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

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

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

The Historical Context

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

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

The Constitutional Convention and Article 3

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

The U.S. Supreme Court

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

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

The Judiciary Act of 1789

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

One group, which believed that federal law should be adjudicated in the state courts first and by the U.S. Supreme Court only on appeal, expressed the fear that the new government would destroy the rights of the states. The other group of legislators, suspicious of the parochial prejudice of state courts, feared that litigants from other states and other countries would be dealt with unjustly. This latter group naturally favored a judicial system that included lower federal courts. The law that emerged from the debate, the Judiciary Act of 1789, set up a judicial system comprising a Supreme Court, consisting of a chief justice and five associate justices; three circuit courts, each with two justices of the Supreme Court and a district judge; and thirteen district courts, each presided over by one district judge. The power to create inferior federal courts, then, was immediately exercised. Congress created not one but two sets of lower courts.
Given the high court's importance to the U.S. system of government, it was perhaps inevitable that the Court would evoke great controversy. A leading student of the Supreme Court said, Nothing in the Court's history is more striking than the fact that, while its significant and necessary place in the Federal form of Government has always been recognized by thoughtful and patriotic men, nevertheless, no branch of the Government and no institution under the Constitution has sustained more continuous attack or reached its present position after more vigorous opposition.3

The Impact of Chief Justice Marshall

John Marshall served as chief justice from 1801 to 1835, and although he was not the nation's first chief justice, he dominated the Court to a degree unmatched by anyone who came after him. In effect, Marshall was the Court—perhaps because, in the words of one scholar, he "brought a first-class mind and a thoroughly engaging personality into second-class company."4

Marshall's dominance of the Court enabled him to initiate some major changes in the way opinions were presented. Before his tenure, the justices ordinarily wrote separate opinions (called seriatim opinions) in major cases. Under Marshall's stewardship, the Court adopted the practice of handing down a single opinion, and the evidence shows that from 1801 to 1835 Marshall himself wrote almost half the opinions.5

In addition to bringing about changes in opinion-writing practices, Marshall used his powers to involve the Court in the policymaking process. Early in his tenure as chief justice, in Marbury v. Madison (1803), the Court asserted its power to declare an act of Congress unconstitutional.6

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

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

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

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

The decision Marshall fashioned from this seemingly impossible predicament was evidence of sheer genius. He declared Section 13 of the Judiciary Act of 1789 unconstitutional because it granted original jurisdiction to the Supreme Court in excess of that specified in Article 3 of the Constitution. Thus, the Court's power to review and determine the constitutionality of acts of Congress was established. This decision is rightly seen as one of the single most important decisions the Supreme Court has ever handed down. A few years later the Court also claimed the right of judicial review of actions of state legislatures. During Marshall's tenure it overturned more than a dozen state laws on constitutional grounds.7

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

The Supreme Court as a Policymaker

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

Courts in any political system participate to some degree in the policymaking process because it is their job. Any judge faced with two or more interpretations and applications of a legislative act, executive order, or constitutional provision must choose among them
In a democracy broad matters of public policy are, at least in theory, presumed to be left to the elected representatives of the people—not to judicial appointees with life terms. In principle, U.S. judges are not supposed to make policy, but in practice they cannot help but do so to some extent, as the examples discussed earlier demonstrate.

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

**The Supreme Court as Final Arbiter**

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

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

Since 1925 a device known as certiorari has allowed the high court to exercise discretion in deciding which cases it should review. Under this method a person may request Supreme Court review of a lower court decision; then the justices determine whether the request should be granted. In the October 2007 term the Court handed down decisions with full opinions in seventy-two cases. If review is granted, the Court issues a **writ of certiorari**, which is an order to the lower court to send up a complete record of the case. When certiorari is denied, the decision of the lower court stands.

**The Supreme Court at Work**

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

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

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

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

Before the Friday conference, each justice is given a list of the cases that will be discussed. The conference begins at about 9:30 or 10:00 a.m. and runs until 5:30 or 6:00 p.m. As the justices enter the conference room, they shake hands with one another and take their seats around a rectangular table. They meet behind locked doors, and no official record is kept of the discussions. The chief justice presides over the conference and offers an opinion first in each case. The other justices follow in descending order of seniority. At one time a formal vote was then taken in reverse order (with the junior justice voting first); today the justices usually indicate their view during the discussion, making a formal vote unnecessary.

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

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

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

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

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

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

**The U.S. Courts of Appeals**

The **courts of appeals** have been described as “perhaps the least noticed of the regular constitutional courts.” They receive less media coverage than the Supreme Court, in part because their activities are simply not as dramatic. However, one should not assume that the courts of appeals are unimportant to the judicial system. Recall that in its 2007 term the Supreme Court handed down decisions with full opinions in only seventy-two cases, which means that the courts of appeals are the courts of last resort for most appeals in the federal court system.

Originating in the Judiciary Act of 1789 as three circuit courts, the courts making up the intermediate level of the federal judiciary evolved into courts of appeals in 1948. Despite this official name, they continue to be referred to colloquially as circuit courts. Although these intermediate appellate courts have been headed at one time or another by circuit judges, courts of appeals judges, district judges, and Supreme Court justices, they now are staffed by 166 authorized courts of appeals judges.

Nine regional courts of appeals, each encompassing several states, were created in 1891. Another, covering the District of Columbia, was absorbed into the system after 1893. Next came the Court of Appeals for the Tenth Circuit, which was carved from the Eighth Circuit in 1929. In 1981, following a long battle during which many civil rights activists expressed the fear that a split might negate gains they had made acting through the courts, the Court of Appeals for the Eleventh Circuit was carved from the Fifth Circuit.

The courts of appeals in each of the twelve regional circuits are responsible for reviewing cases appealed from federal district courts (and in some cases from administrative agencies) within the boundaries of the circuit. Figure 2–1 depicts the appellate and district court boundaries and indicates the states contained in each.

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

The Review Function of the Courts of Appeals

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

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

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

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

Because the courts of appeals have no control over which cases are brought to them, they deal with both routine and 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. Such appeals are no doubt encouraged by the fact that the Supreme Court has ruled that assistance of counsel for first appeals should be granted to all indigents who have been convicted of a crime. Occasionally a claim is successful, which then motivates other prisoners to appeal.

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 on to monitor the performance of federal district courts and federal agencies and to supervise their application and enforcement 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 do and may help shape what they consider review-worthy claims. Judicial scholars have found that the second hearing of appealed cases sometimes differs from the first.

The Courts of Appeals as Policymakers

The Supreme Court's role as a policymaker derives from the fact that it interprets the law; the same holds true for the courts of appeals. The scope of the courts of appeals' policymaking role takes on added importance because they are the courts of last resort in the vast majority of cases. A study of three circuits, for example, found that the U.S. Supreme Court reviewed only nineteen of the nearly four thousand decisions of those tribunals.

As an example of the impact of circuit court judges, consider a decision in a case involving the Fifth Circuit. For several years the University of Texas Law School granted preference to black and Mexican American applicants to increase the enrollment of these classes 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 Fourteenth 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 race may not be used 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 constituting the Fifth Circuit. However, the Supreme Court did tackle the use of race as a factor in law school and undergraduate admissions in two cases decided during its 2002–2003 term. The cases, Gratz v. Bollinger and Grutter v. Bollinger, are discussed more fully in Chapter 13.

A major difference in policymaking by the Supreme Court and by the courts of appeals should be noted. Whereas there is one high court for the entire country, each court of appeals covers only a specific region. Thus the courts of appeals are more likely to make policy on a regional basis. Still, as evidenced by the Hopwood case, they are part of the federal judicial system and "participate in both national and local policy networks, their decisions becoming regional law unless intolerable to the Justices."
The Courts of Appeals at Work

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

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 also results in a uniform decision. In deciding which cases can be disposed of without oral argument, the courts of appeals increasingly rely on law clerks or staff attorneys. These people 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. In the twelve-month period ending September 30, 2008, for example, almost 70 percent of the appeals were terminated without oral argument.26

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.

Panel assignments are typically made by the circuit executive or someone else, and then a clerk assigns cases blindly to the panels. Because all the circuits now contain more than three judges, the panels change frequently so that the same three judges do not sit together permanently. Regardless of the method used to determine panel assignments, one fact remains clear: A decision reached by a majority of a three-judge panel does not necessarily reflect the views of a majority of the judges in 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 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 eleven judges. The en banc procedure may also be used when the case concerns an issue of extraordinary importance, as in the famous Tinker v. Des Moines Independent Community School District decision in 1969.27 That case arose when several students attended school wearing black armbands to protest the Vietnam War. After being expelled because of their actions, they filed suit against the school district in a federal district court. The federal trial court ruled in favor of the school district. When the case was appealed to the Court of Appeals for the Eighth Circuit in 1967, the en banc procedure was used because of the important First Amendment issue raised. After the circuit court split 3–3, the case was reviewed by the U.S. Supreme Court, which ruled that the wearing of black armbands was a symbolic expression of views entitled to First Amendment protection.

The en banc procedure may be requested by the litigants or by the judges of the court. The circuits themselves have discretion to decide if and how the procedure will be used. Clearly, its use is the exception, not the rule.

Oral Argument. Cases that have survived the screening process and have not been settled by the litigants are scheduled for oral argument. Attorneys for each side are given a short amount of time (in some cases no more than ten 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. Recent years have seen a general decrease in the number of published opinions, although circuits vary in their practices.

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.

Current Organization of the District Courts

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

Congress often provides further organizational detail by creating divisions within a district. In doing this, the national legislature precisely lists the counties included in a particular division as well as the cities in which court will be held.

As indicated, the original district courts were each assigned one judge. With the growth in population and litigation, Congress has periodically added judgeships to the districts, bringing the current total to 678. The Southern District of New York, which includes Manhattan and the Bronx, currently has twenty-eight judges and is the largest. Because each federal district court is normally presided over by a single judge, several trials may be in session at various cities 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 cross-examine witnesses. The factual record is thus established at this level. Subsequent appeals of the trial court decision will focus on correcting errors, not on reconstructing the facts. The task of determining the facts in a case often falls to a jury, a group of citizens from the community who serve as impartial arbiters of the facts and apply the law to the facts.

The Constitution guarantees the right to a jury trial in criminal cases in the Sixth Amendment and the same right in civil cases in the Seventh Amendment. The right can be waived, however, in which case the judge becomes the arbiter of questions of fact as well as matters of law. Such trials are referred to as bench trials. Two types of juries are associated with federal district courts. The grand jury is a group of men and women convened to determine whether probable cause exists 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 twelve jurors in criminal cases but permit fewer in civil cases. The federal district courts generally use six-person juries in civil cases.

Norm Enforcement by the District Courts

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

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

Policymaking by the District Courts

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

When they make policy, the courts do not exercise more discretion than when they enforce community norms. The difference lies in the intended impact of the decision. Policy decisions are intended to be guideposts for future actions; norm-enforcement decisions are aimed at the particular case at hand.

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

Three-Judge District Courts

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

At one time Congress provided that private citizens challenging the constitutionality of state or federal statutes and seeking injunctions to prohibit further enforcement could bring the case before a three-judge district court. That is what happened in the abortion case of Roe v. Wade.\(^{31}\)

Jane Roe (a pseudonym), a single, pregnant woman, challenged the constitutionality of the Texas anti-abortion statute and sought an injunction to prohibit further enforcement of the law. The case was initially heard by a three-judge court consisting of district judges Sarah T. Hughes and W. N. Taylor and Fifth Circuit Court of Appeals judge Irving L. Goldberg. The three-judge district court held the Texas abortion statute invalid but declined to issue an injunction against its enforcement on the ground that a federal intrusion into the state's affairs was not warranted. Roe then appealed the denial of the injunction directly to the Supreme Court.

Constitutional Courts, Legislative Courts, and Courts of Specialized Jurisdiction

The Judiciary Act of 1789 established the three levels of the federal court system in existence today. Periodically, however, Congress has exercised its power, based on Article 3 and Article 1 of the Constitution, to create other federal courts. Courts established under Article 3 are known as constitutional courts, and those created under Article 1 are called legislative courts. The former handles the bulk of litigation in the system and, for this reason, will remain the focus of this discussion. The Supreme Court, courts of appeals, and federal district courts are constitutional courts. The trial and appellate military courts, created under authority found in Article 1 (legislative court) judges serve during a period of good behavior, or what amounts to life tenure. Because Article 1 (legislative court) judges have no constitutional guarantee of good-behavior tenure, Congress may set specific terms of office for them. Judges of Article 3 courts are also constitutionally protected from salary reductions while in office. Those who serve as judges of legislative courts have no such protection. Bankruptcy courts provide a good example. The bankruptcy judges are appointed for fourteen-year terms by the court of appeals for the circuit in which the district court is located and have their salaries set by Congress.

A court of specialized jurisdiction that has garnered much attention since September 11, 2001, is the foreign intelligence surveillance court. Created in 1978 by passage of the Foreign Intelligence Surveillance Act, this court has had its powers expanded when the USA Patriot Act was passed in October 2001.\(^{33}\) The court consists of eleven federal district judges appointed by the chief justice of the United States, with no fewer than three of the judges residing within twenty miles of the District of Columbia. It was created for the purpose of passing on requests for surveillance and physical searches aimed at foreign powers and their agents.\(^{34}\) Some have referred to it as a secret court because the records of its proceedings are not made public but instead are kept confidential under procedures developed by the chief justice, the attorney general, and the CIA director. There is also an appeals panel consisting of three district or court of appeals judges appointed by the chief justice. Their task is to hear appeals from denials of applications for surveillance and physical searches.

Administrative and Staff Support in the Federal Judiciary

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

**United States Magistrate Judges**

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

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

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

**Law Clerks**

More than two thousand law clerks now work for federal judges, and more than six hundred 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, spending a good deal of time examining the various motions filed in civil and criminal cases. They review each motion, noting the issues and the positions of the parties involved, then research important points raised in the motions and prepare written memoranda for the judges. Because their work is devoted to the earliest stages of the litigation process, law clerks may have a substantial amount of contact with attorneys and witnesses. Law clerks at this level may also be involved in the initial drafting of opinions. As one federal district judge said, “I even allow my law clerks to write memorandum opinions. I first tell him what I want and then he writes it up. Sometimes I sign it without changing a word.”

At the appellate level, the law clerk becomes involved in a case first by researching the issues of law and fact presented by an appeal. Saving the judge’s time is important. Consider the courts of appeals. These courts do not have the same discretion that the U.S. Supreme Court has to accept or reject a case. Nevertheless, the courts of appeals now use certain screening devices to differentiate between cases that can be handled quickly and those that require more time and effort. Law clerks are an integral part of this screening process.

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

A number of cases are scheduled for oral argument, and the clerk may be called on to assist the judge in preparing for it. Intensive analysis of the record by judges before oral argument is not always possible. Judges seldom have time to do more than scan pertinent portions of the record called to their attention by law clerks. As one judicial scholar aptly noted, “To prepare for oral argument, all but a handful of circuit judges rely upon bench memoranda prepared by their law clerks, plus their own notes from reading briefs.”

Once a decision has been reached by an appellate court, the law clerk frequently participates in writing the order that accompanies the decision. The clerk’s participation generally consists of drafting a preliminary opinion or order pursuant to the judge’s directions. A law clerk may also be asked to edit or check citations in an opinion written by the judge.

Because the work of the law clerk for a Supreme Court justice roughly parallels that of a clerk in the other appellate courts, all aspects of their responsibility do not need to be restated here. However, a few important points about Supreme
Court law clerks deserve mention. Clerks play an indispensable role in helping justices decide which cases should be heard. At the suggestion of Justice Lewis Powell 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.38 The memo summarizes the facts of the case, the questions of law presented, and the recommended course of action—whether the case should be granted a full hearing, denied, or dismissed. Currently, Justice Samuel Alito and Justice John Paul Stevens are the only members of the Court that do not participate in the certpool. Nevertheless, Justice Stevens finds this initial reading of certiorari petitions by the law clerks invaluable. “They examine them all and select a small minority that they believe I should read myself. As a result, I do not even look at the papers in over 80 percent of the cases that are filed.”39

Once the justices have voted to hear a case, the law clerks, like their counterparts in the courts of appeals, prepare bench memoranda that the justices may use during oral argument. Finally, law clerks for Supreme Court justices, like those who serve courts of appeals judges, help to draft opinions.

**Administrative Office of the U.S. Courts**

The administration of the federal judicial system as a whole is managed by the Administrative Office of the U.S. Courts, which essentially functions as “the judiciary’s housekeeping agency.”40 Since its creation in 1939, it has handled everything from distributing supplies and negotiating with other government agencies for court accommodations in federal buildings to maintaining judicial personnel records and collecting data on cases in the federal courts.

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

Closely related to this staff function is the Administrative Office’s role as liaison for both the federal judicial system and the Judicial Conference. The Administrative Office serves as advocate for the judiciary in its dealings with Congress, the executive branch, professional groups, and the 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.

**Federal Court Workload**

Table 2-1 provides a look at the changing workload of the federal district courts for the fiscal years 1999, 2004, 2007, and 2008. Civil cases, which far outnumber criminal cases in the United States, increased by nearly 4 percent between 2007 and 2008. This increase came on the heels of an 8 percent decline from 2004–2007. Furthermore, the number of civil cases terminated in 2008 was more than 2 percent less than the number terminated the previous year.

Criminal case filings in 2008 were up more than 3.5 percent from the previous year following a decline in criminal case filings between 2004 and 2007. According

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<td><strong>Criminal Cases</strong></td>
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<tr>
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to the Administrative Office of United States Courts, immigration cases increased 27 percent, with improper reentry by an alien accounting for 73 percent of all immigration cases. Not surprisingly, 72 percent of all the immigration cases were filed in the five southwestern border districts.

Table 2-2 presents judicial caseload indicators for the regional courts of appeals for the fiscal years 1999, 2004, 2007, and 2008. Filings in these tribunals increased nearly 5 percent between 2007 and 2008, with increases in both civil and criminal appeals.

Of even greater significance is the fact that appeals of administrative agency decisions rose by 12 percent from 2007 to 2008 after declining for two consecutive years. The Administrative Office of United States Courts attributes this increase primarily to challenges to Board of Immigration Appeals decisions which rose by thirteen percent.

Overall, when looking at the number of cases filed, terminated, and pending, it is obvious that both the trial and appellate courts are stretched to their limits with heavy caseloads. Furthermore, their caseloads vary widely in nature.

Table 2-3 presents caseload data for the U.S. Supreme Court. The total number of cases on the High Court’s docket increased steadily between 2004 and 2006 before declining slightly in the October 2007 term. The total number of paid (those for which the Court’s filing fee has been paid and all the required materials have been provided), pauper (those brought by indigent people for whom the filing fee and requirement of multiple copies are waived by the Court), and original cases (those being heard by the Court in the first instance) on the docket for the 2007 term stood at 9,602 cases.

Perhaps the key point to remember about the workload of the Supreme Court is that the justices themselves have discretion to decide which cases merit the Court’s full attention. As a result, the number of cases argued before the Court has declined rather dramatically over the years. In the 2007 term only 75 cases were argued, and 72 were disposed of by full opinions.

Summary

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

We focused on the three basic levels created by the Judiciary Act of 1789, noting, however, that Congress has periodically created both constitutional and legislative courts. The bulk of federal litigation is handled by U.S. district courts, courts of appeals, and the Supreme Court. We also briefly examined the role of magistrate judges and law clerks associated with the federal judiciary.

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

Further Thought and Discussion Questions

1. Under the Articles of Confederation, there was no national judiciary, a situation that was remedied when a national court system was established in Article 3 of the U.S. Constitution. But if Article 3 established a national court system, why did Congress pass the massive Judiciary Act of 1789 within months after the Constitution was adopted?
2. Why is the U.S. Supreme Court described as “distinctly American in conception and function”?

3. How can a democracy justify the fact that federal judges appointed for life possess the power to nullify federal and state laws that were enacted by elected representatives?

4. Since Article 3 judges are appointed for life and are independent of one another, what guarantees exist that justice is consistently and equitably dispensed?

NOTES


2. Ibid., 2.


8. Herbert Jacob, "Conclusion," in Herbert Jacob et al., Courts, Law, and Politics in Comparative Perspective (New Haven, Conn.: Yale University Press, 1996), 394.

9. Ibid.


12. Ibid., 251.


18. For a thorough account of the Fifth Circuit split, see Deborah J. Barrow and Thomas G. Walker, A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform (New Haven, Conn.: Yale University Press, 1988), 32-61.


SUGGESTED RESOURCES


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

Legal Information Institute Web Site. Available online at www.law.cornell.edu. An excellent source of information about all aspects of the U.S. Supreme Court, including recent and historical decisions.
Even before the Articles of Confederation and the writing of the U.S. Constitution in 1787, the colonies, as sovereign entities, already had written constitutions, which provided for judicial oversight. The development of the organization and procedures of state court systems can therefore be traced from the colonial period.

**Historical Development of State Courts**

No two states are exactly alike when it comes to the organization of courts. Each state is entirely 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 known as 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 a great deal of 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. One study of state supreme courts says that the main categories of cases include appeals in major felonies; state regulation of business and professions; a wide range of private economic disputes, including business contracts and real estate; wills, trusts, and estates; divorce, child custody, and child support; and personal injury suits involving automobile accidents, medical malpractice, job-related injuries, and the like.

State courts also interpret their own state constitutions, which sometimes have broader protections for their citizens than are found in the federal constitution. In fact, "since the 1970s, state courts (particularly the highest courts of the states) have issued hundreds of opinions interpreting their constituions to protect rights beyond the federal minima." U.S. Supreme Court justice William Brennan, in an influential law review article published in 1977, is generally credited with encouraging state courts to interpret their own constitutions to provide greater protection of citizens' rights. One study of this development, known as "new judicial federalism," indicates that there was a dramatic increase in state courts' reliance on state declarations of rights in civil-liberties cases over the latter part of the twentieth century. Not surprisingly, then, the number of cases litigated annually in the state courts far exceeds those decided in the federal tribunals.

As colonists moved from England to settle in America, they naturally brought with them the various customs and traditions with which they were familiar. For this reason, American law borrowed heavily from English common law. Likewise, common law traditions became important factors in shaping the state court systems. Ohio and Pennsylvania, for example, still call their major trial courts the courts of common pleas, a title whose origin may be traced to England.

The Colonial Period

During the colonial period, political power was concentrated in the hands of the governor, who was appointed by the king of England. Because the governors performed executive, legislative, and judicial functions, an elaborate court system was not necessary. The courts of this period were simple institutions that borrowed their form from the English judiciary. However, the colonists greatly simplified the English procedures to suit their own needs.

The lowest level of the colonial judiciary consisted of local judges called justices of the peace or magistrates, who 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. These courts "were at the heart of colonial government." In addition to deciding cases, they performed some administrative functions. Appeals from all courts were taken to the highest level—the governor and his council. Grand and petit juries were also introduced during this period and remain prominent features of the state judicial systems.

By the early eighteenth 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. In addition, common commercial needs and a common language helped to make colonial and English legal practices more similar.

As one judicial scholar notes, "In a relatively short time—between 1760 and 1820—a rather backward colonial legal framework was transformed into a very English common law system."

Modern State Courts

Following the American Revolution, the powers of the government were not only taken over by legislative bodies but also greatly reduced in scope. 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. However, the basic structure of the state judiciaries was not greatly altered.

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 prevalent. 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."
One typical response was to create new courts to handle the increased volume of cases. Courts were often simply piled on top of one another with overlapping jurisdictions. Another strategy was the addition of new courts, coupled with a careful specification of their jurisdiction in terms of 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 result of all this activity was a confusing array of courts, especially in the major urban areas, where growth tended to be more pronounced, and even more problems. One observer noted that each court was a separate entity; each had a judge and a staff. Such an organizational structure meant there was no way to shift cases from an overloaded court to one with little to do. In addition, each court produced political patronage jobs for the city political machines.

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. Many of these courts had very narrow jurisdictions. Furthermore, the jurisdictions of the various courts often overlapped. This meant that a case could be tried in a number of courts depending on the advantages each one offered. Court costs, court procedures, court delays, and the reputation of the judge all entered into the decision of which court to choose. For example, a strict law-and-order district attorney prosecuting a criminal case might choose a court with a reputation for handing out stiff sentences. An attorney filing a civil suit on behalf of a client might seek a court known for its complex procedures to draw the other side into a confusing web of legal technicalities. Political considerations were also involved in the choice of a court. The justice of the peace courts were especially political because many of them operated on a fee basis. Justices of the peace (J.P.s) were often willing to trade favorable decisions for court fees. The initials J.p. were often said to stand for "Justice for the Plaintiff." In California, 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 the bulk of litigation in this country each year and constitute about 85 percent of all courts in the United States. 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.

In the early twentieth 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 to court unification has arisen. Many trial lawyers who are in court almost daily become accustomed to existing court organization and therefore are opposed to change. Knowledge of the local courts is the key to their success, so they naturally are not eager to try cases in strange new courts.

Also, 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, having to learn new procedures, or having to decide cases outside their area of specialization. Nonlawyer judges, such as justices of the peace, often oppose court reform because they view it as a threat to their jobs. The court unification movement, then, has not been as successful as many would like, although proponents of court reform have secured victories in some states.

**State Court Organization**

Some states have moved closer to a unified court system, whereas others still operate with a bewildering complex of courts with overlapping jurisdiction. The California court system, shown in Figure 3-1, is an example of a simplified state court system. Like the federal court system described in Chapter 2, it consists of one level of trial courts, regional courts of appeals, and one high court. The New York court system, on the other hand, provides an example of a state with a complex network of courts. A look at Figure 3-2 indicates that there are ten trial courts, two appellate courts, and one high court in the state. These courts are staffed by more than 3,500 judicial officials known in different courts as judges, justices, or surrogates.

Most states, falling somewhere between the two extremes illustrated in Figures 3-1 and 3-2, are 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 this country each year and constitute about 85 percent of all courts in the United States. 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 typically handle infractions and misdemeanors. They may impose only limited fines (usually 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, such as $3,000. In addition, these types of courts are often limited to certain kinds of matters: traffic violations, domestic relations,
or cases involving juveniles, for example. Another difference is that in many instances these limited courts are not courts of record. Because 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).

New York is one of about 30 states that rely on a large number of local trial courts of limited jurisdiction to dispense justice at the lowest level. One such group, the nearly fifteen hundred Town and Village Justice courts, has more than 2,000 judges spread throughout all areas of the state except New York City.

William Glaberson, in a series of in-depth articles published in the New York Times in 2006, offers some startling facts about these locally funded courts which are staffed by judges popularly elected to four-year terms. First, he reports that nearly three quarters of the judges who preside over these courts are not lawyers but truck drivers, sewer workers, and laborers who have a scant grasp of the most basic legal principles. Some never finished high school and at least one never got further than grade school. In fact, Glaberson claims that New York demands more training for licensed manicurists and hair stylists than for this group of elected judges. Second, Glaberson points out that these courts suffer from a serious lack of resources since they are funded by local levels of government rather than the state legislature. Because of this lack of resources, the judges must often hold court in tiny offices or basement rooms without a judge's bench or a jury box, rather than in real courtrooms. Furthermore, there is often no money available to employ court reporters or other clerical support staff. Therefore, protocol in some of these courts dictates that the public is not admitted, witnesses are not sworn to tell the truth, and there is no word-for-word record of the proceedings. Judges are simply not required to make transcripts or tape recordings of what happens in the court.

In spite of the fact that judges presiding over the Town and Village Justice courts are generally nonlawyers with only six days of training classes at the start of their tenure and a twelve-hour refresher course each year thereafter, they perform some important duties. In the criminal area, for example, they can set bail, hold preliminary hearings in felony cases, and conduct trials in misdemeanor cases. On the civil side, they can preside over cases involving claims of up to $3,000 and landlord-tenant disputes with no dollar limit.12

**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 the majority of 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 from state to 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 from one town to another within the district or circuit to hold court in different parts of the territory according to a fixed schedule. In urban areas 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. As noted earlier, Ohio and Pennsylvania still cling to the title "court of common pleas." New York is undoubtedly the most confusing of all; its trial court of general jurisdiction is called the supreme court (see Figure 3-2). 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. In other words, a degree of professionalism is evident at this level that is often lacking in the trial courts of limited jurisdiction.

**Intermediate Appellate Courts**

The intermediate appellate courts are relative newcomers to the state judicial scene. Only thirteen such courts existed in 1911, whereas forty states now have them. Their basic purpose is to relieve the workload of the state's highest court.

In most instances they are called courts of appeals, although other names are occasionally used. Most states have one court of appeals with statewide jurisdiction. Other states, such as California, Ohio, and Texas, have created regional appellate courts to hear appeals from trial courts in a specific area. Alabama and Tennessee have separate intermediate appellate courts for civil and criminal cases.

The names of these intermediate appellate courts vary. The size of intermediate courts also varies from state to state. The court of appeals in Alaska, for example, has only three judges. At the other extreme, California has 105 courts of appeals judges.13 In some states the intermediate appeals courts sit en banc, whereas in other states they sit in permanent or rotating panels.

Generally speaking, the jurisdiction of intermediate appellate courts is mandatory because Americans hold to the view that parties in a case are entitled to at
least one appeal. In numerous instances, these are the courts of last resort for litigants in the state court system.

Courts of Last Resort

Every state has a court of last resort. 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 and New York), the supreme judicial court (Maine and Massachusetts), and the supreme court of appeals (West Virginia).

The courts of last resort range in size from five to nine judges (called justices in some states). They typically sit en banc and usually, although not necessarily, in the state capital.

The highest courts have jurisdiction in matters pertaining to state law and are the final arbiters in such matters. In states that have intermediate appellate courts, the supreme court's cases come primarily from these midlevel 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. This is likely to create a role of error correction for the court of last resort in routine cases and to reduce its opportunities for policymaking.14

In most instances, 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. Amicus curiae briefs are also filed quite frequently in such states as California, Illinois, Michigan, Oklahoma, Pennsylvania, and Wisconsin.15 After reaching a decision, the judges issue written opinions explaining that decision.

Juvenile Courts

Even the most casual reading of a daily newspaper or the viewing of a nightly news broadcast acquaints one with the fact that Americans are increasingly concerned about the handling of cases involving juveniles. Not surprisingly, states have responded to the problem in a variety of ways.16 Some have established a statewide network of courts specifically to handle matters involving juveniles. They are commonly called juvenile courts or family courts. Georgia, for example, has
or gossips with the neighbors knows that crime, criminal justice, and criminal
courts attract nearly everyone’s enduring interest and morbid fascination.” Even
though similar rules and processes are used to prosecute criminal cases throughout
the United States, careful observers tell us that there are also notable differences
from one courthouse to another. How do we explain these differences, which exist
not only among courts in different cities but also among different judges’ court-
rooms in the same city?

One plausible explanation, prominent in the social science literature, notes that
the culture of a community, that is, its shared beliefs and attitudes, influences how its
members behave. These shared beliefs and attitudes may help explain the actions of
entire nations or smaller communities within a nation. Many legal scholars argue
that a local legal culture—norms shared by members of the local court community—
determines how criminal cases will be prosecuted in a particular courtroom.18

The values and norms shared by judges, attorneys, clerks, bailiffs, probation
officers, and others who work in the court system influence court operations in
three important ways.20 First, they help participants distinguish between “our”
court and other courts. Attorneys and judges will often boast that they process
cases more efficiently than other courts within the city or state. Second, norms tell
members of a court community how they should treat one another. Third, the
norms describe how cases should be processed in a particular court. In short, the
local legal culture helps us understand why different courts handle things differ-
ently, even though the formal rules of criminal procedure are basically the same.

The Courtroom Work Group

Implicit in the notion of courts as communities is the belief that courts are perma-
nent organizations rather than occasional gatherings of strangers who resolve a
particular conflict and then go their separate ways.21 The most visible members of
this permanent organization are judges, prosecutors, and defense attorneys. Com-
monly referred to as the courtroom work group, each is generally associated with a
specific function. Prosecutors push for convictions of those accused of criminal
offenses against the government; defense attorneys seek acquittals for their clients;
and judges serve as neutral arbiters to guarantee a fair trial. In reality, members of
the courtroom work group share certain values and goals and are not the fierce
adversaries that many Americans imagine. Cooperation among judges, prosecu-
tors, and defense attorneys is the norm.

The most important goal of the courtroom work group 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, resolving cases quickly works to
their advantage, too. Public defenders seek quick dispositions simply because they
generally lack adequate resources to handle their caseloads.

A second important goal of the courtroom work group is to maintain group
cohesion. Conflict among the members makes work more difficult and interferes
with the expeditious handling of cases. Therefore, the work group stresses coopera-
tion and censures those who violate this norm.

Finally, the courtroom work group is interested in reducing or controlling
uncertainty. In practice, this means that all members of the group 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 the goals of handling cases expeditiously, maintaining group cohesion,
and reducing uncertainty, work group members use several techniques. Although
unilateral decisions and adversarial proceedings occur, negotiation is the most com-
monly used technique in criminal courtrooms. The members negotiate on a variety
of issues—continuances, hearing dates, and exchange of information, among other
matters. Without a doubt, however, plea bargaining is the most heavily publicized
subject of negotiation among members of the courtroom work group.

Administrative Hearings in the States

For at least the last half century there has been a movement in the United States, at
both the national and state levels, to separate agency hearings from their regulation
and enforcement functions. The idea is that an agency should not be “the policeman,
prosecutor, judge and jury of its own action.”22 To avoid this problem more than
twenty states have created central panels of administrative law judges to conduct
hearings. These judges are independent of the agencies for which they hold hearings.

The State of Oregon provides an interesting and informative case study of this
process in action.23 Before 2000 Oregon, along with a number of other states, per-
mitted hearing officers within the regulating agency to hear complaints by citizens
and businesses who disputed the agency’s action.

That changed when the Oregon legislature created the Office of Administrative
Hearings (OAH) in 1999 and it began operating in 2000. Today the OAH has 119
permanent employees, including 65 administrative law judges, and is headed by a
chief administrative law judge. According to OAH’s Web site, the administrative
law judges hold more than 30,000 hearings per year for about seventy state agen-
cies. That number represents 90 percent or more of all the contested orders issued
by agencies in Oregon.
Policymaking in the State Courts

State courts do more than simply enforce norms. There are also opportunities to engage in shaping policies in the state. One good example of policymaking by state high courts involves the issue of school districts within a state spending vastly unequal amounts on the education of their students. When the U.S. Supreme Court held in San Antonio Independent School District v. Rodriguez that different spending patterns in poor and wealthy school districts within a state do not violate equal protection rights under the U.S. Constitution, a number of legal challenges were mounted in state courts, arguing that unequal educational opportunities violate various clauses in state constitutions. This strategy has proven successful. One observer notes that state supreme courts in more than half the states have held that reliance on local property-tax revenues to fund public schools violates the right to a free public education contained in their respective state constitutions.

Gay and lesbian rights have also fared better in the hands of state judges than in federal tribunals. For instance, the Georgia Supreme Court overturned the state’s antisodomy law under the privacy provisions of the Georgia constitution, even though the same law had been upheld in 1986 by the U.S. Supreme Court (Bowers v. Hardwick).

Same-sex marriages, civil unions, and domestic partnerships have also been heavily contested in state courts. New Hampshire became the sixth state to allow same-sex couples to marry when its state legislature passed a law permitting such unions in June 2009. The new law will take effect in January 2010. New Hampshire’s action solidified New England as the center of the same-sex marriage movement, with Rhode Island being the only New England state that does not allow same-sex couples to wed. Maine and Vermont legalized same-sex marriages earlier in 2009 while Connecticut, Massachusetts, and Iowa allowed same-sex marriages after the high courts in those states ruled it unconstitutional to deny gay couples the right to marry.

Perhaps no state’s courts have gained more notoriety than California’s in grappling with the issue of same-sex marriage. In 2004 six separate cases were filed by both supporters and opponents of same-sex marriage. They were eventually consolidated as In re Marriage Cases and heard by a superior court judge in San Francisco. Although this court held that California statutes limiting marriage to opposite-sex couples were unconstitutional, that decision was overturned by a three-judge panel of the California Court of Appeals.

The case next moved to the California Supreme Court. Many in the state were shocked when that court announced on May 15, 2008, that it was striking down California’s existing statutes limiting marriage to opposite-sex couples.

Although many hailed the court’s decision, others sought to overturn it by amending the California Constitution and reinstating the principle that only opposite-sex couples could legally marry in the state. Supporters of the amendment were able to get an initiative to that effect on the ballot in the November 2008 election. Proposition 8, as the initiative was known, was approved by a majority of the voters.

Undaunted, supporters of same-sex marriage mounted another court challenge. Their hopes were dashed, however, when the California Supreme Court ruled on May 26, 2009, that their objections were without merit. California once again joined the list of states limiting marriage to opposite-sex couples. There was some solace for supporters of same-sex marriage, however. The court upheld the validity of same-sex marriages previously performed in California.

Same-sex relationships may also be protected as domestic partnerships and civil unions, but the availability and rights of these alternatives vary greatly. Domestic partnerships, for example, have no federal protections. However, protections such as health care, hospital visitations, and the right to meet with a nonbiological child’s teacher are available through domestic partnership registries in several states and cities. Civil unions, like domestic partnerships, have no federal protections even though same-sex couples may have access to state benefits.

As these examples of judicial activity concerning same-sex marriages, domestic partnerships, and civil unions illustrate, state court judges possess important tools that permit them to be quite active in expanding the rights of state citizens. Whether state judges are willing and politically able to do so is a different matter. Many state judges are conservative and simply not inclined to engage in overt policymaking. Moreover, the political and legal climate in the state may work against an active policymaking agenda. In short, a combination of ideology, judicial role, interpretation, and political pressures may dictate that state high court judges not venture far from the status quo.

Innovation in State Courts

Given the wide variety of problems facing state courts and the ever-present fights over scarce budget resources, it is not surprising that a substantial amount of innovation has occurred in the state judiciaries. As noted earlier, some states have created specialized courts to handle particular types of case, ranging from water courts (which resolve legal disputes over water rights in states with scarce water
supplies) and probate courts to others dealing with domestic relations, small claims, and juveniles.

Over the past few decades court-connected alternative dispute resolution (ADR) has spread throughout the country as an alternative to lengthy court involvement in certain types of cases. According to the National Center for State Courts, every state now has some type of court-connected ADR at some level. Innovations have also been made in the way cases are placed on a court's docket, so the less complicated cases may be resolved more quickly and not be delayed in the midst of more complicated cases. Changes in the courts' calendar systems have made it easier to track cases and keep all involved parties up-to-date on the status of the case. Increasing use of technology has also been a priority in many state court systems, as computer records have largely replaced paper trails in everything from the filing of cases to the publication of final decisions. Perhaps more important, state judicial systems have begun to examine the very reasons for the existence of courts. It is to that issue that we next turn our attention.

By the latter part of the twentieth century a developing trend saw some state courts changing from adversarial arenas to problem-solving courts focusing on the underlying behavior of criminal defendants. Drawing on a concept known as therapeutic jurisprudence, these new problem-solving courts were expected to include services along with judicial case processing.

Perhaps the best-known examples are the drug courts that now exist in many states. Often referred to as drug treatment courts, they emphasize therapeutic measures to reduce recidivism and generally include such essential elements as immediate intervention, nonadversarial adjudication, hands-on judicial involvement, treatment programs with clear rules and structured goals, and a team approach that brings together judges, prosecutors, defense attorneys, treatment providers, and corrections personnel.

Other types of problem-solving courts have also become popular, among them mental health courts, teen courts, domestic violence courts, DWI courts, and reentry courts. Some are permanent courts, while others are pilot or model programs. Still others exist as specialized dockets of established courts. Whatever the specific approach, it is clear that the state courts are willing and imaginative innovators.

Administrative and 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 also 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. In North Carolina, for example, the magistrates who lend support to the state’s district courts may accept guilty pleas on certain traffic violations as well as preside over small-claims 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 function as staff attorneys for an entire court.

Administrative Office of the Courts

Every state now has an administrative office of the courts or a similarly titled agency that performs a variety of administrative tasks for its court system. The size of the administrative office and its operating budget vary from state to state, so that some of these agencies perform more tasks than others. Among the duties more commonly associated with administrative offices are budget preparation, data processing, facility management, judicial education, public information, research, and personnel management. A number of administrative offices have total or partial responsibility for one or more of these tasks. In some states still other jobs are assigned to administrative offices. Juvenile and adult probation are the responsibility of administrative offices in a few states, as is ADR.

Court Clerks and 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.

In many areas the traditional court clerks have been replaced by court administrators. In contrast to the court clerk, who managed the operations of a specific courtroom, the modern court administrator may assist a presiding
judge in running the entire courthouse. Even more broadly, in some states the administrator may work for a statewide organization that oversees all the state court systems at the city or county level.

State Court Workload

The lion’s share of the nation’s judicial business exists at the state, not the national, level. That federal judges adjudicate several hundred thousand cases in a year is impressive; that state courts handle several million in a year is overwhelming. Although justice of the peace and magistrate courts at the state level handle relatively minor matters, a number of multimillion-dollar judgments in civil cases are annually awarded by ordinary state trial court juries.

Reliable data on the number of cases filed in the state courts are somewhat difficult to come by. Record-keeping is much better in some states than others, and some of the lower level courts, which are sometimes not courts of record, often greatly vary. Nonetheless, the National Center for State Courts does an excellent job of tracking the figures for the states’ trial courts.

The first part of Figure 3–3 compares the number of cases entering the nation’s state courts between 1997 and 2006. The number stood at slightly more than ninety million cases in 1997. That number had increased by 2006 to nearly one hundred million cases, an increase of 10 percent.

The second part of Figure 3–3 provides a bit more detail about the cases entering state courts by breaking them down by categories. Traffic cases, which far outnumber the other categories, increased by nine percent between 1997 and 2006. Incoming criminal and civil cases increased over the same ten-year period by 12 and 13 percent, respectively. Domestic relations cases climbed by 10 percent from 1997 to 2006. Juvenile cases entering the state courts during the comparable time period remained flat, however.

Total appellate filings in the state courts over the ten-year period 1997 to 2006 are shown in Figure 3–4. The number of cases filed in state appellate courts declined 4 percent, from about 300,000 cases in 1997 to about 288,000 cases in 2006.

Summary

In this chapter we offered a brief historical review of the development of state judicial systems. No two state court systems are alike. However, there are four basic levels within the states: trial courts of limited jurisdiction, trial courts of general
jurisdiction, intermediate appellate courts, and courts of last resort. We examined the work done at each of these four levels. Our discussion also included a brief look at the handling of juvenile cases within the states. In addition, we briefly discussed norm enforcement, policymaking by state courts in the context of new judicial federalism, and innovation, primarily in the context of problem-solving courts.

In discussing administrative assistance for the state courts, our review centered on administrative offices of the courts, law clerks, court clerks and court administrators, and magistrates. We concluded with a brief look at the workload of the state trial and appellate courts.

Further Thought and Discussion Questions

1. Does a unified court system provide the best way for state courts to handle their legal issues?

2. Why are state courts not as commonly recognized for their policymaking activities as the federal courts?

3. What conclusions may be drawn from a comparison of state and federal court caseload statistics?

Notes


8. Ibid., 38.


16. Our discussion of the various approaches to handling juvenile matters in the states is based on material found in National Center for State Courts, State Court Caseload Statistics, 2007, available online at ncsconline.org.


19. For an important study of the influence of local legal culture in nine medium-size criminal courts in three states, see ibid.


21. See James Eisenstein and Herbert Jacob, Felony Justice (Boston: Little, Brown, 1977). Our discussion of the concept of the courtroom work group relies heavily on Eisenstein and Jacob’s discussion.


23. Ibid. Also see www.oregon.gov/OAH/about_us.shtml. Our discussion is drawn from these two sources.