening statement first and for the defense to follow with a statement about how it will refute that case.

The Prosecution's Case

After the opening statements the prosecutor presents the evidence amassed by the state against the accused. Evidence is generally of two types – physical evidence and the testimony of witnesses. The physical evidence may include things such as bullets, ballistics tests, fingerprints, handwriting samples, blood and urine tests, and other documents or items that serve as physical aids. The defense may object to the admission of any of these tangible items and will, if successful, have the item excluded from consideration.

If defense challenges are unsuccessful, the physical evidence is labeled by one of the courtroom personnel and becomes part of the official record.

Most evidence at criminal trials takes the form of testimony of witnesses.

The format is a question-and-answer procedure whose purpose is to elicit very specific information in an orderly fashion. The goal is to present only evidence that is relevant to the immediate case at hand and not to give confusing or irrelevant information or illegal evidence that might result in a mistrial. After each witness the defense attorney has the right to cross-examine. The goal of the defense will be to impeach the testimony of the prosecution witness – that is, to discredit it.

The attorney may attempt to confuse, fluster, or anger the witness, causing him or her to lose self-control and begin providing confusing or conflicting testimony.

A prosecution witness' testimony may also be impeached if defense witnesses who contradict the version of events suggested by the state are subsequently presented. Upon completion of the cross-examination, the prosecutor may conduct a redirect examination, which serves to clarify or correct some telling point made during the cross-examination.

The Case for the Defense

The presentation of the case for the defense is similar in style and format to that of the prosecution. Tangible evidence is less common in the defense's case, and most of the evidence will be that of witnesses who are prepared to rebut or contradict the prosecution's arguments. The witnesses are questioned by the defense attorney in the same style as those in the prosecution case. Each defense witness may in turn be cross-examined by the district attorney, and then a redirect examination is in order.

The difference between the case for the prosecution and the case for the defense lies in their obligation before the law. The defense is not required by law to present any new or additional evidence or any witnesses at all. The defense may consist merely of challenging the credibility or the legality of the state's evidence and witnesses.

The defense is not obligated to prove the innocence of the accused; it need show only that the state's case is not beyond a reasonable doubt. The defendant need not even take the stand. After the defense has rested its case, the prosecution has the right to present rebuttal evidence. In turn, the defense may offer a rejoinder known as a surrebuttal. After that, each side delivers closing arguments.

Oftentimes this is one of the more dramatic episodes in the trial because each side seeks to sum up its case, condense its strongest arguments, and make one last appeal to the jury. New evidence may not be presented at this stage, and the arguments of both sides tend to ring with emotion and appeals to values that transcend the immediate case.

The prosecutor may talk about the crime problem in general, about the need for law and order; about the need not to let compassion for the accused get in the way of empathy for the crime victim. The defense attorney, on the other hand, may remind the jurors "how we have all made mistakes in this life" or argue that in a free, democratic society any doubt they have should be resolved in favor of the accused.

The prosecution probably avoids emotionalism more than the defense attorney, however, because many jury verdicts have been reversed on appeal after the district attorney injected prejudicial statements into the closing statements.

Role of the Judge during the Trial

The judge's role in the trial, although very important, is a relatively passive one. He or she does not present any evidence or take an active part in the examination of the witnesses.

The judge is called upon to rule on the many motions of the prosecutor and of the defense attorney regarding the types of evidence that may be presented and the kinds of questions that may be asked of the witnesses. In some jurisdictions the judge is permitted to ask substantive questions of the witnesses and to comment to the jury about the credibility of the evidence that is presented; in other states the judge is constrained from such activity.

Still, the American legal tradition has room for a variety of judicial styles that depend on the personality, training, and wisdom of individual judges.

First and foremost, the judge is expected to play the part of a disinterested party whose primary job is to see to it that both sides are allowed to present their cases as fully as possible within the confines of the law. If judges depart from the appearance or practice of being fair and neutral parties, they run counter to fundamental tenets of American jurisprudence and risk having their decisions overturned by an appellate court.

Although judges do for the most part play such a role, the backgrounds and values of the jurists affect their decisions in the close calls. When they are called upon to rule on a motion for which the arguments are about equally strong or on a point of law that is open to a variety of interpretations.

Role of the Jury during the Trial

The jurors' role during the trial is passive. Their job is to listen attentively to the cases presented by the opposing attorneys and then come to a decision based solely on the evidence that is set forth. They are ordinarily not permitted to ask questions either of the witnesses or of the judge, nor are they allowed to take notes of the proceedings.

This is not because of constitutional or statutory prohibitions but primarily because it has been the traditional practice of courts in America. In recent years, however, many judges have allowed jurors to become more involved in the judicial arena.

Chicago's Chief U.S. District Court Judge John F. Grady has for over a decade permitted jurors in his courtroom to take notes. At least four U.S. appellate courts have given tacit approval to the practice of juror participation in questioning witnesses, as long as jurors are not permitted to blurt out queries in the midst of trial and attorneys are given a chance to object to specific questions before they are posed to witnesses. In some states a few trial judges have allowed jurors to take fairly active roles in the trial. Still, at both state and federal levels the role of the jury remains basically passive.

Instructions to the Jury

Although the jury's job is to weigh and assess the facts of the case, the judge must instruct the jurors about the meaning of the law and how the law is to be applied.

Because many cases are overturned on appeal as a result of faulty jury instructions, judges tend to take great care that the wording be technically and legally correct. All jury instructions must have some basic elements. One is to define for the jurors the crime with which the accused is charged. This may involve giving the jurors a variety of options about what kind of verdict to bring. For example, if one person has taken the life of another, the state may be trying the accused for first-degree murder.

Nevertheless, the judge may be obliged to acquaint the jury with the legal definition of second-degree murder or manslaughter if it should determine that the defendant was the killer but did not act with malice aforethought. The judge must remind the jury that the burden of proof is on the state and that the accused is presumed to be innocent. If, after considering all the evidence, the jury still has a reasonable doubt as to the guilt of the accused, it must bring in a not guilty verdict. Finally, the judge usually acquaints the jurors with a variety of procedural matters: how to contact the judge if they have questions, the order in which they must consider the charges if there are more than one, who must sign the official documents that express the verdict of the jury. After the instructions are read to the jury (the attorneys for each side have been given an opportunity to offer objections), the jurors retreat into a deliberation room to decide the fate of the accused.

The Jury's Decision

The jury deliberates in complete privacy; no outsiders observe or participate in its debate. During their deliberation jurors may request the clarification of legal questions from the judge, and they may look at items of evidence or selected segments of the case transcript, but they may consult nothing else – no law dictionaries, no legal writings, no opinions from experts.

When it has reached a decision by a vote of its members, the jury returns to the courtroom to announce its verdict. If it has not reached a decision by nightfall, the jurors are sent home with firm instructions neither to discuss the case with others nor read about the case in the newspapers. In very important or notorious cases, the jury may be sequestered by the judge, which means that its members will spend the night in a local hotel away from the public eye. If the jury becomes deadlocked and cannot reach a verdict, it may report that fact to the judge. In such an event the judge may insist that the jury continue its effort deadlocked, he or she may dismiss the jury and call for a new trial. Research studies indicate that most juries dealing with criminal cases make their decisions fairly quickly.

Almost all juries take a vote soon after they retire to their chambers in order to see how divided, or united, they are. In 30 % of the cases it takes only one vote to reach a unanimous decision. In 90 % of the remainder, the majority on the first ballot eventually wins out. Hung juries – those in which no verdict can be reached – tend to occur only when a large minority existed on the first ballot.

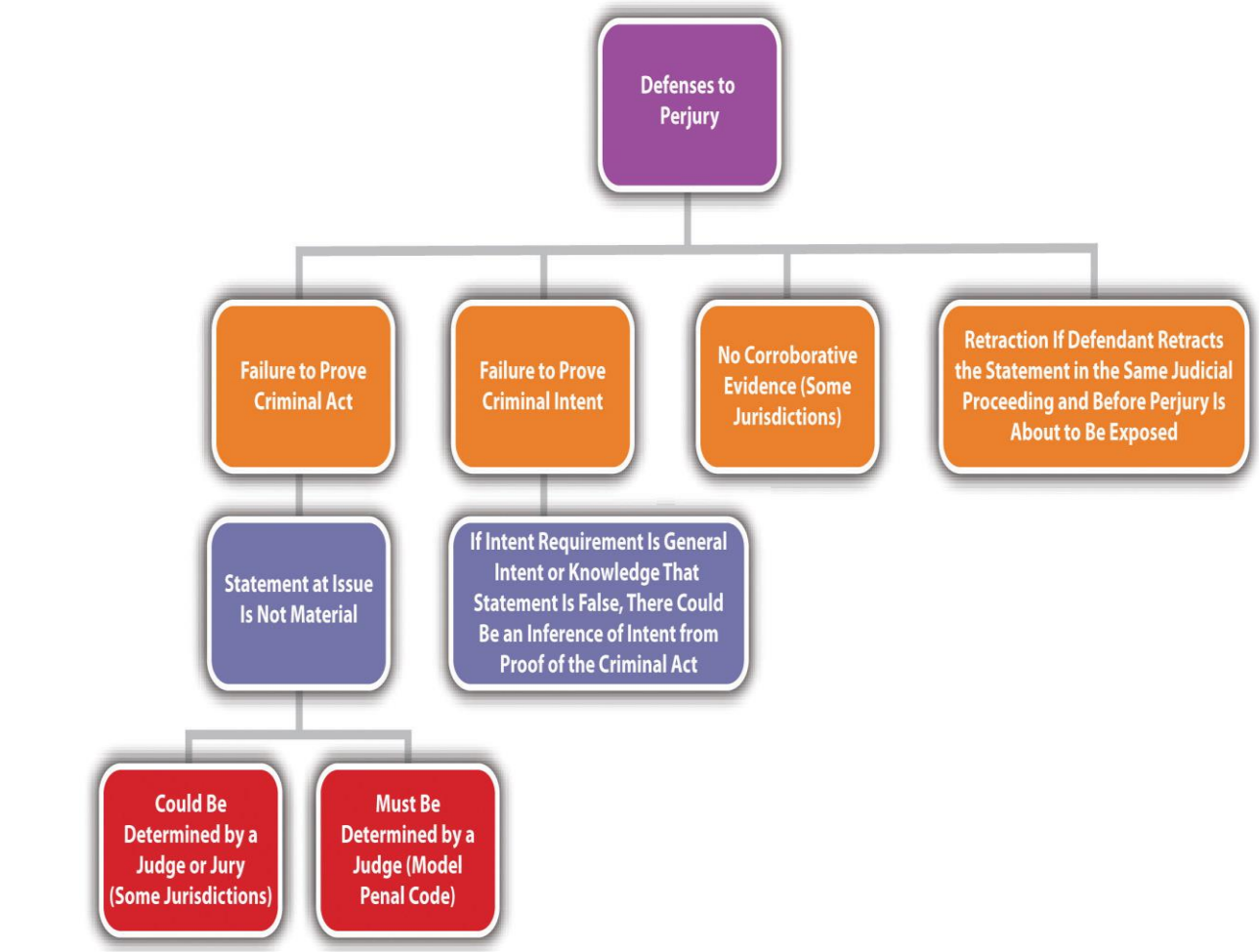
Scholars have also learned that juries often reach the same verdict that the judge would have, had he or she been solely responsible for the decision. One large jury study asked judges to state how they would have decided jury cases over which they presided.

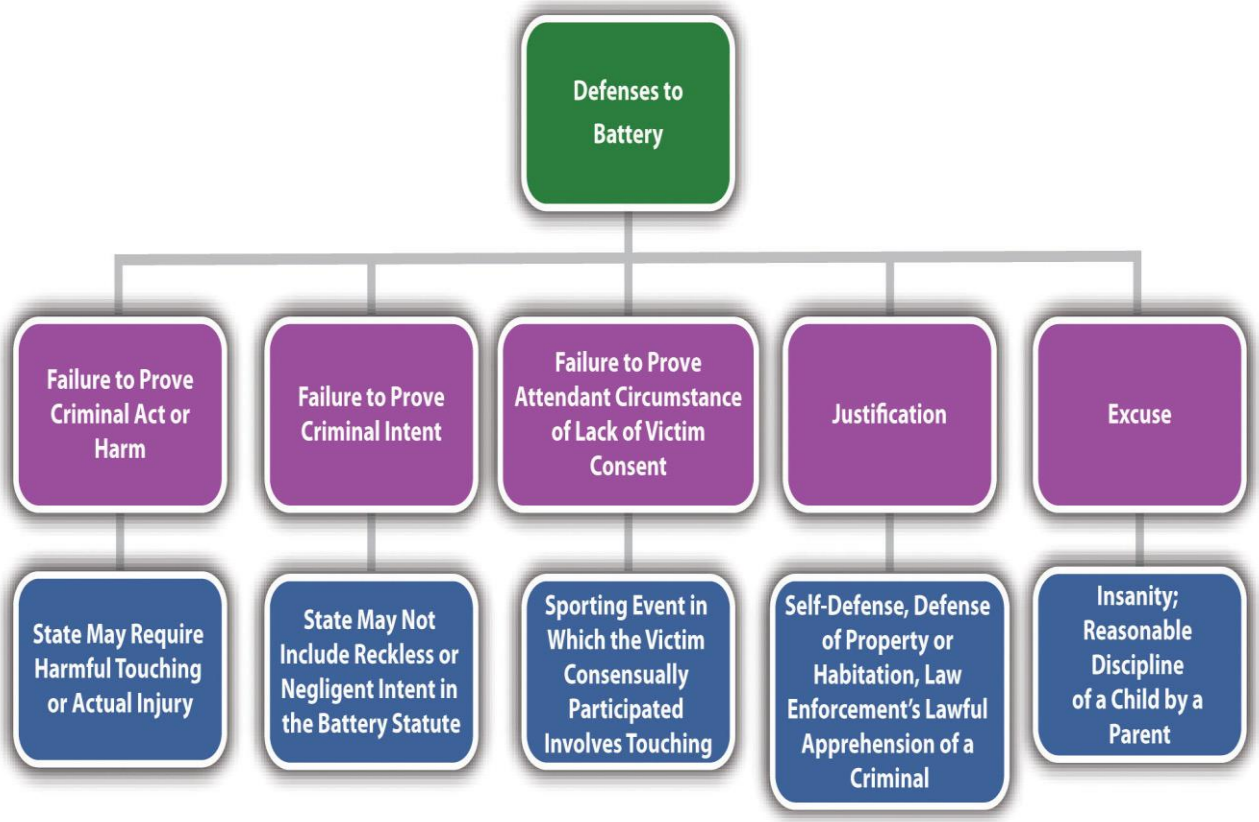
The judge and jury agreed in 81 % of the criminal cases (about the same as in civil cases). In 19 % of the criminal cases the judge and jury disagreed, with the judge showing a marked tendency to convict where the juries had acquitted. When the members of the jury do finally reach a decision, they return to the courtroom and their verdict is announced in open court, often by the jury foreman. At this time either the prosecutor or the defense attorney often asks that the jury be polled – that is, that each juror be asked individually if the general verdict actually reflects his or her own opinion.

The purpose is to determine whether each juror supports the overall verdict or whether he or she is just caving in to group pressure. If the polling procedure reveals that the jury is indeed not of one mind, it may be sent back to the jury room to continue deliberations; in some jurisdictions a mistrial may be declared. If a mistrial is declared, the case may be tried again before another jury. There is no double jeopardy because the original jury did not agree on a verdict. If the jury's verdict is not guilty, the defendant is discharged on the spot and is free to leave the courtroom.

Task 1. Transfer the given information from the passages onto a table.

№	Activity			
	Definitions	**When**	**Where**	**Score**
1.				


Defenses to Perjury
Failure to Prove Criminal Act
Failure to Prove Criminal Intent
No Corroborative Evidence (Some Jurisdictions)
Retraction If Defendant Retracts the Statement in the Same Judicial Proceeding and Before Perjury Is About to Be Exposed
Statement at Issue Is Not Material
If Intent Requirement Is General Intent or Knowledge That Statement Is False, There Could Be an Inference of Intent from Proof of the Criminal Act
Could Be Determined by a Judge or Jury (Some Jurisdictions)
Must Be Determined by a Judge (Model Penal Code)


Defenses to Battery
Failure to Prove Criminal Act or Harm
Failure to Prove Criminal Intent
Failure to Prove Attendant Circumstance of Lack of Victim Consent
Justification
Excuse
State May Require Harmful Touching or Actual Injury
State May Not Include Reckless or Negligent Intent in the Battery Statute
Sporting Event in Which the Victim Consensually Participated Involves Touching
Self-Defense, Defense of Property or Habitation, Law Enforcement's Lawful Apprehension of a Criminal
Insanity; Reasonable Discipline of a Child by a Parent

PROCEDURES AFTER A CRIMINAL TRIAL

At the close of the criminal trial, generally two stages remain for the defendant if he or she has been found guilty: sentencing and an appeal.

Sentencing

Sentencing is the court's formal pronouncement of judgment upon the defendant at which time the punishment or penalty is set forth. At the federal level and in most states, sentences are imposed by the judge only.

However, in several states the defendant may elect to be sentenced by either a judge or a jury, and in capital cases states generally require that no death sentence shall be imposed unless it is the determination of 12 unanimous jurors. In some states after a jury finds someone guilty, the jury deliberates a second time to determine the sentence. In several states a new jury is empaneled expressly for sentencing.

At this time the rules of evidence are more relaxed, and the jury may be permitted to hear evidence that was excluded during the actual trial.

After the judge pronounces the sentence, several weeks customarily elapse between the time the defendant is found guilty and the time when the penalty is imposed. This interval permits the judge to hear and consider any posttrial motions that the defense attorney might make and to allow a probation officer to conduct a presentence investigation.

The probation officer is a professional with a background in criminology, psychology, or social work, who makes a recommendation to the judge about the length of the sentence to be imposed. The probation officer customarily examines factors such as the background of the criminal, the seriousness of the crime committed, and the likelihood that the criminal will continue to engage in illegal activity. Judges are not required to follow the probation officer's recommendation, but it is still a major factor in the judge's calculus as to what the sentence shall be. Judges are presented with a variety of alternatives and a range of sentences when it comes to punishment for the criminal.

Many of these alternatives involve the concept of rehabilitation and call for the assistance of professionals in the fields of criminology and social science. The lightest punishment that a judge can hand down is that of probation.

This is often the penalty if the crime is regarded as minor or if the judge believes that the guilty person is not likely to engage in additional criminal activity.

If a probated sentence is handed down, the criminal may not spend any time in prison as long as the conditions of the probation are maintained. Such conditions might include staying away from convicted criminals, not committing other crimes, or with increasing frequency, performing some type of community service.

If a criminal serves out his or her probation without incident, the criminal record is usually wiped clean and in the eyes of the law it is as if no crime had ever been committed. If the judge is not disposed toward probation and feels that jail time is in order, he or she must impose a prison sentence that is within a range prescribed by law.

The reason for a range of years instead of an automatically assigned number is that the law recognizes that not all crimes and criminals are alike and that in principle the punishment should fit the crime. In an effort to eliminate gross disparities in sentencing, the federal government and many states have attempted to develop sets of precise guidelines to create greater consistency among judges.

At the national level this effort was manifested by the enactment of the Sentencing Reform Act of 1987, which established guidelines to structure the sentencing process.

Congress provided that judges may depart from the guidelines only if they find an aggravating or mitigating circumstance that the commission did not adequately consider.

Although the congressional guidelines do not specify the kinds of factors that could constitute grounds for departure from the sentencing guidelines, Congress did state that such grounds could not include race, gender, national origin, creed, religion, socioeconomic status, drug dependence, or alcohol abuse. The states, too, have a variety of programs for avoiding vast disparities in judges' sentences.

By 1995, 22 states had created commissions to establish sentencing guidelines for their judges, and as of late 1997 such guidelines were in effect in 17 states. Likewise, almost all of the states have now enacted mandatory sentencing laws that require an automatic, specific sentence upon conviction of certain crimes – particularly violent crimes, crimes in which a gun was used, or crimes perpetrated by habitual offenders.

Despite the enormous impact that judges have on the sentence, they do not necessarily have the final say on the matter. Whenever a prison term is set by the judge, it is still subject to the parole laws of the federal government and of the states. Thus parole boards (the president and governors who may grant pardons or commute sentences) have the final say about how long an inmate actually stays in prison.

An Appeal

At both the state and federal levels everyone has the right to at least one appeal upon conviction of a felony, but in reality few criminals avail themselves of this privilege.

An appeal is based on the contention that an error of law was made during the trial process. Such an error must be reversible as opposed to harmless. An error is considered harmless if its occurrence had no effect on the outcome of the trial. A reversible error, however, is a serious one that might have affected the verdict of the judge or jury.

Appeals must be based on questions of procedure and legal interpretations, not on factual determinations of the defendant's guilt or innocence as such. Furthermore, under most circumstances one cannot appeal the length of one's sentence in the USA.

Criminal defendants do have some degree of success on appeal about 20 % of the time, but this does not mean that the defendant goes free. The usual practice is for the appellate court to remand the case (send it back down) to the lower court for a new trial.

At that point the prosecution must determine whether the procedural errors in the original trial can be overcome in a second trial and whether it is worth the time and effort to do so. A second trial is not considered to be double jeopardy, since the defendant has chosen to appeal the original conviction. The media and others concerned with the law often call attention to appellate courts that turn loose seemingly guilty criminals and to convictions that are reversed on technicalities. Surely this does happen, and one might argue that this is inevitable in a democratic country whose legal system is based on fair play and the presumption of the innocence of the accused.

However, about 90 % of all defendants plead guilty, and this plea virtually excludes the possibility of an appeal. Of the remaining group, two-thirds are found guilty at trial, and only a small percentage of these appeal. Of those who do appeal, only about 20 % have any measurable degree of success.

CHAPTER XI. THE CIVIL COURT PROCESS

INTRODUCTION

Civil actions are separate and distinct from criminal proceedings. This chapter focuses on civil courts: how civil law differs from criminal law, the most important categories of civil law, alternatives to trials, and a step-by-step look at the civil trial process.

THE NATURE & SUBSTANCE OF CIVIL LAW

The American legal system observes several important distinctions between criminal and civil law. Criminal law is concerned with conduct that is offensive to society as a whole.

Civil law pertains primarily to the duties of private citizens to each other. In civil cases the disputes are usually between private individuals, although the government may sometimes be a party in a civil suit. Criminal cases always involve government prosecution of an individual for an alleged offense against society. In a civil case the court attempts to settle a particular dispute between the parties by determining their legal rights.

The court then decides upon an appropriate remedy, such as awarding monetary damages to the injured party or issuing an order that directs one party to perform or refrain from a specific act. In a criminal case the court decides whether the defendant is innocent or guilty. A guilty defendant may be punished by a fine, imprisonment, or both.

In some instances the same act may give rise to both a criminal proceeding and a civil suit. Suppose that "Joe" and "Pete", two political scientists attending a convention in Atlanta, are sharing a taxi from the airport to their downtown hotel.

During the ride they become involved in a heated political discussion. By the time the taxi stops at their hotel, the discussion has become so heated that they get into a physical confrontation. If Pete strikes Joe in the ribs with his briefcase as he gets out of the taxi, Pete may be charged with criminal assault. In addition, Joe might file a civil suit against Pete in an effort to obtain a monetary award sufficient to cover his medical expenses.

Civil cases far outnumber criminal cases in both the federal and state courts, although they generally do not attract the same media attention as criminal trials. Still, they often raise important policy questions and cover a broad range of disagreements in society.

Judicial scholar Herbert Jacob summarizes the breadth of the civil law field in Justice in America: "Every broken agreement, every sale that leaves a dissatisfied customer, every uncollected debt, every dispute with a government agency, every libel and slander, every accidental injury, every marital breakup, every death may give rise to a civil proceeding".

Thus, virtually any dispute between two or more persons may provide the basis for a civil suit. The number of suits is huge, but most of them fall into one of five basic categories.

Task 1. Read the text and pick up the essential details in the form of quick notes.

Task 2. Remember the notion.

Civil law – the system of law concerned with private relations between members of a community rather than criminal, military, or religious affairs. Contrasted with criminal law. The system of law predominant on the European continent and of which a form is in force in Louisiana, historically influenced by the codes of Ancient Rome.

THE MAIN CATEGORIES OF CIVIL LAW

The main categories of civil law are contract, tort, property law, family, the law of succession.

Contract Law

Contract law is primarily concerned with voluntary agreements between two or more people. Some common examples include agreements to perform a certain type of work, to buy or sell goods, and to construct or repair homes or businesses. Basic to these agreements are a promise by one party and a counter promise by the other party, usually a promise by one party to pay money for the other party's services or goods.

Although many contracts are relatively simple and straightforward, some complex fields also build on contract law or contract ideas. One such field is commercial law, which focuses primarily on sales involving credit or the installment plan. Commercial law also deals with checks, promissory notes, and other negotiable financial instruments.

Another closely related field is bankruptcy and creditors' rights. Bankrupt individuals or businesses may go through a process that essentially wipes the slate clean and allows the person filing for bankruptcy to begin again. The bankruptcy process is also designed to ensure fairness to creditors. Bankruptcy law has been a major concern of legislators for several years, and a large number of special bankruptcy judges are now attached to the U.S. district courts. The final area is the insurance contract, which is important because of its applicability to so many people. The insurance industry is regulated by government agencies and subject to its own distinct rules.

Tort Law

Tort law may generally be described as the law of civil wrongs. It concerns conduct that causes injury and fails to measure up to some standard set by society. Actions for personal injury or bodily injury claims are at the heart of tort law, and automobile accidents have traditionally been responsible for a large number of these claims. One of the most rapidly growing subfields of tort law is product liability. This category has become an increasingly effective way to hold corporations accountable for injuries caused by defective foods, toys, appliances, automobiles, drugs, or a host of other products. Perhaps one reason for the growth in product liability cases is a change in the standard of proof.

Traditionally, negligence must be proven before one person is able to collect damages for injuries caused by someone else. However, some have argued that for many years reliance on the negligence concept has been declining, especially in product liability cases.

In its place, the courts often use a strict liability standard, which means that a victim can recover even if there was no negligence and even if the manufacturer was careful.

Another reason commonly suggested for the growth in the number of product liability cases is the size of jury awards when the decision favors the plaintiff. Jury awards for damages may be of two types: compensatory and punitive. Compensatory damages are intended to cover the plaintiff's actual loss, such as repair costs, doctor bills, and hospital expenses. Punitive (or exemplary) damages are designed, instead, to punish the defendant or serve as a warning against such behavior in the future.

As a result of concern over large jury awards and the increasing number of so-called frivolous cases, government officials, corporate executives, interest groups, and members of the legal community have called for legislation aimed at tort reform.

Throughout the 1990s a number of states enacted a variety of tort reform measures.

The American Tort Reform Association, which serves as an advocate of tort reform, reports that states have limited awards for noneconomic damages, modified their laws governing punitive damages, or enacted statutes penalizing plaintiffs who file frivolous lawsuits. Another rapidly growing subfield of tort law is medical malpractice.

The number of medical malpractice claims has increased even as great advances have been made in medicine. Two ongoing problems in contemporary medicine are the increased risk imposed by new treatments and the impersonal character of specialists and hospitals. Patients today have high expectations, and when a doctor fails them, their anger may lead to a malpractice suit.

Courts generally use the traditional negligence standard rather than the strict liability doctrine in resolving medical malpractice suits. This means that the law does not attempt to make doctors guarantee successful treatment, but instead tries to make the doctor liable if the patient can prove that the physician failed to perform in a manner consistent with accepted methods of medical practice.

The notion of acceptable practice varies from state to state, and such questions must be resolved by the courts on a case-bycase basis.

However, customarily a presumption is made that the conduct of professionals, including doctors, is reasonable in nature. This means that to prevail against the doctor in court, the injured patient needs at least the testimony of one or more expert witnesses stating that the doctor's conduct was not reasonable.

Property Law

A distinction has traditionally been made between real property and personal property.

The former normally refers to real estate – land , houses, and buildings – and has also included growing crops. Almost everything else is considered personal property, including such things as money, jewelry, automobiles, furniture, and bank deposits. According to Lawrence M. Friedman in American Law, "As far as the law is concerned, the word property means primarily real property; personal property is of minor importance".

No single special field of law is devoted to personal property. Instead, personal property is generally considered under the rubric of contract law, commercial law, and bankruptcy law.

Property rights have always been important in the USA, but today property rights are more complex than mere ownership of something. The notion of property now includes, among several other things, the right to use that property.

One important branch of property law today deals with land use controls. The most common type of land userestriction is zoning, a practice whereby local laws divide a municipality into districts designated for different uses. For instance, one neighborhood may be designated as residential, another as commercial, and yet another as industrial.

Early zoning laws were challenged on the ground that restrictions on land use amounted to a taking of the land by the city in violation of the Constitution, which says, "Nor shall private property be taken for public use without just compensation". In a sense, zoning laws do take from the owners of land the right to use their property in any way they see fit. Nonetheless, courts have generally ruled that zoning laws are not regarded as a taking in violation of the Constitution. Today, zoning is a fact of life in cities and towns of all sizes throughout the USA.

The Law of Succession

City planners and other city officials recognize zoning ordinances as necessary to the planned and orderly growth of urban areas.

The law of succession considers how property is passed along from one generation to another. The American legal system recognizes a person's right to dispose of his or her property as he or she wishes. One common way to do this is to execute a will.

If a person leaves behind a valid will, the courts will enforce it. However, if someone leaves no will (or has improperly drawn it up), then the person has died intestate, and the state must dispose of the property. The state's disposition of the property is carried out according to the fixed scheme set forth in the state statutes. By law, intestate property passes to the deceased person's heirs – that is, to his or her nearest relatives.

Occasionally a person who dies intestate has no living relatives. In that situation the property escheats, or passes, to the state in which the deceased resided. State statutes often prohibit the more remote relatives, such as second cousins and great uncles and aunts, from inheriting. Increasingly, Americans are preparing wills to ensure that their property is disposed of according to their wishes, not according to a scheme determined by the state. A will is a formal document. It must be very carefully drafted, and in most states it must be witnessed by at least two persons.

Family Law

Family law concerns such matters as marriage, divorce, child custody, and children's rights. It clearly touches the lives of a great number of Americans each year. The conditions necessary for entering into a marriage are spelled out by state law. These laws traditionally cover the minimum age of the parties, required blood tests or physical examinations, mental conditions of the parties, license and fee requirements, and waiting periods.

The termination of a marriage was once very rare. In the early 19th century some states granted divorces only through special acts of the legislature; one state, South Carolina, simply did not allow divorce. In the other states divorces were granted only when one party proved some grounds for divorce. In other words, divorces were available only to innocent parties whose spouses were guilty of such things as adultery, desertion, or cruelty.

The 20th century saw an enormous change in divorce laws. The movement was away from restrictive laws and toward no-fault divorce. This trend was the result of two factors.

First, for many years there was an increasing demand for divorces. Second, the stigma once attached to divorced persons all but disappeared. The no-fault divorce system means that the parties simply explain that irreconcilable differences exist between them and that the marriage is no longer viable. The no-fault divorce system has put an end to the adversarial nature of divorce proceedings. Not so easily solved are some of the other problems that may result from an ended marriage. Child custody battles, disputes over child support payments, and disagreements, over visitation rights find their way into court on a regular basis.

Custody disputes are probably more common and more contentious today than before no-fault divorce. The child's needs come first, and courts no longer automatically assume that this means granting custody to the mother. Fathers are increasingly being granted custody, it is now common for courts to grant joint custody to the divorced parents.

Task 1. Analyze the information, which is in the highlight, and use it in practice.

Task 2. Choose the keywords that best convey the gist of the information.

THE COURTS & OTHER INSTITUTIONS CONCERNED WITH CIVIL LAW

Disagreements are common in the daily lives of Americans. Usually these disagreements can be settled outside the legal system. Sometimes they are so serious, however, that one of the parties sees no alternative but to file a lawsuit.

Deciding Whether to go to Court

Every year thousands of potential civil cases are resolved without a trial because the would-be litigants settle their problems in another way or because the prospective plaintiff decides not to file suit. When faced with a decision to call upon the courts, to try to settle differences, or to simply forget the problem, many people resort to a simple cost-benefit analysis. That is, they weigh the costs associated with a trial against the benefits they are likely to gain if they win.

Alternative Dispute Resolution

In practice few persons make use of the entire judicial process. Instead, most cases are settled without resort to a full-fledged trial. In civil cases, a trial may be both slow and expensive. In many areas the backlogs are so enormous that it takes three to five years for a case to come to trial. In addition, civil trials may be exceedingly complex.

Often, the expense of a trial is enough to discourage potential plaintiffs.

The possibility of losing always exists. The possibility of a long wait also always exists, even if a plaintiff wins, before the judgment is satisfied – that is, if it is ever completely satisfied. In other words, a trial may simply create a new set of problems for the parties concerned.

For all these reasons, many discussion has been heard about alternative methods of resolving disputes. From major corporations to attorneys to individuals, support for alternative dispute resolution (ADR) has been growing.

Corporate America is interested in avoiding prolonged and costly court battles as the only way to settle complex business disputes. In addition, attorneys are more frequently considering alternatives such as mediation and arbitration where there is a need for faster resolution of cases or confidential treatment of certain matters.

Individual citizens are increasingly turning to local mediation services for help in resolving family disputes, neighborhood quarrels, and consumer complaints.

Alternative dispute resolution processes are carried out under a variety of models.

These models are commonly classified as "private, court-referred, court-annexed, but the latter two together often are called court-connected".

Mediation

Mediation is a private, confidential process in which an impartial person helps the disputing parties identify and clarify issues of concern and reach their own agreement.

The mediator does not act as a judge. Instead, the parties themselves maintain control of the final settlement. Mediation is especially appropriate for situations in which the disputants have an ongoing relationship, such as disputes between family members, neighbors, employers and employees, and landlords and tenants.

Mediation is useful in divorce cases because it changes the procedure from one of confrontation to one of cooperation. Child custody and visitation rights are frequently resolved through mediation as well.

Arbitration

The arbitration process is similar to going to court. After listening to both parties in a dispute, an impartial person called an arbitrator decides how the controversy should be resolved. There is no judge or jury. Instead, the arbitrator selected by both parties makes the final decision.

Arbitrators are drawn from all different types of professional backgrounds and frequently volunteer their time to help people resolve their problems. Disputants choose arbitration because it saves time and money and is more informal than a court hearing.

Most arbitrations are completed in four months or less, as compared with six months to several years for court decisions. Arbitration is used privately to resolve a variety of consumer complaints. Examples include disputes over poor automobile repairs, problems with the return of faulty merchandise, and overcharging for services. Arbitration is being used in court-referred and court-annexed processes to resolve several types of disputes, including business, commercial, and employment disputes.

Neutral Fact-Finding

Neutral factfinding is an informal process whereby an agreed-upon neutral party is asked to investigate a dispute. Usually, the dispute involves complex or technical issues.

The neutral third party analyzes the disputed facts and issues his or her findings in a nonbinding report or recommendation. This process can be particularly useful in handling allegations of racial or gender discrimination within a company because such cases often provoke strong emotions and internal dissension.

If both parties are employees of the same company, conflicts of interest could interfere with a supervisor or manager's ability to conduct an impartial investigation of alleged discrimination.

To avoid the appearance of unfairness, a company may turn to a neutral third party in hopes of reaching a settlement all the employees can respect.

Mini-Trial

In a mini-trial each party presents its position in a trial-like fashion before a panel that consists of selected representatives for both parties and neutral third parties. Every panel has one neutral advisor. Minitrials are designed to help define the issues and develop a basis for realistic settlement negotiations. The representatives from the two sides present an overview of their positions and arguments to the panel. As a result, each party becomes more knowledgeable about the other party's position. Having heard each side's presentation, the panel, including the advisor, meets to develop a compromise solution.

The neutral advisor may also issue an advisory opinion regarding the merits of the case. This advisory opinion is nonbinding unless the parties have agreed in writing beforehand to be bound by it. The primary benefit of a mini-trial is that both parties have an opportunity to develop solutions. It means that each has representation and access to detailed information.

Summary Jury Trial

A summary jury trial involves a court-managed process that takes place after a case has been filed, but before it reaches trial. In a summary jury trial each party presents its arguments to a jury (normally six persons). An overview of each side's argument as well as abbreviated opening and closing arguments are presented. Attorneys are typically given a short amount of time (an hour or less) for their presentations.

They are limited to the presentation of information that would be admissible at trial.

No testimony is taken from sworn witnesses, and proceedings are generally not recorded. Because the proceedings are nonbinding, rules of procedure and evidence are more flexible than in a normal trial. The jury hands down an advisory, nonbinding decision based on the arguments presented. In this setting, the verdict is designed to give the attorneys and their clients insight into their cases. If the dispute is not resolved during or immediately following the summary jury trial proceeding, a pretrial conference is held before the court to discuss settlement. One of the major advantages of a summary jury trial is the time involved. A summary jury trial is typically concluded in less than a day compared to several days or weeks for full-fledged trials.

Private Judging

This method of alternative dispute resolution makes use of retired judges who offer their services for a fee. Advocates claim that there are several advantages. First, the parties are able to select a person with the right qualifications and experience to handle the matter.

Second, the parties can be assured that the matter will be handled when first scheduled and not be continued because the court's calendar is too crowded.

Finally, the cost can be less than that incurred in full litigation. Critics of private judging, however, are concerned by the high fees charged by some retired judges.

A California appellate court, for instance, has noted that some sitting judges are leaving the bench in order to earn more money as private judges.

Specialized Courts

The state court systems are frequently characterized by a number of specialized courts that are set up to handle specific types of civil cases. Domestic relations courts are often established to deal with such matters as divorce, child custody, and child support.

In many jurisdictions, probate courts handle the settlement of estates and the contesting of wills. Perhaps the best known of the specialized courts are the small-claims courts.

These courts have jurisdiction to handle cases when the money being sued for is not above a certain amount. Small-claims courts allow less complex cases to be resolved more informally than in most other trial courts. Filing fees are low, and the use of attorneys is often discouraged, making small-claims court affordable for the average person.

Administrative Bodies

A number of government agencies have also established administrative bodies with quasi-judicial authority to handle certain types of cases. At the federal level, for example, agencies such as the Federal Trade Commission and the Federal Communications.

Commission carry out an adjudication of sorts within their respective spheres of authority. An appeal of the ruling of one of these agencies may be taken to a federal court of appeals. At the state level, a common example of an administrative body that aids in the resolution of civil claims is a workers' compensation board. This board determines whether an employee's injury is job-related and thus whether the person is entitled to workers' compensation payments.

Many state motor vehicle departments have hearing boards to make determinations about revoking driver's licenses. Another type of administrative board rules on civil rights matters and cases of alleged discrimination.

THE CIVIL TRIAL PROCESS

Anumber of disputes are resolved through some method of alternative dispute resolution, in a specialized court, or by an administrative body. However, a large number of cases each year still manage to find their way into a civil court. Generally speaking, the adversarial process used in criminal trials is used in civil trials, with just a few important differences.

First, a litigant must have standing. This concept means simply that the person initiating the suit must have a personal stake in the outcome of the controversy.

Otherwise, there is no real controversy between the parties and thus no actual case for the court to decide. A second major difference is that the standard of proof used in civil cases is a preponderance of the evidence, not the more stringent beyond-a-reasonable-doubt standard used in criminal cases. A preponderance of the evidence is generally taken to mean that there is sufficient evidence to overcome doubt or speculation. It clearly means that less proof is required in civil cases than in criminal cases.

A third major difference is that many of the extensive due process guarantees that a defendant has in a criminal trial do not apply in a civil proceeding. Neither party is constitutionally entitled to counsel. The Seventh Amendment does guarantee the right to a jury trial in lawsuits". Although this amendment has not been made applicable to the states, most states have similar constitutional guarantees.

Filing Civil Suits

The person initiating the civil suit is known as the plaintiff, and the person being sued is the defendant or the respondent. A civil action is known by the names of the plaintiff and the defendant. The plaintiff's name appears first. In a typical situation, the plaintiff's attorney pays a fee and files a complaint or petition with the clerk of the proper court. The complaint states the facts on which the action is based, the damages alleged, and the judgment or relief being sought. The decision about which court should actually hear the case involves the concepts of jurisdiction and venue: Jurisdiction deals with a court's authority to exercise judicial power, and venue means the place where that power should be exercised. Jurisdictional requirements are satisfied when the court has legal authority over both the subject matter and the person of the defendant. This means that several courts can have jurisdiction over the same case.

The determination of proper venue may be prescribed by statute based on avoiding possible prejudice, or it may simply be a matter of convenience. The federal law states that proper venue is the district in which either the plaintiff or defendant resides, or the district where the injury occurred. State venue statutes vary somewhat, but they usually provide that where land is involved, proper venue is the county where the land is located.

In most other instances venue is the county where the defendant resides. Venue questions may be related to the perceived or feared prejudice of either the judge or the prospective jury. Attorneys sometimes object to trials being held in a particular area for this reason and may move for a change of venue. Although this type of objection is perhaps more commonly associated with highly publicized criminal trials, it is also found in civil trials.

Once the appropriate court has been determined and the complaint has been filed, the court clerk will attach a copy of the complaint to a summons, which is then issued to the defendant. The summons may be served by personnel from the sheriff's office, a U.S. marshal, or a private processservice agency.

The summons directs the defendant to file a response, known as a pleading, within a certain period of time (usually 30 days). If the defendant does not do so, then he or she may be subject to a default judgment. These simple actions by the plaintiff, clerk of the court, a process server set in motion the civil case.

Approximately 75 % of cases are resolved without a trial during this time.

Pretrial Activities Motions

Once the summons has been served on the defendant, a number of motions can be made by the defense attorney. A motion to quash requests that the court void the summons on the ground that it was not properly served. For example, a defendant might contend that the summons was never delivered personally as required by state law. Two types of motions are meant to clarify or to object to the plaintiff's petition.

A motion to strike requests that the court excise, or strike, certain parts of the petition because they are prejudicial, improper, or irrelevant. A motion to make more definite asks the court to require the plaintiff to be more specific about the complaints.

A fourth type of motion often filed in a civil case is a motion to dismiss. This motion may argue that the court lacks jurisdiction, or it may insist that the plaintiff has not presented a legally sound basis for action against the defendant even if the allegations are true.

The Answer

If the complaint survives the judge's rulings on the motions, then the defendant submits an answer to the complaint. The response may contain admissions, denials, defenses, and counterclaims. When an admission is contained in an answer, there is no need to prove that fact during the trial. A denial, however, brings up a factual issue to be proven during the trial. A defense says that certain facts set forth in the answer may bar the plaintiff from recovering damages. The defendant may create a separate action known as a counterclaim.

If the defendant thinks that a cause of action against the plaintiff arises from the same set of events, then he or she must present the claim to the court in response to the plaintiff's claim. The plaintiff may file a reply to the defendant's answer. In that reply, the plaintiff may admit, deny, or defend against the allegations of fact contained in the counterclaim.

Discovery

The U.S. legal system provides for discovery procedures; that is, each party is entitled to information in the possession of the other. There are several tools of discovery:

• A deposition is testimony of a witness taken under oath outside the court. The same question-andanswer format as in the courtroom is used. All parties to the case must be notified that the deposition is to be taken so that their attorneys may be present to cross-examine the witness.

• Interrogatories are written questions that must be answered under oath.

Interrogatories can be submitted only to the parties in the case, not to witnesses. They are used to obtain descriptions of evidence held by the opposing parties in the suit.

• Production of documents may be requested by one of the parties in the suit if they wish to inspect documents, writings, drawings, graphs, charts, maps, photographs, or other items held by the other party.

• If there are questions about the physical or mental condition of one of the parties, the court may order that person to submit to an examination by a physician.

The Pretrial Conference

Before going to court, the judge may call a pretrial conference to discuss the issues in the case informally with the opposing attorneys.

The general practice is to allow only the judge and the lawyers to attend the conference, which is normally held in the judge's chambers. At this meeting, the judge and the attorneys try to come to agreement on uncontested factual issues, which are known as stipulations. The purpose of stipulations is to make the actual trial more efficient by reducing the number of issues that must be argued in court. The attorneys also share with each other a list of witnesses and documents that are part of each case. Lawyers and judges may also use the pretrial conference to try to settle the case. Some judges actively work to bring about a settlement so the case does not have to go to trial.

The Civil Trial Selection of Jury

The right to a jury trial in a civil suit in a federal court is guaranteed by the Seventh Amendment of the U.S. Constitution. State constitutions likewise provide for such a right.

A jury trial may be waived, in which case the judge decides the matter. Although the jury traditionally consists of 12 persons, today the number varies. Most of the federal district courts now use juries of fewer than 12 persons in civil cases. A majority of states also authorize smaller juries in some or all civil trials. As in criminal trials, jurors must be selected in a random manner from a fair cross-section of the community. A large panel of jurors is called to the courthouse, and when a case is assigned to a court for trial, a smaller group of prospective jurors is sent to a particular courtroom.

Following the voir dire examination, which may include challenges to certain jurors by the attorneys, a jury to hear the particular case will be seated. Lawyers may challenge a prospective juror for cause, in which case the judge must determine whether the person challenged is impartial. Each side may exercise a certain number of peremptory challenges – excusing a juror withoutstating any reason.

However, the U.S. Supreme Court has ruled that the equal protection guarantee of the Fourteenth Amendment prohibits the use of such challenges to disqualify jurors from civil trials because of their race or gender. Peremptory challenges are fixed by statute or court rule and normally range from two to six.

Opening Statements

After the jury has been chosen, the attorneys present their opening statements.

The plaintiff's attorney begins. He or she explains to the jury what the case is about and what the plaintiff's side expects to prove. The defendant's lawyer can usually choose either to make an opening statement immediately after the plaintiff's attorney finishes or to wait until the plaintiff's case has been completely presented. If the defendant's attorney waits, he or she will present the entire case for the defendant continuously, from opening statement onward. Opening statements are valuable because they outline the case and make it easier for the jury to understand the evidence as it is presented.

Presentation of the Plaintiff's Case

In the normal civil case, the plaintiff's side is first to present and attempt to prove its case to the jury and last to make closing arguments. In presenting the case, the plaintiff's lawyer will normally call witnesses to testify and produce documents or other exhibits.

When a witness is called, he or she will undergo direct examination by the plaintiff's attorney. Then the defendant's attorney will have the opportunity to ask questions or cross-examine the witness. The Arizona Supreme Court recently took steps to help jurors do a better job of making decisions in civil cases. Among other things, the state's highest court voted to allow jurors to pose written questions to witnesses through the judge.

Other states are considering implementing Arizona's new practice. Following the crossexamination, the plaintiff's lawyer may conduct a redirect examination, which may then be followed by a second cross-examination by the defendant's lawyer.

Generally speaking, witnesses may testify only about matters they have actually observed; they may not express their opinions. However, an important exception to this general rule is that expert witnesses are specifically called upon to give their opinions in matters within their areas of expertise. To qualify as an expert witness, a person must possess substantial knowledge about a particular field.

Furthermore, this knowledge must normally be established in open court. Both sides often present experts whose opinions are contradictory. When this happens, the jury must ultimately decide which opinion is the correct one. When the plaintiff's side has presented all its evidence, the attorney rests the case.

Motion for Directed Verdict

After the plaintiff's case has been rested, the defendant will often make a motion for a directed verdict. With the filing of this motion, the defendant is saying that the plaintiff has not proved his or her case and thus should lose. The judge must then decide whether the plaintiff could win at this point if court proceedings were to cease. Should the judge determine that the plaintiff has not presented convincing enough evidence, he or she will sustain the motion and direct the verdict for the defendant.

Thus the plaintiff will lose the case. The motion for a directed verdict is similar to the pretrial motion to dismiss. If the motion for a directed verdict is overruled, the defendant then presents evidence. The defendant's case is presented in the same way as the plaintiff's case. That is, there is direct examination of witnesses and presentation of documents and other exhibits. The plaintiff has the right to cross-examine witnesses. Redirect and recross questions may follow.

After the presentation of the defendant's case, the plaintiff may bring forth rebuttal evidence, which is aimed at refuting the defendant's evidence.

Answer to Plaintiff's Rebuttal

The defendant's lawyer may present evidence to counter the rebuttal evidence. This rebuttal-and-answer pattern may continue until the evidence has been exhausted.

Closing Arguments

After all the evidence has been presented, the lawyers make closing arguments, or summations, to the jury. The plaintiff's attorney speaks both first and last. That is, he or she both opens the argument and closes it, and the defendant's lawyer argues in between.

In this stage of the process each attorney attacks the opponent's evidence for its unreliability and may attempt to discredit the opponent's witnesses. In doing so, the lawyers often wax eloquent or deliver an emotional appeal to the jury. However, the arguments must be based upon facts supported by the evidence and introduced at the trial.

Instructions to the Jury

Assuming that a jury trial has not been waived, the instructions to the jury follow the conclusion of the closing arguments. The judge informs the jury that it must base its verdict on the evidence presented at the trial. The judge's instructions also inform the jurors about the rules, principles, and standards of the particular legal concept involved. In civil cases, a finding for the plaintiff is based on a preponderance of the evidence. This means that the jurors must weigh the evidence presented during the trial and determine in their minds that the greater weight of the evidence, in merit and in worth, favors the plaintiff.

The Verdict

The jury retires to the seclusion of the jury room to conduct its deliberations.

The members must reach a verdict without outside contact. In some instances the deliberations are so long and detailed that the jurors must be provided meals and sleeping accommodations until they can reach a verdict.

The verdict, then, represents the jurors' agreement after detailed discussions and analyses of the evidence. Sometimes the jury deliberates in all good faith but cannot reach a verdict. When this occurs, the judge may declare a mistrial. This means that a new trial may have to be conducted. After the verdict is reached, the jury is conducted back into open court, where it delivers its verdict to the judge.

The parties are informed of the verdict. It is then customary for the jury to be polled – the jurors are individually asked by the judge whether they agree with the verdict.

Post-trial Motions

Once the verdict has been reached, a dissatisfied party may pursue a variety of tactics. The losing party may file a motion for judgment notwithstanding the verdict.

This type of motion is granted when the judge decides that reasonable persons could not have rendered the verdict the jury reached. The losing party may also file a motion for a new trial. The usual basis for this motion is that the verdict goes against the weight of the evidence. The judge will grant the motion on this ground if he or she agrees that the evidence presented simply does not support the verdict reached by the jury.

A new trial may be granted for a number of other reasons: excessive damages, grossly inadequate damages, the discovery of new evidence, and errors in the production of evidence, to name a few. In some cases the losing party also files a motion for relief from judgment. This type of motion may be granted if the judge finds a clerical error in the judgment, discovers some new evidence, or determines that the judgment was induced by fraud.

Judgment & Execution

A verdict in favor of the defendant ends the trial, but a verdict for the plaintiff requires another stage in the process. There is no sentence in a civil case, but there must be a determination of the remedy or damages to be assessed.

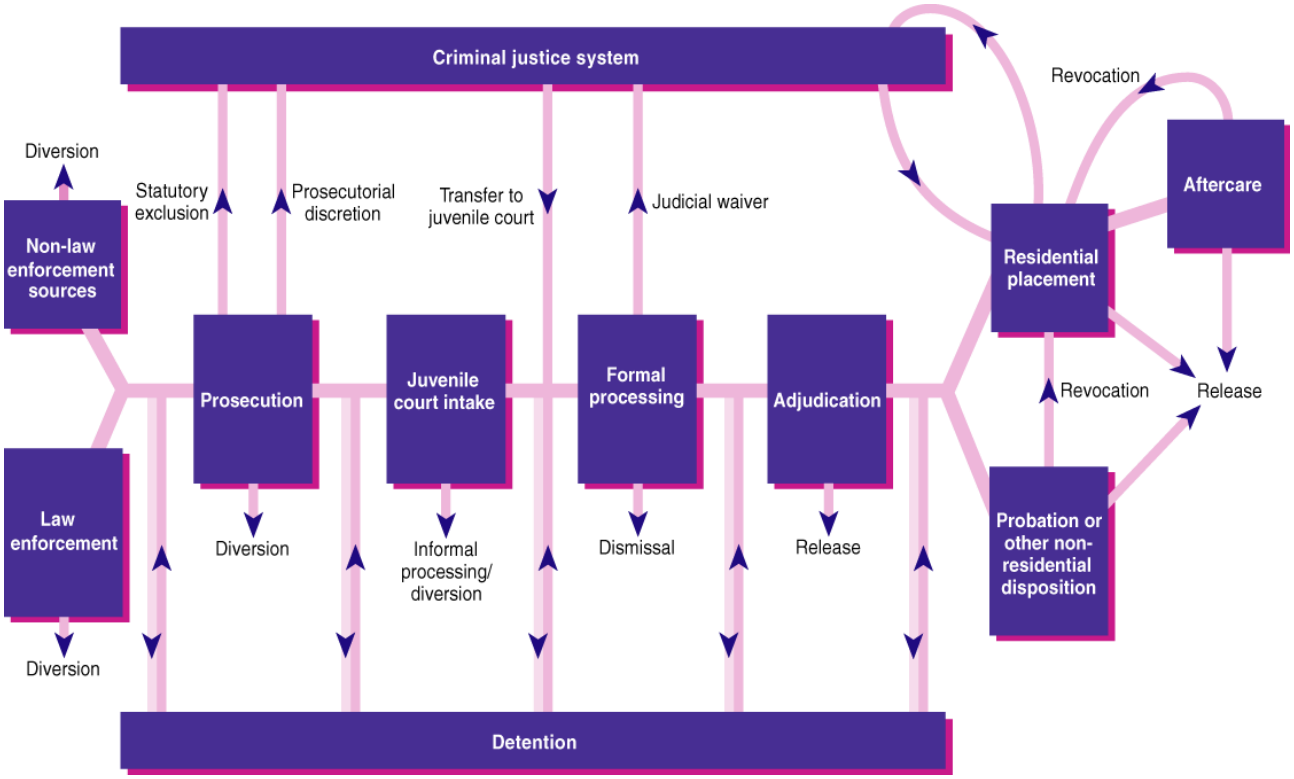
This determination is called the judgment. In situations where the judgment is for monetary damages and the defendant does not voluntarily pay the set amount, the plaintiff can ask to have the court clerk issue an order to execute the judgment.

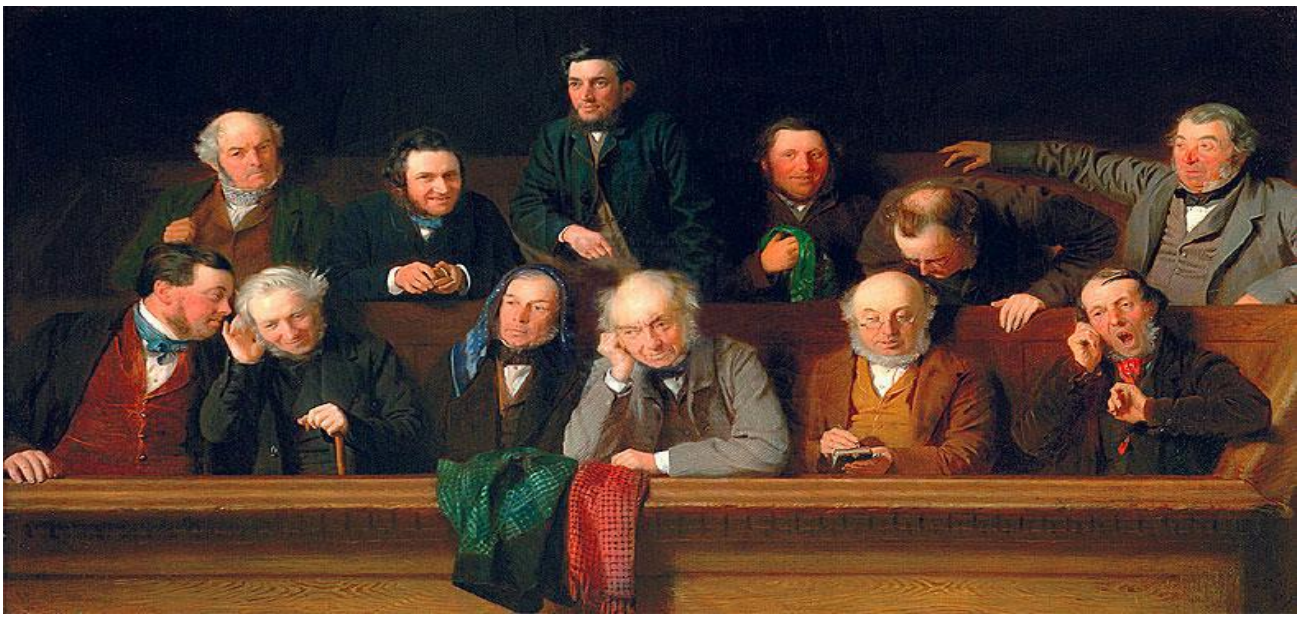
The execution is issued to the sheriff and orders the sheriff to seize the defendant's property and sell it at auction to satisfy the judgment. An alternative is to order a lien, which is the legal right to hold property that may be used for the payment of the judgment.

Appeal

If one party feels that an error of law was made during the trial, and if the judge refuses to grant a posttrial motion for a new trial, then the dissatisfied party may appeal to a higher court. Probably the most common grounds for appeal are that the judge allegedly admitted evidence that should have been excluded, refused to admit evidence that should have been introduced, or failed to give proper jury instructions.

An attorney lays the groundwork for an appeal by objecting to the alleged error during the trial. This objection goes into the trial record and becomes a part of the trial transcript, which may be reviewed by an appellate court. The appellate court decision may call for the lower court to enforce its earlier verdict or to hold a new trial.





Jury trial

CHAPTER XII. FEDERAL JUDGES

INTRODUCTION

The main actors in the federal system are those who serve as judges and justices.

What characteristics do these people have that distinguish them from the rest of the citizenry? What are the qualifications – both (in)formal – for appointment to the bench? How are judges selected and who are the participants in the process? How do judges learn to be judges? How are judges disciplined and when are they removed from the bench?

BACKGROUND CHARACTERISTICS OF FEDERAL JUDGES

Americans cling to the notion that someone born in the humblest of circumstances (such as Abraham Lincoln) may one day grow up to be the president of the USA, or at least a U.S. judge. As with most myths, this one has a kernel of truth. In principle virtually anyone can become a prominent public official, and a few well-known examples can be cited of people who came from poor backgrounds yet climbed to the pinnacle of power. More typically, America's federal judges, like other public officials and the captains of commerce and industry, come from the nation's middle and upper-middle classes.

District Judges

Background data for all federal district judges for the past 210 years have never been collected, but a good deal is known about judges who have served in recent decades.

Before assuming the federal bench, a plurality of judges had been judges at the state or local level. The next largest blocs were employed either in the political or governmental realms or in moderate-to large-sized law firms. Those working in small law firms or as professors of law made up the smallest bloc.

Judges' educational background reveals something of their elite nature. All graduated from college; about half attended either costly Ivy League schools or other private universities to receive their undergraduate and law degrees. Judges also differ from the population as a whole in that there is a strong tendency toward "occupational heredity" – that is, for judges to come from families with a tradition of judicial and public service.

Although the USA is about 51 % female, judges have been almost exclusively male.

Until the presidency of Jimmy Carter (1977-81), less than 2 % of district judges were female, and even with conscious effort to change this phenomenon, only 14.4 % of Carter's appointments to district judgeships were women. Racial minorities have been underrepresented on the trial bench, not only in absolute numbers but also in comparison with figures for the overall population. Until the present time, only Jimmy Carter had appointed a significant number of non-Anglos to the federal bench – over 21 %.

During the administration of President Bill Clinton (1993-2001), a dramatic change took place. During his first six years in office, 49 % of his judicial appointees were either women or minorities. About nine out of ten district judges have been of the same political party as the appointing president. Historically about 60 % have a record of active partisanship.

The typical judge has been 49 years old at the time of appointment.

Appeals Court Judges

Appeals judges are much more likely to have previous judicial experience than their counterparts on the trial court bench, and they are just as likely, if not more so, to have attended private and Ivy League schools.

In terms of political party affiliation, little difference is seen between trial and appellate court appointments. However, appeals judges have a slight tendency to be more active in their respective parties than their colleagues on the trial bench.

The Clinton initiative to make the bench more accurately reflect U.S. gender and racial demographics is evident in the ranks of the appellate judges as well.

A third of his appointees were women, and more African Americans, Hispanics, and Asians were appointed to the appellate court bench by Clinton than by any other president.

President George W. Bush, in turn, has shown a commitment to racial and gender diversity. Almost one-third of his district court appointments have been "nontraditional" – women and minorities.

Supreme Court Justices

Since 1789, 106 men and two women have sat on the bench of America's highest judicial tribunal. Although perhaps 10 % of the justices were essentially of humble origin, a majority of the justices came from politically active families, and about a third were related to jurists and closely connected with families with a tradition of judicial service.

Until the 1960s the High Court had been all white and all male, but in 1967 President Lyndon Johnson appointed Thurgood Marshall as the first African American member of the Court. When Marshall retired in 1991, President George H.W. Bush, father of President George W. Bush, replaced him with another African American, Clarence Thomas.

In 1981 the gender barrier was broken when President Ronald Reagan named Sandra Day O'Connor to the Court, and 13 years later she was joined by Ruth Bader Ginsburg. As for the nonpolitical occupations of the justices, all 108 had legal training and all had practiced law at some stage in their careers. Only 22 % had state or federal judicial experience immediately prior to their appointments, although more than half had served on the bench at some time before their nomination to the Supreme Court.

As with their colleagues in the lower federal judiciary, the justices were much more likely to have been politically active than the average American, and virtually all shared many of the ideological and political orientations of their appointing president.

USA District court

QUALIFICATIONS OF FEDERAL JUDGES

Despite the absence of formal qualifications for a federal judgeship, there are welldefined informal requirements.

Formal Qualifications

No constitutional or statutory qualifications are stipulated for serving on the Supreme Court or the lower federal courts. The Constitution merely indicates that "the judicial Power of the USA, shall be vested in one supreme Court" as well as in any lower federal courts that Congress may establish (Article III, Section 1) and that the president "by and with the Advice and Consent of the Senate, shall appoint Judges of the supreme Court" (Article II, Section 2). Congress has applied the same selection procedure to the appeals and the trial courts. There are no exams to pass, no minimum age requirement, no stipulation that judges be native-born citizens or legal residents, no requirement that judges even have a law degree.

Informal Requirements

At least four vital although informal factors determine who sits on the federal bench: professional competence, political qualifications, self-selection, the element of luck.

Professional Competence: Although candidates for U.S. judicial posts do not have to be attorneys, it has been the custom to appoint lawyers who have distinguished themselves professionally. Although the political rules may allow a president to reward an old ally with a seat on the bench, tradition has created an expectation that the would-be judge have some reputation for professional competence, the more so as the judgeship in question goes from the trial court to the appeals court to the Supreme Court level.

Political Qualifications: Most nominees for judicial office have some record of political activity for two reasons. First, to some degree judgeships are still considered part of the political patronage system; those who have served the party are more likely to be rewarded with a federal post than those who have not. Second, some political activity on the part of the would-be judge is often necessary, because otherwise the candidate would simply not be visible to the president, senator(s), or local party leaders who send forth the names of candidates.

Self-Selection: While many consider it undignified and lacking in judicial temperament for someone to announce publicly a desire for a federal judgeship, some would-be jurists orchestrate discreet campaigns on their own behalf or at least pass the word that they are available for judicial service. Few will admit to seeking an appointment actively, but credible anecdotes suggest that attorneys often position themselves in such a way that their names will come up when there is a vacant seat to fill.

The Element of Luck: A good measure of happenstance exists in virtually all judicial appointments. Being a member of the right party at the right time or being visible to the power brokers at the right moment often has as much to do with becoming a judge as one's professional background.

Task 1. Transfer the given information from the passages onto a table.

№	Activity			
	Judge	When	Where	Score

THE FEDERAL SELECTION PROCESS

The framework of judicial selection is the same for all federal judges, although the roles of the participants vary depending on the level of the U.S. judiciary. All nominations are made by the president after due consultation with the White House staff, the attorney general's office, certain senators, and other political operatives.

The Federal Bureau of Investigation (FBI), an arm of the Justice Department, customarily performs a routine security check. After the nomination is announced to the public, various interest groups that believe they have a stake in the appointment may lobby for or against the candidate. Also, the candidate's qualifications will be evaluated by a committee of the American Bar Association. The candidate's name is sent to the Senate Judiciary Committee, which conducts an investigation of the nominee's fitness for the post. If the committee's vote is favorable, the nomination is sent to the floor of the Senate, where it is either approved or rejected by a simple majority vote.

The President

Technically, the president nominates all judicial candidates, but historically the chief executive has been more involved in appointments to the Supreme Court than to the lower courts. This is so for two major reasons. First, Supreme Court appointments are seen by the president – and by the public at large – as generally more important and politically significant than openings on the lesser tribunals. Presidents often use their few opportunities for High Court appointments to make a political statement or to set the tone of their administration.

During the period of national stress prior to U.S. entry into World War II, Democratic President Franklin D. Roosevelt elevated Republican Harlan Fiske Stone to chief justice as a gesture of national unity. In 1969 President Richard Nixon used his appointment of the conservative Warren Burger to fulfill his campaign pledge to restore "law and order".

President Ronald Reagan in 1981 hoped to dispel his reputation for being unsympathetic toward the women's movement by being the first to name a woman to the High Court.

A second reason why presidents are likely to devote more attention to Supreme Court appointments and less to lower court appointments is that tradition has allowed for individual senators and local party leaders to influence, and often dominate, lower court appointments.

The practice known as senatorial courtesy is part of the appointment process for district judges. Under senatorial courtesy, senators of the president's political party who are from the home state of the nominee are asked their opinions of the candidate by the Senate Judiciary Committee. In expressing their views about a particular candidate, these senators are in a position to virtually veto a nomination. Senatorial courtesy does not apply to appellate court appointments, although it is customary for presidents to defer to senators of their party from states that make up the appellate court circuit.

The Department of Justice

Assisting the president and the White House staff in the judicial selection process are the two key presidential appointees in the Justice Department – the attorney general of the USA & the deputy attorney general. Their primary job is to seek out candidates for federal judicial posts who conform to general criteria set by the president.

Once several names are obtained, the staff of the Justice Department will subject each candidate to further scrutiny. They may order an FBI investigation of the candidate's character and background; they will usually read copies of all articles or speeches the candidate has written or evaluate a sitting judge's written opinions; they might check with local party leaders to determine that the candidate is a party faithful and is in tune with the president's major public policy positions.

In the case of district judge appointments, where names are often submitted by home-state senators, the Justice Department's function is more that of screener than of initiator.

Regardless of who comes up with a list of names, the Justice Department's primary duty is to evaluate the candidate's personal, professional, and political qualifications.

In performing this role the department may work closely with the White House staff, with the senators involved in the nomination, and with party leaders who may wish to have some input in choosing the nominee.

State & Local Party Leaders

Regional party leaders have little to say in the appointment of Supreme Court justices, where presidential prerogative is dominant, and their role in the choice of appeals court judges is minimal. However, in the selection of U.S. trial judges their impact is formidable, especially when appointments occur in states in which neither senator is of the president's political party. In such cases the president will be more likely to consult with state leaders of his own party rather than with the state's senators.

Interest Groups

A number of pressure groups in the USA, representing the whole political spectrum from left to right, often lobby either for or against judicial nominations. Leaders of these groups – civil liberties, business, organized labor, civil rights – have little hesitation about urging the president to withdraw the nomination of someone whose political and social values are different from their own or about lobbying the Senate to support the nomination of someone who is favorably perceived. Interest groups lobby for and against nominees at all levels of the federal judiciary.

The American Bar Association (ABA)

For more than five decades, the Committee on the Federal Judiciary of the ABA has played a key role in evaluating the professional credentials of potential nominees for positions on the federal bench. The committee, whose 15 members represent all theU.S. circuits, evaluates candidates on the basis of three criteria: judicial temperament, professional competence, and integrity. A candidate approved by the committee is rated either "qualified" or "well qualified", whereas an unacceptable candidate is stamped with a "not qualified" label.

The Senate Judiciary Committee

The rules of the Senate require its Judiciary Committee to consider all nominations to the federal bench and to make recommendations to the Senate as a whole. Its role is thus to screen individuals who have already been nominated, not to suggest names of possible candidates. The committee holds hearings on all nominations, at which time witnesses are heard and deliberations take place behind closed doors. The hearings for district court appointments are largely perfunctory because the norm of senatorial courtesy has, for all intents and purposes.

Already determined whether the candidate will be acceptable to the Senate.

However, for appeals court nominees – surely for an appointment to the Supreme Court – the committee hearing is a serious proceeding.

The Senate

The final step in the judicial appointment process for federal judges is a majority vote by the Senate. Historically, two general views have prevailed of the Senate's prescribed role.

Presidents from the time of George Washington and a few scholars have taken the position that the Senate ought quietly to go along with the presidential choices unless overwhelmingly strong reasons exist to the contrary.

Other scholars and most senators have held the view that the Senate has the right and the obligation to make its own decision regarding the nominee.

In practice the role of the Senate in the judicial confirmation process has varied, depending on the level of the federal judgeship that is being considered. For district judges the norm of senatorial courtesy prevails. That is, if the president's nominee is acceptable to the senator(s) of the president's party in the state in which the judge is to sit, the Senate is usually happy to confirm the appointment.

For appointments to the appeals courts, senatorial courtesy does not apply, since the vacancy to be filled covers more than just the state of one or possibly two senators. But senators from each state in the circuit in which the vacancy has occurred customarily submit names of possible candidates to the president. An unwritten rule is that each state in the circuit should have at least one judge on that circuit's appellate bench. As long as the norms are adhered to and the president's nominee has reasonably good qualifications, the Senate as a whole usually goes along with the recommendations of the chief executive.

The Senate has been inclined to dispute the president if disagreement arises over a nominee's fitness for the High Court. Since 1789, presidents have sent the names of 144 Supreme Court nominees to the Senate for its advice and consent.

Of this number, 30 were either rejected or "indefinitely postponed" by the Senate, or the names were withdrawn by the president. Thus presidents have been successful about 79 % of the time, and their success rate seems to be improving, given that as many as onethird of the nominations were rejected by the Senate in the 19th century. The record shows that presidents have met with the most success in getting their High Court nominations approved when the nominee comes from a noncontroversial background and has middle-of-the-road political leanings, and when the president's party also controls the Senate, or at least a majority shares the president's basic attitudes and values.

Federal Court House

THE JUDICIAL SOCIALIZATION PROCESS

In college and law school, future judges acquire important analytic and communication skills, in addition to the basic substance of the law. After a couple of decades of legal practice, the future judge has learned a good bit about how the courts and the law actually work and has specialized in several areas of the law.

Despite all this preparation, sometimes called "anticipatory socialization", most new judges in America still have a lot to learn about being a judge. Not only does the USA lack formalized training procedures for the judicial profession, but there is an assumption that being a lawyer for a decade or so is all the experience one needs to be a judge.

On the contrary, becoming a judge in America requires a good deal of freshman socialization (short-term learning and adjustment to the new role) and occupational socialization (on-the-job training over a period of years).

Typical new trial court appointees may be first-rate lawyers and experts in a few areas of the law in which they have specialized. As judges, however, they are expected to be experts on all legal subjects, are required to engage in judicial duties usually unrelated to any tasks they performed as lawyers (sentencing), are given a host of administrative assignments for which they have had no prior experience (learning how to docket efficiently several hundred diverse cases). At the appeals court level there is a period of freshman socialization – despite the circuit judge's possible prior judicial experience – and former trial judges appear to make the transition more easily.

During the transition time, circuit judges tend to speak less for the court than their more experienced colleagues. They often take longer to write opinions, defer more often to senior colleagues, or experience a period of indecision.

The learning process for new Supreme Court justices is even harder. As with new appeals court judges, novice Supreme Court justices tend to defer to senior associates, to write fewer majority and dissenting opinions, and to manifest a degree of uncertainty.

New High Court appointees may have more judicial experience than their lower-court colleagues, but the fact that the Supreme Court is involved in broad judicial policy making – as opposed to the error correction of the appeals courts and the norm enforcement of the trial courts – may account for their initial indecisiveness.

Given the need on the part of all new federal jurists for both freshman and occupational socialization, where do they go for instruction? For both the appeals court judges and their trial court peers, most of their training comes from their more senior, experienced colleagues on the bench – particularly the chief judge of the circuit or district.

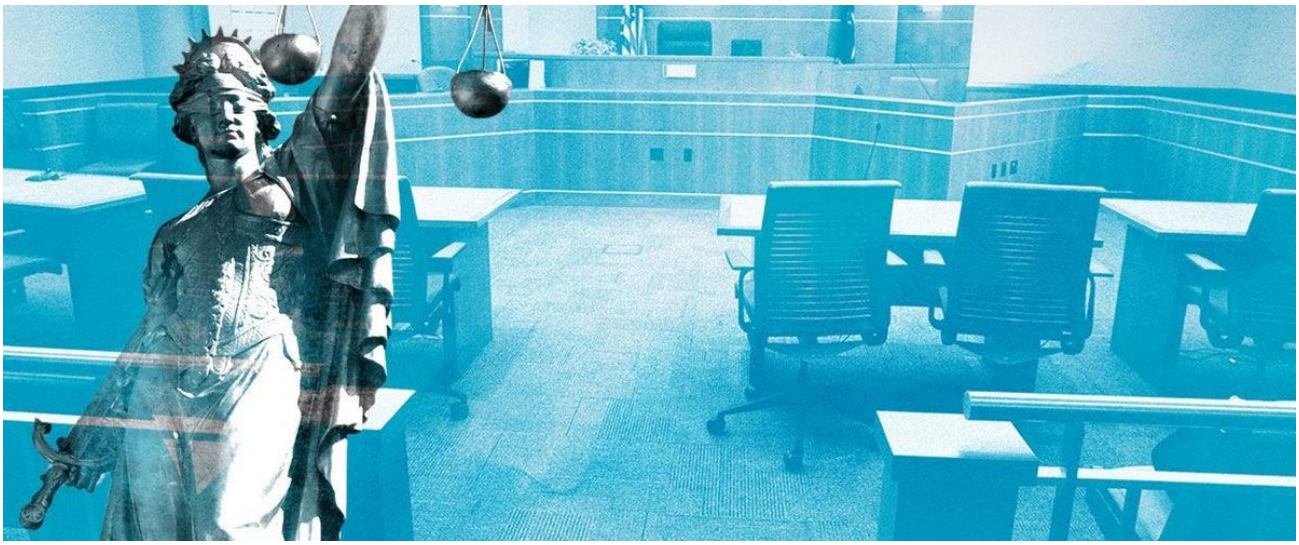
Likewise on the Supreme Court, older associates, often the chief justice, play a primary part in passing on to novice justices the essential rules and values of the Court.

Training seminars provided by the Federal Judicial Center for newly appointed judges also play an important role in the training and socialization of new jurists. Although some of these seminars are conducted by outsider specialists – subject matter experts in the law schools – the key instructors tend to be seasoned judges whose reallife experience on the bench commands the respect of the new members of the federal judiciary.

What is the significance of this socialization process for the operation of the U.S. judicial-legal system? First, the agents of socialization that are readily available to the novice jurists allow the system to operate more smoothly, with a minimum of down time.

If new judges were isolated from their more experienced associates, geographically or otherwise, they would require more time to learn the fine points of their trade and presumably a greater number of errors would occur in litigation. Second, the fact that the system is able to provide its own socialization – that the older, experienced jurists train the novices – serves as a sort of glue that helps bond the system together. It allows the judicial values, practices, and orientations of one generation of judges to be passed on to another.

It gives continuity and a sense of permanence to a system that operates in a world where chaos and random behavior are common.



Senate vacancies n the USA

THE RETIREMENT & REMOVAL OF JUDGES

Judges cease performing their judicial duties when they retire by choice or because of ill health or death, or when they are subjected to the disciplinary actions of others.

Disciplinary Action against Federal Judges

All federal judges appointed under the provisions of Article III of the Constitution hold office "during good Behavior", which means in effect for life or until they choose to step down. The only way they can be removed from the bench is by impeachment (indictment by the House of Representatives) and conviction by the Senate.

In accordance with constitutional requirements (for Supreme Court justices) and legislative standards (for appeals & trial court judges), impeachment may occur for "Treason, Bribery, or other high Crimes and Misdemeanors". An impeached jurist would face trial in the Senate, which could convict by a vote of two-thirds of the members present.

Since 1789 the House of Representatives has initiated impeachment proceedings against only 13 jurists – although about an equal number of judges resigned just before formal action was taken against them. Of these 13 cases, only seven resulted in a conviction, which removed them from office. Although outright acts of criminality by those on the bench are few, a gray area of misconduct may put offending judges somewhere between acceptable and impeachable behavior.

What to do with the federal jurist who hears a case despite an obvious conflict of interest, who consistently demonstrates biased behavior in the courtroom, whose personal habits negatively affect his or her performance in court? Historically, little has been done in such cases other than issuance of a mild reprimand by colleagues.

In recent decades, however, actions have been taken to discipline judges.

On October 1, 1980, a new statute of Congress took effect. Titled the Judicial Councils Reform and Judicial Conduct and Disability Act, the law has two distinct parts.

The first part authorizes the Judicial Council in each circuit, composed of both appeals and trial court judges and presided over by the chief judge of the circuit, to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit". The second part of the act establishes a statutory complaint procedure against judges. Briefly, it permits an aggrieved party to file a written complaint with the clerk of the appellate court.

The chief judge then reviews the charge and may dismiss it if it appears frivolous, or for a variety of other reasons. If the complaint seems valid, the chief judge must appoint an investigating committee consisting of himself or herself and an equal number of trial and circuit court judges. After an inquiry the committee reports to the council, which has several options: the judge may be exonerated; if the offender is a bankruptcy judge or magistrate, he or she may be removed; an Article III judge may be subject to private or public reprimand or censure, certification of disability, request for voluntary resignation, or prohibition against further case assignments.

However, removal of an Article III judge is not permitted; impeachment is still the only recourse. If the council determines that the conduct might constitute grounds for impeachment, it will notify the Judicial Conference, which in turn may transmit the case to the U.S. House of Representatives for consideration.

Disability of Federal Judges

Perhaps more problematic than removing jurists for misconduct is the removal of those who have become too old and infirm to carry out their judicial responsibilities effectively. Congress has tried with some success to tempt the more senior judges into retirement by making it financially more attractive to do so. Since 1984 federal judges have been permitted to retire with full pay and benefits under what is called the rule of 80; that is, when the sum of a judge's age and number of years on the bench is 80.

Congress has permitted judges to go on senior status instead of accepting full retirement. In exchange for a reduced caseload they are permitted to retain their office and staff and – equally important – the prestige and self-respect of being an active judge.

Judges often time their resignations to occur when their party controls the presidency so that they will be replaced by a jurist of similar political and judicial orientation.

A 1990 study found that especially since 1954, "judicial retirement/resignation rates have been strongly influenced by political/ideological considerations, and infused with partisanship", thus indicating that many jurists view themselves as part of a policy link between the people, the judicial appointment process, and the subsequent decisions of the judges and justices.

CHAPTER XIII.
IMPLEMENTATION & IMPACT OF JUDICIAL POLICIES

INTRODUCTION

After a court's decision is reached, a variety of individuals – other judges, public officials, even private citizens – may be called upon to implement the decision.

This chapter looks at the various actors involved in the implementation process, their reactions to judicial policies, and the methods by which they may respond to a court's decision. Depending upon the nature of the court's ruling, the judicial policy may have a very narrow or a very broad impact. A suit for damages incurred in an automobile accident would directly affect only the persons involved and perhaps their immediate families.

But the famous Gideon v. Wainwright (1963) decision has directly affected millions of people in one way or another. In Gideon the Supreme Court held that states must provide an attorney for indigent defendants in felony trials. Scores of people – defendants, judges, lawyers, taxpayers – have felt the effects of that judicial policy.

THE IMPACT OF HIGHER COURT DECISIONS ON LOWER COURTS

Appellate courts, notably the U.S. Supreme Court, often are viewed as the most likely courts to be involved in policy making, while the trial courts are generally seen as norm enforcers. However, lower-court judges have a great deal of independence from the appellate courts and may be viewed, according to one study, as "independent actors…who will not follow the lead of higher courts unless conditions are favorable for their doing so".

Lower-Court Discretion

Why do the lower-court judges have so much discretion when it comes to implementing a higher court's policy? In part, the answer may be found in the structure of the U.S. judicial system. The judiciary has always been characterized by independence, decentralization, and individualism. Federal judges, for example, are protected by life tenure and traditionally have been able to run their courts as they see fit.

Disciplinary measures are not at all common, and federal judges have historically had little fear of impeachment. To retain their positions, the state trial court judges generally have only to keep the electorate satisfied. The discretion exercised by a lowercourt judge may also be a product of the higher court's decision itself.

The Supreme Court did not provide specific answers to these questions. Although not all High Court decisions are so open to interpretation, a good number of them are. A court's decision may be unclear for several reasons. Sometimes the issue or subject matter may be so complex that it is difficult to fashion a clear policy.

In obscenity cases the Supreme Court has had little difficulty in deciding that pornographic material is not entitled to protection as free speech under the First Amendment to the Constitution. Defining obscenity has proven to be another matter, however.

Phrases such as "prurient interest", "patently offensive", "contemporary community standards", and "without redeeming social value" have become commonplace in obscenity opinions, but these terms leave a good deal of room for subjective interpretation.

Policies established by collegial courts are often ambiguous because the majority opinion is written to accommodate several judges. The majority opinion may be accompanied by several concurring opinions. Some justices opposed the death penalty per se, on the ground that it constituted cruel and unusual punishment in violation of the Eighth Amendment to the Constitution. Others voted to strike down the state laws because they were applied in a discriminatory manner. The uncertainty created by the 1972 decision affected not only lower-court judges but also state legislatures.

The states passed a rash of widely divergent death penalty statutes and caused a considerable amount of new litigation. A lower-court judge's discretion in the implementation process may be affected by the manner in which a higher court's policy is communicated.

Certainly the court from which a case has been appealed will be informed of the decision. However, systematic, formal efforts are not made to inform other courts of the decision or to see that lower-court judges have access to a copy of the opinion.

The decisions that contain the new judicial policy are made available to the public in printed form or on the Internet, and judges are expected to read them if they have the time and inclination. Opinions of the Supreme Court, lower federal courts, and state appellate courts are available in a large number of courthouse, law school, and university libraries. They are also increasingly available on the Internet. This widespread availability does not guarantee that they will be read and clearly understood, however. Many lower-level state judges, such as justices of the peace and juvenile court judges, are nonlawyers who have little interest or skill in reading complex judicial decisions.

Finally, even those judges who have an interest in highercourt decisions and the ability to understand them do not have adequate time to keep abreast of all the new opinions. Given these problems, how do judges become aware of upper-court decisions?

One way is to hear of them through lawyers presenting cases in the lower courts.

It is generally assumed that the opposing attorneys will present relevant precedents in their arguments before the judge. Those judges who have law clerks may also rely upon them to search out recent decisions from higher courts. Thus some higher-court policies are not quickly and strictly enforced simply because lower-court judges are not aware of them. Even those policies which lower-court judges are aware of may not be so clear to them. Either reason contributes to the discretion exercised by lower-court judges placed in the position of having to implement judicial policies.

Interpretation by Lower Courts

One study noted that "important policy announcements almost always require interpretation by someone other than the policy maker". This is certainly true in the case of judicial policies established by appellate courts. The first exercise of a lowercourt judge's discretion may be to interpret what the higher court's decision means. The manner in which a lowercourt judge interprets a policy established by a higher court depends upon a number of factors. Many policies are not clearly stated. Thus reasonable people may disagree over the proper interpretation. Even policy pronouncements that do not suffer from ambiguity, however, are sometimes interpreted differently by different judges.

A judge's own personal policy preferences will also have an effect upon the interpretation he or she gives to a higher-court policy. Judges come to the courts with their own unique background characteristics.

Some are Republican, others are Democrat; one judge may be more lenient, another strict. They come from different regions of the country. Some have been prosecutors; others have been primarily defense lawyers or corporate lawyers. In short, their backgrounds may influence their own particular policy preferences. Thus the lowercourt judges may read their own ideas into a higher-court policy. The result is that a policy may be enthusiastically embraced by some judges yet totally rejected by others.

Strategies Employed by Lower Courts

Judges who favor and accept a higher court's policy will naturally try to enforce it and perhaps even expand upon it. Some judges even have risked social ostracism and various kinds of harassment in order to implement policies they believed in but that were not popular in their communities. Judges who do not like a higher court's policy decision may implement it sparingly or only under duress.

A judge who basically disagrees with a policy established by a higher court can employ a number of strategies. One rarely used strategy is defiance, whereby a judge simply does not apply the higher court's policy in a case before a lower court. Such outright defiance is highly unusual. Other strategies are not so extreme. One is simply to avoid having to apply the policy. A case may be disposed of on technical or procedural grounds so that the judge does not have to rule on the actual merits of the case. It may be determined, for example, that the plaintiff does not have standing to sue or that the case has become moot because the issue was resolved before the trial commenced.

Lower-court judges sometimes avoid accepting a policy by declaring a portion of the higher-court decision to be "dicta" (Latin, meaning an authoritative declaration). Dicta refers to the part of the opinion that does not contribute to the central logic of the decision. It may be useful as guidance but is not seen as binding. What constitutes dicta is open to varying interpretations. Another strategy used by judges who are in basic disagreement with a judicial policy is to apply it as narrowly as possible. One method is for the lower-court judge to rule that a precedent is not controlling because factual differences exist between the higher-court case and the case before the lower courts. That is, because the two cases may be distinguished, the precedent does not have to be followed.

Influences on Lower-Court Judges

At times the lower courts must decide cases for which no precise standards have been provided by the higher courts. Whenever this occurs, lowercourt judges must turn elsewhere for guidance in deciding a case before them. One study notes that lowercourt judges in such a position "may take their cues on how to decide a particular case from a wide variety of factors including their party affiliation, their ideology, or their regional norms".

Task 1. Transfer the given information from the passages onto a table.

№	Activity			
	Judge	When	Where	Score

CONGRESSIONAL INFLUENCES

Once a federal judicial decision is made, Congress can offer a variety of responses: It may aid or hinder the implementation of a decision. In addition, it can alter a court's interpretation of the law. Finally, Congress can mount an attack on an individual judge.

In the course of deciding cases, the courts are often called upon to interpret federal statutes. On occasion the judicial interpretation may differ from what a majority in Congress intended. When that situation occurs, Congress can change the statute in new legislation that in effect overrules the court's initial interpretation. However, the vast majority of the federal judiciary's statutory decisions are not changed by Congress. Besides ruling on statutes, the federal courts interpret the Constitution.

Congress has two methods to reverse or alter the effects of a constitutional interpretation it does not like. First, Congress can respond with another statute designed to avoid the constitutional problems. Second, a constitutional decision can be overturned directly by an amendment to the U.S. Constitution.

Although many such amendments have been introduced over the years, it is not easy to obtain the necessary two-thirds vote in each house of Congress to propose the amendment and then achieve ratification by three-fourths of the states.

Only four Supreme Court decisions in the history of the Court have been overturned by constitutional amendments. Congressional attacks on the federal courts in general and on certain judges in particular are another method of responding to judicial decisions.

These attacks may take the form of verbal denouncements by a member of Congress, threats of impeachment of sitting judges, or more thorough investigations of the judicial philosophies of potential nominees to the federal bench. Congress and the federal courts are not natural adversaries, however. Retaliations against the federal judiciary are fairly rare, and often the two branches work in harmony toward similar policy goals.

In 1965 Congress further solidified its support for a policy of desegregated public schools by passing the Elementary and Secondary Education Act. This act gave the federal government a much larger role in financing public education and thus made the threat to cut off federal funds a serious problem for many segregated school districts. Such support from Congress was significant because the likelihood of compliance with a policy is increased when there is unity between branches of government.

EXECUTIVE BRANCH INFLUENCES

At times the president may be called upon directly to implement a judicial decision.

An example is USA v. Nixon (1974). A Senate committee investigation into the cover-up of a break-in at the Democratic Party headquarters in the Watergate Hotel in Washington, D.C., led directly to high government officials working close to the president.

It was revealed during the investigation that President Richard Nixon had installed an automatic taping system in the Oval Office. Leon Jaworski, who had been appointed special prosecutor to investigate the Watergate affair, subpoenaed certain tapes that he felt might provide evidence needed in his prosecution of high-ranking officials.

Nixon refused to turn over the tapes on grounds of executive privilege and the need for confidentiality in discussions leading to presidential decisions. The Supreme Court's decision instructed the president to surrender the subpoenaed tapes to Judge John J. Sirica, who was handling the trials of the government officials. Nixon did comply with the High Court's directive and thus a decision was implemented that quickly led to his downfall. Within two weeks he resigned from the presidency, in August 1974.

Even when not directly involved in the enforcement of a judicial policy, the president may be able to influence its impact. Because of the status and visibility of the position, a president, simply by words and actions, may encourage support for, or resistance to, a new judicial policy. A president can propose legislation that directly affects the courts.

President Franklin D. Roosevelt unsuccessfully urged Congress to increase the size of the Supreme Court so he could "pack" it with justices who supported his administration's legislative agenda. The appointment power gives the president an opportunity to influence federal judicial policies, as the president appoints all federal judges, with the advice and consent of the Senate.

A president can influence judicial policy making through the activities of the Justice Department, a part of the executive branch. The attorney general and staff subordinates can emphasize specific issues according to the overall policy goals of the president. The other side of the coin, however, is that the Justice Department may, at its discretion, de-emphasize specific policies by not pursuing them vigorously in the courts.

Another official who is in a position to influence judicial policy making is the solicitor general. Historically, this official has been seen as having dual responsibility to both the judicial and executive branches. Because of the solicitor general's close relationship with the Supreme Court, this official is sometimes referred to as the "tenth justice". The solicitor general is often seen as a counselor who advises the Court about the meaning of federal statutes and the Constitution. The solicitor general also determines which of the cases involving the federal government as a party will be appealed to the Supreme Court.

Furthermore, he or she may file an amicus curiae brief urging the Court to grant or deny another litigant's certiorari petition or supporting or opposing a particular policy being urged upon the High Court. Many judicial decisions are actually implemented by the various departments, agencies, bureaus, and commissions of the executive branch.

The implementation of judicial policies is often performed by state as well as federal officials. Many of the Supreme Court's criminal due process decisions.

State and local police officers have played a major role in implementing the Miranda requirement that criminal suspects must be advised of their rights.

The Gideon ruling that an attorney must be provided at state expense for indigent defendants in felony trials has been implemented by public defenders, local bar associations, and individual court-appointed lawyers.

State legislators and executives are frequently drawn into the implementation process. A judge who determines that a wrong has been committed may choose from a variety of options to remedy the wrong. Among the more common options are process remedies, performance standards, and specified remedial actions.

Process remedies provide for such things as advisory committees, citizen participation, educational programs, evaluation committees, dispute resolution procedures, and special masters to address a problem and come up with a solution.

The remedies do not specify a particular form of action. Performance standards call for specific remedies – a certain number of housing units or schools or a certain level of staffing in a prison or mental health facility. The specific means of attaining these goals are left to the discretion of the officials named in the suit.

Examples of specified remedial actions are school busing, altered school attendance zones, and changes in the size and condition of prison cells or hospital rooms.

This type of remedy provides the defendant with no flexibility concerning the specific remedy or the means of attaining it. Implementation of these remedial decrees often devolves, at least partially, to the state legislatures.

An order calling for a certain number of prison cells or a certain number of guards in the prison system might require new state expenditures, which the legislature would have to fund. Similarly, an order to construct more modern mental health facilities or provide more modern equipment would mean an increase in state expenditures. Governors would also be involved in carrying out these types of remedial decrees because they typically are heavily involved in state budgeting procedures.

They may sign or veto laws. Sometimes judges appoint certain individuals to assist in carrying out the remedial decree. Special masters are usually given some decision-making authority. Court-appointed monitors are also used in some situations, but they do not relieve the judge of decision-making responsibilities.

Instead, the monitor is an information gatherer who reports on the defendant's progress in complying with the remedial decree.

When orders are not implemented or when barriers of one kind or another block progress in providing a remedy, a judge may name someone as a receiver and empower him or her to disregard normal organizational barriers to get the job done.

One group of individuals has been deeply involved in implementing judicial policies: the thousands of men and women who constitute school boards throughout the country. Two major policy areas stand out as having embroiled school board members in considerable controversy as they faced the task of trying to carry out Supreme Court policy.

First, when the High Court ruled in 1954 that segregation has no place in the public schools, school boards and school superintendents, along with federal district judges, bore the brunt of implementing that decision. Their role in this process has affected the lives of millions of schoolchildren, parents, and taxpayers all over America. The second area that has involved school boards is the Supreme Court's policies on religion in the public schools.

Task 1. Analyze the information, which is in the highlight, & use it in practice.

THE IMPACT OF JUDICIAL POLICIES

The ultimate importance of the Supreme Court's decisions depends primarily on their impact on American society as a whole. A few policies that have had significant effects are in the areas of racial equality, criminal due process, and abortion.

Racial Equality

The Supreme Court justices and many lower federal judges were persistent, however, and kept the policy of racial equality on the national political agenda. Their persistence paid off with passage of the 1964 Civil Rights Act, 10 years after the Brown decision.

That act, which had the strong support of Presidents John F. Kennedy (1961-63) and Lyndon B. Johnson (1963-69), squarely placed Congress and the president on record as being supportive of racial equality in America.

Criminal Due Process

Judicial policy making in the area of criminal due process is most closely associated with Earl Warren's tenure as U.S. chief justice (1953-69). Speaking of this era, Archibald Cox, a former solicitor general, said, "Never has there been such a thorough-going reform of criminal procedure within so short a time". The Warren Court decisions were aimed primarily at changing the procedures followed by the states in dealing with criminal defendants. The Supreme Court went a step further and ruled that police officers must advise suspects taken into custody of their constitutional rights, one of which is to have an attorney present during questioning. Suspects must be advised that

- they have a right to remain silent;
- any statement they make may be used in court;
- if they cannot afford an attorney, one will be provided at state expense;
- they have the right to stop answering questions at any time.

These requirements are so clearly stated that police departments have actually copied them down on cards for officers to carry in their shirt pockets.

Then, when suspects are taken into custody, the police officers simply remove the card and read the suspects their rights.

The decision that indigent defendants in state criminal trials must be provided with an attorney did not meet any strong outcries of protest. Furthermore, it was a policy that primarily required the support of judges and lawyers; action by Congress and the president was not really necessary. A policy of equality for all segments of society, on the other hand, is so broad and controversy-laden that it must move beyond the judiciary. As it does so, the courts become simply one part, albeit an important part, of the policymaking process.

Library of Congress in the USA

Four Landmark Cases That Changed America

The American judicial system is set up so that major court cases make a significant impact on the entire country. Many of the country's most important cases have impacted laws that influence us today. Any student pursuing a criminal justice degree should understand the significance of these four landmark court cases as well as their ongoing implications.

Dred Scott v. Sandford, 1857

This decision made by the U.S. Supreme Court determined that black slaves could not be American citizens and therefore could not sue an American in federal court. The landmark decision also deemed the federal government unable to regulate slavery in territories established after the U.S. was created.

Dred Scott was a black slave who had been taken by his owners to a free territory. He attempted to sue them for his freedom, but was unable to do so as the result of the 7-2 decision. Scott used legal precedent to make his argument, drawing from Somerset v. Stewart and Rachel v. Walker among other cases.

However, the ruling maintained that Scott must remain a slave and could not sue for his freedom. The court cited the Fifth Amendment and claimed that the government could not deprive a slaveholder of his property. While Chief Justice Taney, who handed down the ruling, hoped this would end the slavery discussion, it actually resulted in more than further discussion. In fact, this landmark case was one of the catalysts for the Civil War.

United States v. Nixon, 1974

In this case, all eight Supreme Court justices ruled against President Richard Nixon, severely limiting the power of a president as part of the fall-out from the infamous Watergate scandal.

The Watergate scandal began with the 1972 break-in of the Watergate building in Washington, D.C. This happened to occur during Nixon's presidential campaign against Senator McGovern. Once Nixon won, he was forced to investigate the crime and turn over tapes and papers with damaging evidence about the men indicted and President Nixon.

Nixon turned over edited transcripts and seemed to have the idea that the U.S. President was above any court process except for impeachment. Each justice believed that the tapes would incriminate President Nixon and rejected his claim that he was immune from judicial process. This court case has a lasting impact.

Just two weeks after the court passed down the decision, President Nixon resigned. Today, American presidents know that they are not above the country's laws and they may answer to the Supreme Court for their crimes.

Miranda v. Arizona, 1966

The United States Supreme Court heard this case in 1966 regarding interrogation tactics used by the police. The decision passed with 5-4. The justices referred to the Fifth and Sixth Amendments, specifically the clauses regarding self-incrimination and the right to an attorney. As a result of this landmark decision, statements made by a defendant to police officers are only admissible at a trial if the defendant was informed of their rights, known today as Miranda Rights. This includes the right to consult with an attorney before and during questioning and protection against self-incrimination. Not only must the defendant understand the rights but waive them voluntarily.

Brown v. Board of Education, 1954

This landmark case is one of the biggest landmarks for ending racial division within the United States because it ruled that establishing public schools to separate black and white students was not constitutional. In effect, it overturned the Supreme Court's 1896 decision regarding Plessy v. Ferguson. The decision was unanimous with all nine justices claiming that separate facilities could not be considered equal under the law.

In this case, the plaintiffs claimed that the educational facilities for black students were not "separate but equal" to those for white students.

The Supreme Court claimed that educational segregation violated the constitutional rights of black students under the Equal Protection Clause in the 14th Amendment. This case was significant in that it was a victory for the civil rights movement and helped pave the way for black Americans to fight for their rights.

Each of these landmark cases has a well-deserved place in U.S. history. Without each of these landmark cases, much of the progress the country has made would be non-existent. We see the lasting impacts of each of these cases every day.

Alvernia University offers an online B.A. in Criminal Justice for students to develop their knowledge of the law. Graduates can pursue employment opportunities in law enforcement, courts, corrections and more. The program is fully online, allowing students to study when and where they have the time.

Task 1. Analyze the information, which is in the highlight, and use it in practice.

Task 2. Choose the keywords that best convey the gist of the information.

Task 3. Read the text and pick up the essential details in the form of quick notes.

Task 4. Transfer the given information from the passages onto a table.

№	Activity			
	Event	When	Where	Score
1.				

CHAPTER XIV. LEGAL EDUCATION IN THE USA

INTRODUCTION

Legal education in the USA generally refers to a graduate degree, the completion of which makes a graduate eligible to sit for an examination for a license to practice as a Lawyer. Around 60 % of those who complete a law degree typically practice law, with the remainder primarily working in business (especially finance, insurance, real estate, and consulting) or government or policy roles, where their degrees also confer advantages.

The First Law Schools in Europe

The foundations of the first universities in Europe were the glossators of the 11th century, which were schools of law. The first European university, that of Bologna, was founded as a school of law by four famous legal scholars in the 12th century who were students of the glossatorschool in that city.

The first academic title of doctor applied to scholars of law. The University of Bologna served as the model for other law schools of the medieval age. Although it was common for students of law to visit and study at schools in other countries, such was not the case with England because of the English rejection of Roman Law. Although Oxford did teach canonical law, its importance was always superior to civil law in that institution.

Early Legal Education in England

In England in 1292, when Edward I first requested that lawyers be trained, law students merely sat in the courts and observed. Over time, the students would hire professionals to lecture them in their residences. This practice led to the institution of the Inns of Court system. The original method of education at the Inns of Court was a mix of moot court-like practice and lecture, and observation of court proceedings.

By the 17th century, the Inns obtained a status as a kind of university akin to Oxford and Cambridge, though very specialized in purpose. With the frequent absence of parties to suits during the Crusades, the importance of the lawyer's role grew tremendously, and the demand for lawyers grew.

The apprenticeship program for solicitors emerged, structured and governed by the same rules as the apprenticeship programs for the trades Oxford and Cambridge did not see common law as worthy of study, and included coursework in law only in the context of canon and civil law, and for the purpose of the study of philosophy or history only.

These universities, therefore, did not train lawyers. Professional training in England was unlike that of continental Europe, where the law was viewed as an academic discipline. Legal educators in England stressed practical training. The training of solicitors by apprenticeship was formally established by an act of parliament in 1729. William Blackstone became the first lecturer of law at Oxford in 1753. The university did not establish the program for the purpose of professional study, and the lectures were very philosophical and theoretical in nature. Blackstone insisted that the study of law should be university based, where concentration on foundational principles can be had, instead of concentration on detail and procedure obtained through apprenticeship and the Inns of Court.

LEGAL EDUCATION IN AMERICAN COLONIES

No significant educational activity or examination was required for bar admission.

In 1846, the Parliament examined the education and training of prospective barristers and found the system to be inferior to the legal education provided in Europe and the USA. Therefore, formal schools of law were called for, but not finally established until later in the century. Even then, the bar did not consider a university degree in admission decisions.

Initially there was much resistance to lawyers in colonial North America because of the role they played in hierarchical England. Slowly the colonial governments started using the services of professionals trained in the Inns of Court, and by the end of the Revolution there was a functional bar in each state.

As institutions for training developed in the colonies, because of the distrust of a profession only open to the elite in England, the institutions which developed in what would become the USA would be much different from those in England.

Initially in the USA, the legal professionals were trained and imported from England.

A formal apprenticeship (training) or clerkship program was established first in New York in 1730 – at that time a seven-year clerkship was required, and in 1756 a four-year college degree was required in addition to five years of clerking and an examination. Later the requirements were reduced to require only two years of college education.

A system like the Inns did not develop, however, and a college education was not required in England until the 19th century, so the American system was unique.

The clerkship program required much individual study. The mentoring lawyer was expected to carefully select materials for study and to guide the clerk in his study of the law to ensure that the material was being absorbed. The student was supposed to compile his notes of his reading of the law into a "commonplace book", which he would endeavor to memorize. Although those were the ideals, in reality the clerks were often overworked and rarely were able to study the law individually as expected. They were often employed to tedious tasks, such as making handwritten copies of documents.

Finding sufficient legal texts was a seriously debilitating issue, and there was no standardization in the books assigned to the clerk trainees because they were assigned by their mentor, whose opinion of the law may be different greatly from his peers.

One famous attorney in the USA, William Livingston, stated in 1745 in a New York newspaper that the clerkship program was severely flawed, and that most mentors "have no manner of concern for their clerk's future welfare.

This a monstrous absurdity to suppose, that the law is to be learnt by a perpetual copying of precedents." There were some few mentors that were dedicated to the service, and because of their rarity, they became so sought after that the first law schools evolved from the offices of some of these attorneys who took on many clerks and began to spend more time training than practicing law.

It was seen over the years that the apprenticeship program was not capable of producing lawyers capable of serving their clients. The apprenticeship programs often employed the trainee with menial tasks, and while they were well trained in the day-to-day operations of a law office, they were generally unprepared practitioners or legal reasoners.

The establishment of formal faculties of law in U.S. universities did not occur until the latter part of the 18th century.

The first law degree granted by a U.S. university was a Bachelor of Law in 1793 by the College of William & Mary, which was abbreviated L.B.; Harvard University was the first university to use the LL.B. abbreviation in the USA.

The first university law programs in the USA, such as that of the University of Maryland established in 1812, included much theoretical and philosophical study, including works such as the Bible, Cicero, Seneca, Aristotle, Adam Smith, Montesquieu and Grotius. It has been said that the early university law schools of the early 19th century seemed to be preparing students for careers as statesmen rather than as lawyers.

At the LL.B. programs in the early 1900s at Stanford University and Yale continued to include "cultural study," which consisted of courses in languages, mathematics and economics.

In the 1850s there were many proprietary schools which originated from a practitioner taking on multiple apprentices and establishing a school and which provided a practical legal education, as opposed to the one offered in the universities which offered an education in the theory, history and philosophy of law. The universities assumed that the acquisition of skills would happen in practice, while the proprietary schools concentrated on the practical skills during education.

In part to compete with the small professional law schools, there began a great change in U.S. university legal education. For a short time beginning in 1826 Yale began to offer a complete "practitioners' course" which lasted two years and included practical courses, such as pleading drafting. U.S. Supreme Court justice Joseph Story started the spirit of change in legal education at Harvard when, as a lecturer there in the early 19th century, he advocated a more "scientific study" of the law.

Therefore, at Harvard the education was much of a trade school type of approach to legal education, contrary to the more liberal arts education advocated by Blackstone at Oxford and Jefferson at William and Mary. Nonetheless there continued to be debate among educators over whether legal education should be more vocational, as at the private law schools, or through a rigorous scientific method, such as that developed by Story and Langdell.

In the words of Dorsey Ellis, " Langdell viewed law as a science and the law library as the laboratory, with the cases providing the basis for learning those 'principles or doctrines' of which 'law, considered as a science, consists." Nonetheless, into the year 1900 most states did not require a university education (although an apprenticeship was often required) and most practitioners had not attended any law school or college.

Therefore, the modern legal education system in the U.S. is a combination of teaching law as a science and a practical skill, implementing elements such as clinical training, which has become an essential part of legal education in the U.S. and in the J.D. program of study. Whereas in the 18th and 19th century, few U.S. lawyers trained in an apprenticeship "achieved a level of competence necessary to adequately serve their clients," today as a result of the development of the U.S. legal education system, "law graduates perceive themselves to be prepared upon graduation" for the practice of law.

AALS Faculty Recruitment Conference

About half of the faculty hired by law schools in the USA result from interviews conducted at the annual AALS Faculty Recruitment Conference at the Marriott Wardman Park Hotel in Washington, D.C.

Legal education is typically received through a law school program. The professional degree granted by U.S. law schools is the Juris Doctor(J.D.). Prospective lawyers who have been awarded the J.D. (or other appropriate credential), must fulfill additional, state-specific requirementsin order to gain admission to the bar in the USA. The Juris Doctor (J.D.), like the Doctor of Medicine (M.D.), is a professional doctorate.

The American Bar Association issued a Council Statement that the JD is equivalent to the PhD for educational employment purposes. The Doctor of Juridical Science (S.J.D.) ("*Scientiae Juridicae Doctor*" in Latin), and Doctor of Comparative Law (D.C.L.), are research and academic-based doctorate level degrees. In the U.S., the Legum Doctor is only awarded as an honorary degree.

As of July 2012, Yale Law School offers a Ph.D. in Law designed for students who have already earned a J.D. and who wish to pursue extended legal scholarship. Academic degrees for non-lawyers are available at the baccalaureate and master's level.

A common baccalaureate level degree is a Bachelor of Science in Legal Studies (B.S.). Academic master's degrees in legal studies are available, such as the Master of Studies (M.S.), and the Master of Professional Studies (M.P.S.). Foreign lawyers seeking to practice in the U.S., who do not have a Juris Doctor (J.D.), often seek to obtain a Juris Master (J.M.), Master of Laws (LL.M.), Master of Comparative Law (M.C.L.), or a Master of Jurisprudence (M.J.).

Task 1. Analyze the information, which is in the highlight, and use it in practice.

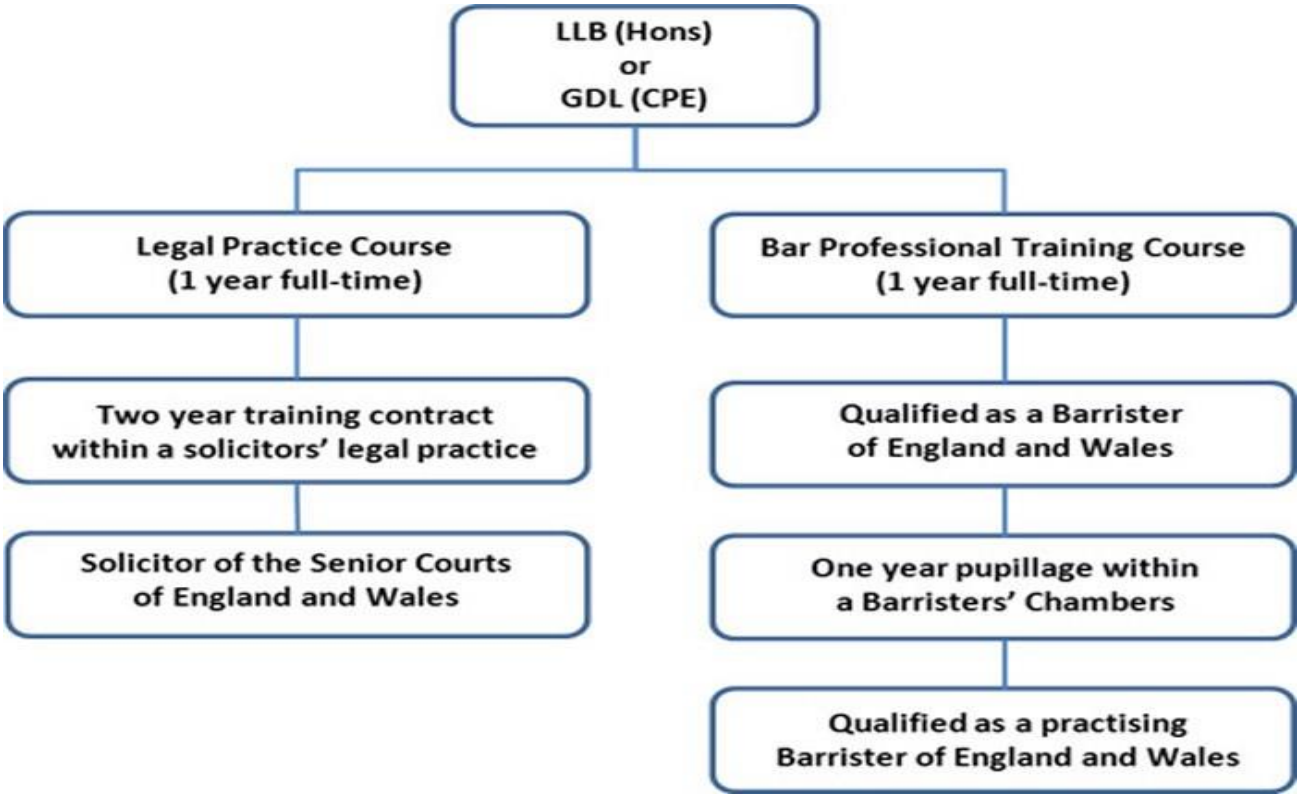
Task 2. Remember the notions.

JD – the abbreviation of Juris Doctor literally translates to teacher of law from Latin.

LLM – derived from Legum Magister means master of laws in Latin.

ABA – American Bar Association is the organization that accredits JD programms.

LSAT – Law School Admission Test.



One of the Most Affordable Law Schools in the U.S. at Cleveland State University

Stanford Law School William H. Neukom Building Stanford, California, USA -- Frequently rated as one of the top three law schools in the United States

Law School at Oxford University

American law firms are often very credential-oriented. Apart from the minimum requirements of a J.D. and admission to the state bar, there are certain credentials recognized within the profession to distinguish lawyers from one another.

Those credentials are almost mentioned in lawyer profiles and biographies, which are used to communicate to both fellow attorneys and prospective clients. Chief among them are such honors as being a member of their law school's law review, moot court, or mock trial programs. Judicial clerkships after graduation or law clerkpositions at prestigious law firms while in school are distinguishing marks.

This credential-based system is sown in law school, where high grades are frequently rewarded with law review membership and much sought after summer clerkships (called "summer associateships") with large private law firms. These programs are designed to give a firm's summer associates an idea of what the everyday practice of law is like at that particular firm by allowing them to work with the firm's partners and associates on real projects involving real clients. In larger cities, such as New York or Chicago, summer associates at large firms can make as much as $3,000 per week.

Competition to receive a summer offer from a firm is intense, and credentials (a student's GPA and class rank, law review or moot court membership, publications, etc.) play a decisive role in determining who is selected. Most offers are received after a three-step interview process. First, during the early fall of their 2L (second year), students at each law school first submit their resumes to a central paper file or online database (such as CRIS or LexisNexis Martindale-Hubbell), from which interviewers selected candidates they wish to interview, based almost entirely on their 1L GPA and class rank.

Second, selected students are notified, usually via email, and then schedule a screening interview, either at the law school or at a local hotel; this interview is usually conducted by one or more attorneys from that firm and is part of most schools' On Campus Interview ("OCI") program, in which firms send recruiters to schools across the country.

Finally, students selected from the screening interviews are invited for a final "callback" interview, commonly held at the firm's offices. If the selected student attends school in a place far from the city in which the firm is located, it is not unusual for the firm to fly the student in and pay for accommodations while he is in town.

After the callback, a selected candidate will receive a phone call (within 48 hours) informing him that he has been extended an offer. After the summer, early into their 3L (third) years, the vast majority of summer associates receive formal offers to join the firm after graduating school and sitting for the bar exam.

Law School Rankings

The *US News and World Report* publishes the most well-known annual ranking of American programs, where Yale Law School has held the 1 spot every year since the inception of the ranking reports. A number of alternative rankings exist, such as the Leiter Reports Law School Rankings. These rankings divide law schools into "tiers" based on the overall quality of each program. A number of factors and statistics are compiled to produce these rankings each year, including

• academic reputation;
• the quality of the faculty (measured by the quality of its publications);
• the quality of the student body (measured by average Law School Admission Test);
• score and undergraduate grade point average);
• the number of volumes in the library;
• the earnings potential of graduates;
• bar passage rates, and job placement rates.

Most of these measurements are acquired by voluntary self-reporting from each law program; others are compiled through a formal process of polling judges, legal professionals, recent graduates, law professors, and school administrators. The issuance of press releases that dismiss the rankings has become a yearly ritual for many law programs, but all but a handful cooperate in gathering and reporting statistics to the various ranking publications.

First Tier

There are approximately 200 ABA approved law schools in the USA. There is no universally accepted ranking system, but many have attempted to divide law schools in to "tiers" consisting of quartiles (50 law schools each) or perhaps eighths (25 law schools each), or have separated out the top 10 or top 20 law schools by U.S. News rank or median LSAT score. *After the JD*, a large study of law graduates who passed the bar examination (but were not necessarily practicing law), found that graduates of the top 10 law schools by median LSAT score of incoming classes typically earned incomes exceeding $170,000 within 12 years after graduation. Graduates of the next 10 law schools earned around $158,000, and graduates of schools ranked 21-50 typically earned more than $130,000.

Another peer reviewed study found that Law graduates at the 75th %ile of earnings ability typically earned around $80,000 more every year than they would have earned with only a bachelor's degree. Law graduate earnings typically continue to grow and do not peak until their mid 50s; thus graduates of top tier law schools can likely peak at incomes exceeding $250,000 per year. Though the specific rankings change from year to year, the overall composition of the top schools has remained fairly constant.

Most legal professionals (judges, practitioners, or professors) rank the University of Chicago, Columbia, Harvard, NYU, Stanford, and Yale in the top echelon of American law schools, with Yale Law School, Harvard Law School, and Stanford Law School being considered the most prestigious and the most selective schools to gain admission as measured by reputation scores from *U.S. News* surveys and admissions rate. In recent years, many people have used the concept of the T14 (the top 14) to define the top tier of law schools.

These schools have consistently ranked in the top 14 in the annual US News ranking of law schools. The T14 is composed of the schools listed above & Berkeley (Boalt Hall), Cornell, Duke, Michigan, Georgetown, Michigan, Northwestern, University of Pennsylvania, and Virginia. The most prestigious and sought-after law jobs in the country – U.S. Supreme Court Clerks, legal faculty, Bristow Fellows, Office of Legal Counsel Lawyers, Assistant U.S. Attorneys in cities like New York and Chicago – are more likely to be awarded to students and graduates in one of these programs. Recruiters from elite law firms visit top-tier law schools each fall to recruit new associates for the following summer. In contrast, small and mid-market law firms – which make up the bulk of law firms in the U.S. – cannot predict their labor needs that far in advance.

Most new law school graduates who do not graduate from top tier law schools therefore must seek out jobs at law firms during their third year or even after graduation.

Lower Tiers

The majority of law school students do not end up at an elite university, but many can, and often do, find well-paying jobs in law firms, government, or business positions.

After the JD, a large study of law graduates who passed the bar examination (but were not necessarily practicing law), found that even graduates of lower ranked law schools were typically making six figure ($100,000+) incomes within 12 years after graduation., although graduates of higher ranking schools typically earned more.

The Economic Value of a Law Degree, a peer reviewed study which included law graduates who do not pass the bar exam, found that law graduates at the 25th percentage of earnings ability more every year than they would have earned with only a bachelor's degree, compared to more for those at the 75th percentage.

Regional Tiers

Most law schools outside the top tier are more regional in scope and often have very strong regional connections to these post-graduation opportunities.

A student graduating from a lower-tier law school may find opportunities in that school's "home market": the legal market containing many of that school's alumni, where most of the school's networking and career development energies are focused. In contrast, an upper-tier law school may be limited in terms of employment opportunities to the broad geographic region that the law school feeds.

State Accredited Schools

Some schools are accredited by state governments. They are located in Alabama, California, Massachusetts, and Tennessee. Some state authorized law schools are maintained to offer a non-ABA option eliminating costly ABA requirements seen as unnecessary by many of these states.

Unaccredited Schools

Many schools are not accredited by a state or the American Bar Association. Most are located in California. While graduates of these schools may apply for admission to the California State Bar, they may not necessarily be allowed to apply for admission in other states.

Law School Activities & Honors

Within each U.S. law school, students may receive additional credentials.

Law review/Law journal membership or editorial position (based either on grades or write-on competition or both). This is important for at least three reasons.

First, because membership is determined by either grades or writing ability, it is an indicator of strong academic performance. This leads to the second reason: potential employers sometimes use law review membership in their hiring criteria.

Third, work on law review exposes a student to legal scholarship and editing, and often allows the student to publish a significant piece of legal scholarship on his or her own.

Most law schools have a "flagship" journal usually called "*School name* Law Review" (the *Harvard Law Review*) or "*School name* Law Journal" (the *Yale Law Journal*) that publishes articles on all areas of law, and one or more other specialty law journals that publish articles concerning only a particular area of the law (the *Harvard Journal of Law & Technology*).

Moot court membership or award (based on oral and written argument). Success in moot court can distinguish one as an outstanding oral advocate or appellate brief writer and can provide a degree of practical legal training often absent from law review membership.

Membership in moot court and related activities, such as Dispute Resolution, may appeal especially to employers hiring for specialized litigation positions.

Mock trial/trial advocacy membership or award, based on oral advocacy in mock trial competitions. Mock trial honors often have special appeal to litigation-oriented offices, such as a district attorney's office, attorney general's office, public defender's office, or private firms that specializes in trial litigation. Mock trial is especially useful at assisting students with public speaking, allowing them to master the rules of evidence, and gain experience in writing opening statements, direct examination, cross examinations, and closing statements.

Order of the Coif membership (based on grade point average). This is often coupled with Latin honors (summa and magna cum laude, though often not cum laude). A slight majority of law schools in the USA do not have Order of the Coif chapters.

On the basis of these credentials, as well as favorable faculty recommendations and other connections, some students become law clerks with judges after graduation, signing on for one or two-year clerkships. Clerkships may be with state or federal judges.

There is a generally recognized hierarchy with regard to clerkships (federal clerkships are considered more prestigious than state court clerkships, and appellate court clerkships are considered more prestigious than trial court clerkships, with USA Supreme Court clerkships considered the most prestigious). The benefit to the lawyer from clerkships is experience working for a judge. Often, clerks engage in significant legal research and writing for the judge, writing memos to assist a judge in coming to a legal conclusion in some cases, and writing drafts of opinions based on the judge's decisions.

Appellate court clerkships, although generally more prestigious, do not necessarily give one a great deal of practical experience in the day-to-day life of a lawyer in private practice. The average litigator might get much more out of a clerkship at the trial court level, where he or she will be learning about motions practices, dealing with lawyers, and generally learning how a trial court works on the inside.

What a lawyer might lose in prestige he or she might gain in experience. By and large, though, clerkships provide other valuable assets to a new lawyer.

Judges often become mentors to their clerks, providing the attorney with an experienced individual to whom he or she can go for advice. Fellow clerks can also become lifelong friends and/or professional connections. Those contemplating academia do well to obtain an appellate court clerkship at the federal level, since those clerkships provide a great opportunity to think at a very high level about the law. Hierarchies aside, clerkships are great experiences for the new lawyers, and law schools encourage graduates to engage in a clerkship to broaden their professional experiences.

USA Supreme Court Clerkships

Some law school graduates are able to clerk for one of the Justices on the Supreme Court. Each Justice takes 4 clerks per year. Almost without exception, these clerks are graduates of elite law schools (with Harvard, Yale, and the University of Chicago being the most highly represented schools) who have already clerked for at least one year with highly selective federal circuit court judges (such as Judges Merrick Garland, Alex Kozinski, Harvie Wilkinson, David Tatel, Richard Posner).

It is perhaps the most highly selective and prestigious position a recently graduated lawyer can have, and Supreme Court clerks are often highly sought after by law firms, the government, and law schools. The vast majority of Supreme Court clerks either become academics at elite law schools, enter private practice as appellate attorneys, or take highly selective government positions.

Law school normally consists of only a classroom setting, unlike training in other professions. (For example, medical school in the USA is traditionally two years of class environment and two years of "rotations", or an apprenticeship-type hands-on experience.)

Although some countries such as Germany and France require apprenticeship with a practicing attorney, this is not required in any USA jurisdiction. Because of this, many law students graduate with a grasp of the legal doctrines necessary to pass the bar exam, but with no actual hands-on experience or knowledge of the day-to-day practice of law.

The American Bar Association called for American law schools to move towards a practice-based approach in the MacCrate Report. Many law schools have started to supplement classroom education with practical experience.

Externship programs allow students to receive academic credit for unpaid work with a judge, government agency, or community legal services office. Several law schools have law clinic programs in which students counsel actual clients under the supervision of a professor, such as University of Massachusetts School of Law.

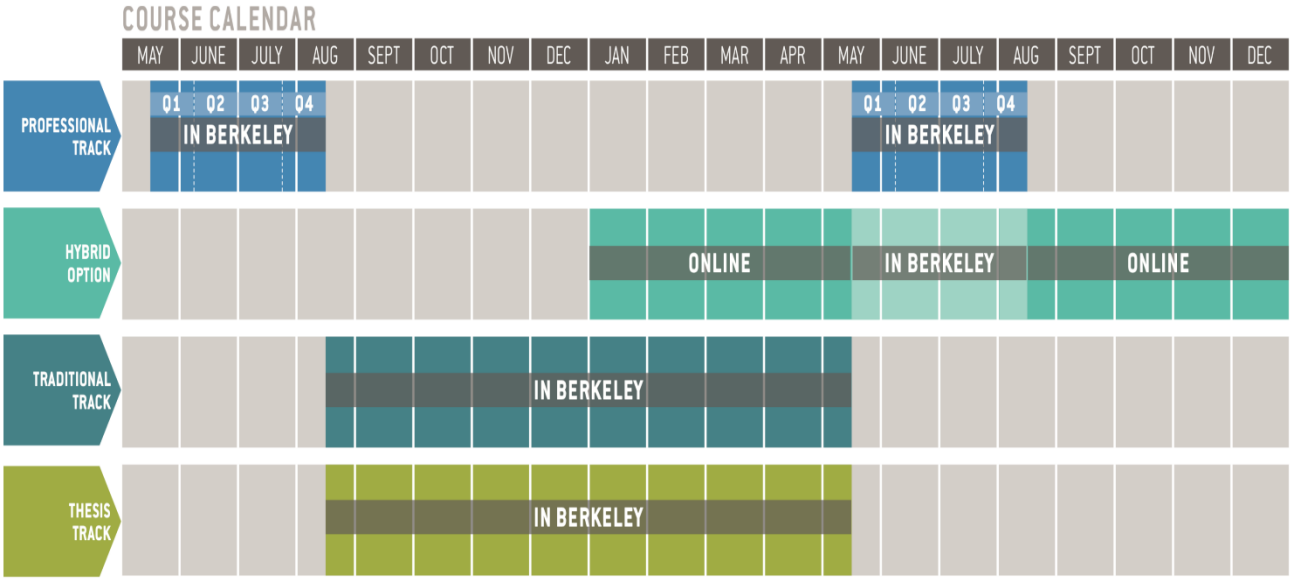
City University of New York School of Law and Florida Coastal School of Law are some of the few law schools that require student participation in law clinic courses.

Similarly, Northeastern University School of Law and Savannah Law School use cooperative to give their students law office work experience prior to graduation.

Washington and Lee University School of Law has completely re-vamped its curriculum to require students to take practicum courses, externships, and clinics in the final year of law school to provide experience in preparation for practice.

Large scale representative studies find that the overwhelming majority of lawyers are satisfied with their careers and their decisions to attend law school. Based on anecdotal evidence, some have claimed that high level of stress, a "culture of hours" and ethical issues common in the legal profession lead to a lower level of job satisfaction relative to many other careers.

Practical hands-on-training Externship



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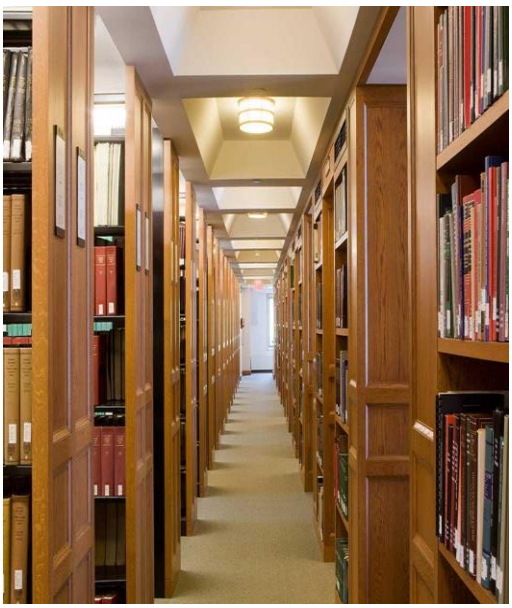
Yale Law School



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