CHAPTER 1

The Legal System

Definition of Law: [A] rule of civil conduct prescribed by the supreme power of a state (or nation), commanding what is right, and prohibiting what is wrong.

—Blackstone

The powers of the legislature are defined and limited; and that those limits are not mistaken, or forgotten, the Constitution is written.

—Chief Justice John Marshall, *Marbury v. Madison*

CHAPTER OUTLINE

Sources of Legal Material

INTRODUCTION

The law of the school includes all those areas of jurisprudence that bear on the operation of public elementary and secondary schools in the United States. *School law*, or *education law*, as a field of study is a generic term covering a wide range of legal subject matter including the basic fields of contracts, property, torts, constitutional law, and other areas of law that directly affect the educational and administrative processes of the educational system. Due to the breadth of the subject matter involved, it is necessary for the school law student to be versed in certain fundamental concepts of the American legal system and to be able to apply this knowledge to situations that daily affect school operation.

THE NATURE OF PUBLIC SCHOOL LAW

Because a public school is a governmental agency, its operation is circumscribed by precedents of public administrative law supplemented by those legal and historical traditions surrounding an educational organization that is state established, yet locally administered. In this setting, legal and educational structural issues that define the powers to operate, control, and manage the schools must be considered. In analyzing the American educational system, and comparing it to central state systems of education in foreign countries, one is struck by the diversity of authority under which the American public schools are governed. As a federal and not a national system, the U.S. government comprises a union of states united under one central government. The particular form of American federalism creates a unique educational system that is governed by laws of 50 states, with component parts amounting to several thousand local school district operating units. Through all of this organizational multiformity and, indeed, complexity runs the basis for justice on which the entire educational and legal systems are founded.

THE CONCEPT OF JUSTICE

Justice embraces three elements. The first *element has to do with one's relations and dealings with other persons; it is 'inter-subjective' or interpersonal. There is a question of justice and injustice only where there is a plurality of individuals and some practical question concerning their situation and/or interactions* vis-à-vis *each other. The* second *element in the relevant concept of justice is that of* duty*, of what is owed (*debitum*) or due to another, and correspondingly of what that other person has a right to (viz roughly) what is his 'own' or at least his 'due' by right. The* third *element in the relevant concept of justice can be called* equality*. . . .* proportionality*, or . . .* equilibrium *or balance.*

—John Finnis

The fundamental principles of legal control are those generally prescribed by our constitutional system, from which the basic organic law of the land emanates: the written constitutions of the 50 states and the federal government. Constitutions at both levels of government are basic because the positive power to create public educational systems is assumed by state constitutions, and provisions of both the state and federal constitutions serve as restraints to protect the people from the unwarranted denial of basic constitutional rights and freedoms.

SOURCES OF LAW

The power of operation of the public educational system, therefore, originates with a constitutional delegation to the legislature to provide for a system of education. With legislative enactments forming the foundation for public school law, it then becomes the role of the courts to interpret the will of the legislature. The combination of constitutions, statutes, and judicial decisions (case law) and administrative law forms the legal structure on which the public schools are based.

SOURCES OF THE LAW

1. Constitutions (State and federal)
2. Statutes (State and federal)
3. Judicial Decisions (State and federal)
4. Administrative Law (Agencies of government; federal, state and local)

Constitutions

A written constitution is a body of precepts that provides a framework of law within which orderly governmental processes can operate. An eminent English judge, Tom Bingham, in his book *Rule of Law*, noted the worldwide importance of the U.S. Constitution:

> The Constitution of the United States was a crucial staging-post in the history of the rule of law. . . . [T]he U.S. Constitution was groundbreaking in its enlightened attempt to create a strong and effective central government while at the same time preserving the autonomy of the individual states and . . . preserving the fundamental rights of the individual. . . .[1]

No one . . . would pay attention to a constitution if everyone thought it had been put together by a tribe of monkeys with quills.

—Richard S. Kay

The federal and state constitutions of this country are characterized by their provisions for securing fundamental liberty, property, and political rights. One of the basic principles embodied in a constitution is the provision for authorized modification of the document. Experience in human and governmental relations teaches that to be effective a constitution must be flexible and provide for systematic change processes. The U.S. Constitution expressly provides in Article V a process for proposing amendments by a two-thirds vote of each house of Congress or by a convention that shall be called by Congress upon application by two-thirds of the state legislatures. Amendments must be ratified by the legislatures of three-fourths of the states or by conventions in three-fourths of the states.

[T]he purpose of a constitution is to lay down fixed rules that can affect human conduct and thereby keep government in good order. Constitutionalism implements the rule of law: It brings about predictability and security in the relations of individuals to the government by defining in advance the powers and limits of that government.

—Larry Alexander

Another precept reflected in the state and federal constitutions of this country is the importance of a government of separated powers. Although all state constitutions do not expressly provide for a separation of all legislative, executive, and judicial departments, in actual practice, all states have governments of separated powers. No requirement in the federal constitution exists that the states have constitutions that require a separation of powers. Theoretically, if a state so desired, it could clothe an officer or an agency with not only executive but also plenary judicial and legislative powers. However, as indicated previously, this is not the case, and all states have governments with separate branches, each of which exercises checks and balance on the powers of other branches.

All state constitutions provide for a system of free public schools. Such provisions range from very specific educational requirements to broad mandates that the legislature of the state shall provide funds for the support of a public school system.

We must not expect a good constitution because those who make it are moral men. Rather it is because of a good constitution that we may expect a society composed of moral men.

—Immanuel Kant

Statutes

A statute is an act of government expressing legislative will and constituting a law of the state. *Statute* is a word derived from the Latin term *statutum,* which means "it is decided." Statutes, in our American form of government, are the most viable and effective means of making new law or changing old law. Statutes enacted at the state or federal level may either follow custom or forge ahead and establish new laws that shape the future.

Statutes in this country are subject to review by the judiciary to determine their constitutionality. This procedure is different from that used in England, where the legislature has ultimate authority and there are no means by which the courts can hold legislation unconstitutional. This is true primarily because in England the constitution, for the most part, is unwritten, and the legislature, Parliament, may amend the constitution when it so desires. The U.S. public schools are governed by statutes enacted by state legislatures. The schools have no inherent powers, and the authority to operate them must be found in either the express or implied terms of statutes. The specificity of statutes governing the operation of public schools varies from state to state and from subject to subject. As an example, one state may generally require appropriate measures to be followed in budgeting and accounting for public funds, whereas in another state the legislature may actually specify each line item of the budget for school systems and prescribe intricate details for fund accounting.

Rules and regulations of both state and local boards of education fall within the category of statutory sources of school law. As a general rule, the legislature cannot delegate its legislative powers to govern the schools to a subordinate agency or official. Boards of education must, in devising rules and regulations for the administration of the schools, do so within the limits defined by the legislature and cannot exercise legislative authority. However, the legislature may confer, expressly or impliedly, administrative duties upon an agency or official through statute. These administrative powers must be well defined and "canalized" within definitely circumscribed channels.

Judicial Decisions (Case Law)

The third source of school law derives from judicial opinions or case law. The term *case law* is used to distinguish the rules of law that originate within legislative bodies. The term *common law*, in its broadest sense, may be used to contrast the entire system of Anglo-American law with the law of non-English-speaking countries that sometimes are referred to as having systems of civil law. Civil law is a system of statutes in which there is no reliance on precedent. Not all case law can be categorized as common law. Case law rendered by courts in interpreting the meanings of statutes or constitutions are not, per se, common law. Common law originated in England, where judicial precedents from various parts of the country became common to the entire country. This customary law eventually crystallized into legal principles that were applied and used as precedent throughout England—common to the entire country.

Common Law—Thus, "common law is a body of general rules prescribing social conduct"[2] that have five recognizable attributes. First, it is a general, overarching precedent that applies throughout the state or country. Second, the general rules are applied and enforced by the courts without necessarily involving either the executive

or legislative branches of government. Third, the common law enunciates principles derived from actual legal controversies. Fourth, the common law emanates from use of the jury system to ascertain the facts to which the law is applicable. Fifth, the common law is premised upon the rule of law or doctrine of supremacy of law—that is, the rule of law and not of man, the rule of established principles and not acts of caprice or arbitrariness.[3]

Hogue says that these five principles prescribe a positive definition: "[T]he common law is a body of general rules prescribing social conduct, enforced by ordinary . . . courts, and characterized by the development of its own principles in actual legal controversies, by the procedure of trial by jury, and by the doctrine of the supremacy of law."[4]

The subject matter most prevalent in common law involves torts, contracts, property, and trusts. Lawrence M. Friedman in his popular work, *A History of American Law,* describes what he calls the "liability explosion": the vast increase in liability in tort, mostly for personal injuries."[5] He attributes most of this explosion in common-law tort to the invention of the automobile and all the injuries that emanate from that one source. Automobiles cannot take all the blame. The common-law tort explosion has resulted from other sources of injury as well: product liability, medical malpractice, and other professional malpractice suits against lawyers, accountants, financial institutions, etc., as well as the full panoply of toxic torts, best represented by the asbestos litigation, and other injuries both physical and mental, limited only by the imagination and ingenuity of knowledgeable lawyers.

Since common law, including torts, is so diverse, by and large emanating from many state courts, the American Law Institute (ALI) began in 1923 to publish *Restatements of Law,* researched and written by committees of legal experts, judges, lawyers, and professors. The *Restatements* seek to enunciate "an orderly restatement of the general common law of the United States, including in that term not only the law developed solely by judicial decision, but also the law that has grown from the application by the courts of statutes that were generally enacted and were in force for many years."[6] These *Restatements* are considered to be authoritative sources by the courts.

Administrative Law

A fourth source of law is constituted of those rules and regulations promulgated by administrative agencies of government at the local, state, and federal levels. As we discuss later in this book, administrative agencies are a part of the executive branch of government. They, however, possess aspects of all three branches of government. Their rule-making function is quasi-legislative; their administrative function is that of the executive branch, and their enforcement of these rules are quasi-judicial in nature.

State education agencies, usually headed by a state superintendent of public instruction or a commissioner of education, are agencies that form, implement, and adjudicate matters of administrative law for the public schools. At the local level the school board formulates policy and enacts regulations that are administered by a school superintendent, and the school board sets as an administrative tribunal when conflicts arise regarding the regulations or their implementation.

At the federal level, the U.S. Department of Education is the main administrative agency that promulgates regulations affecting the public schools. All of such regulations must be authorized and approved by Congress and must be within the scope and intent of acts of Congress. For example, the myriad regulations promulgated by the U.S. Department of Education constitute a large body of administrative law to which state and local education agencies must adhere if they are to benefit from the largesse federal educational funding. The administrative structure at the federal level, which oversees the use of federal funds for education, differs from the administrative law agencies at the state level in that the U.S. Department of Education regulations are not

promulgated by a board but rather by the U.S. secretary of education. Moreover, the secretary is empowered by Congress to administer the laws of Congress and the regulations made pursuant thereto and to render judgments as to violations. However, not all federal agencies act only through the singularity of a secretary or one appointed official. For example, some agencies are governed by appointed boards authorized by legislation such as the National Labor Relations Act, under which the National Labor Relations Board not only enacts agency policy, but oversees its administration and sits as a tribunal to hear cases involving labor disputes in the private sector.

POLITICAL NEUTRALITY AND THE COURTS

The notion that the judiciary should be above pedestrian politics and factionalism is an ideal that has found only limited success in the United States. Madison was concerned about the detrimental effects of political factions—the danger of factions in securing the public good.[7] The Founders relied to a large extent on two features of the Constitution to mitigate the effects of national factions: first was the reservation of rights to the state governments, and second was the vesting of elections. Unfortunately, the nation was barely out of the starting gates when the conflict between the Federalists and the Republicans materially infected the Supreme Court and its judgments. The great Chief Justice John Marshall was not immune; rather, he was a carrier of the political virus. As an ardent Federalist, he opposed in his decisions virtually everything that the Republicans, led by Thomas Jefferson and James Madison, envisioned for the new nation. Most notably, the decision by Marshall in the seminal 1819 *Dartmouth College* case,[8] that formed the boundaries of contract law and corporate charters, granted the Federalist Party an important victory in national and state politics. Also, politics greatly influenced Marshall's decision in the structural constitutional law case of *Marbury v. Madison*.[9] In *Marbury,* Marshall, the Federalist, again check-mated Madison and Jefferson and the Republicans, by upholding the appointments of the "midnight judges" by President Adams.

Thus, the politicizing of the judiciary in the United States is of early vintage. Such political influences over the judiciary continue and are possibly even more pronounced today. In his relevant essay on the "rule of law," Tom Bingham[10] observes that in the appointment of U.S. Supreme Court justices is "a matter of acute political controversy," and he points to the highly partisan U.S. Supreme Court decision in *Bush v. Gore*, 2000, as the ultimate political act where the Court departed from all judicial restraint and effectively appointed the president of the United States. The Supreme Court, in supporting Bush, ignored precedents and exhibited little concern for the vaunted ideal of the "rule of law."

POLITICS AND THE COURT

On the morning of Jefferson's inauguration, Marshall (whom Jefferson, in a conciliatory move, asked to administer the oath) had written a letter to a friend making clear where his political allegiances rested now that the judiciary was the only branch of government that his party, the Federalists, controlled. "Of the importance of the judiciary at all times but more especially the present, I am very fully impressed and I shall endeavor in the new office (Chief Justice) to which I am called not to disappoint my friends," he wrote pointedly. Perhaps to put himself into a less partisan frame of mind, he conceded that Jefferson was not as extreme as some of his supporters. "The democrats are divided into speculative theorists and absolute terrorists," he observed. "With the latter I am not disposed to class Mr. Jefferson." The letter then broke off so Marshall could administer the oath of office, but he returned after the ceremony to add some wan praise for the inaugural address he had just witnessed, in which Jefferson declared, "We are all republicans, we are all federalists," referring to the political principles of majority rule and national union. "It is in the general well judged and conciliatory," Marshall wrote. "It is in direct terms giving the lie to the violent party declamation which has elected him, but it is strongly characteristic of the general cast of his political theory."

—Jeffrey Rosen

Bingham buttressed his argument by pointing to Justice Brandeis's involvement with Democrat President Woodrow Wilson's legislative program, Justice Frankfurter's strategy sessions with President Roosevelt regarding the New Deal legislation, and Justice Fortas's counsel to President Johnson regarding the Vietnam War, steel price increases, and labor union issues.[11] The departures from the rule of law in favor of political considerations were notably illustrated in the U.S. Supreme Court 2010 decision, *Citizens United v. Federal Election Commission*,[12] that disregarded earlier precedents, and upheld, as a corporate speech right, the film *Hillary: The Movie*, labeled by the *New York Times* to be a "90-minute stew of political commentary."[13] The decision dramatically favored the position of the Republican Party, permitting unlimited financing of political campaigns by large corporations.

A half century earlier, Robert A. Dahl,[14] a respected political scientist from Yale, wrote about the "politics" dilemma expressing the view that the Supreme Court is simply a part of the ordinary partisan political machinery of the nation. He said: "As a political institution, the Court is highly unusual, not least because Americans are not quite willing to accept the fact that it is a political institution and not quite capable of denying it; so that frequently we take both positions at once."[15]

Michael Kammen,[16] the outstanding constitutional historian at Cornell, however, advances a more positive view of the encroachment of politics into the presumed sanctity of the judiciary. He cites Theodore Roosevelt's reasoning when, in 1902, he was considering the great jurist Oliver Wendell Holmes, Jr., for appointment to the Supreme Court. Roosevelt asked the influential Henry Cabot Lodge, T.R.'s friend, for his opinion regarding Holmes's partisanship and whether such would be a deterrent to his reasoning of cases before the Supreme Court. Roosevelt wrote to Lodge saying: "In the ordinary and low sense which we attach to the words 'partisan' and 'politician,' a judge of the Supreme Court should be neither. But in the higher sense, in the proper sense, he is not in my judgment fitted for the position unless he is a party man, a constructive statesman, constantly keeping in mind his adherence to the principles and policies under which this nation has been built up and in accordance with which it must go on."[17]

Of course, Roosevelt's observations regarding judges are equally applicable to all people in all walks of life, and are particularly expected of public officials, regardless of their political leanings.

In 2010, six of the nine justices on the U.S. Supreme Court were appointed by Republican Party presidents and among the judges on 13 federal circuits, U.S. Courts of Appeals, 59 percent were appointed by Republican presidents.[18] Among the federal circuits, only the Ninth has a majority of judges appointed by Democrat presidents.

Brooks Adams, writing in 1913, lamented the inadequacy of the political courts. He wrote:

> *[Under the American system] the Constitution, or fundamental law, is expounded by judges, and this function, which, in essence, is political, has brought precisely that quality of pressure on the bench which it has been the labor of a hundred generations of our ancestors to remove. On the whole, the result has been not to elevate politics, but to lower the courts toward the political level. . . .*

A careful examination of education law decisions reveals a more conservative bent of the federal courts due to the presidencies of Reagan, Bush I, and Bush II, as reflected in opinions regarding school desegregation, separation of church and state, student/teacher equal protection rights and due process interests, the emergence of Eleventh Amendment precedents protecting states from liability, etc. These precedents are discussed in the chapters below.

Thus, although most persons would, presumably, prefer the sanctity of the rule of law, and would desire political neutrality of the judiciary, the record of practical application of the concept unfortunately finds the political nonpartisanship screen to be porous and highly permeable.

POWERS AND FUNCTIONS OF COURTS

The question of what powers may be exercised by the judiciary in reviewing decisions or enactments by the other two branches of government is essential to our system of government. The courts have traditionally maintained and enforced the concept of "separation of powers" when confronted with cases involving education. They do not usually question the judgment of either the administrative agencies of the executive branch or the legislative branch. This is true at the federal level as well as the state level.

One court, in describing the hesitancy of the courts to interfere with the other two branches of government, said:

> This reluctance is due, in part, to an awareness of the sometimes awesome responsibility of having to circumscribe the limits of their authority. Even more persuasive is an appreciation of the importance in our system of the concept of separation of powers so that each division of government may function freely within the area of its responsibility. This safeguarding of the separate powers is essential to preserve the balance which has always been regarded as one of the advantages of our system.[19]

In accordance with this reasoning, the courts presume that legislative or administrative actions were enacted conscientiously with due deliberation and are not arbitrary or capricious.[20] When the courts do intervene, they perform three types of judicial functions: (1) settle controversies by applying principles of law to a specific set of facts, (2) construe or interpret enactments of the legislature, and (3) determine the constitutionality of legislative or administrative actions.

Applying Principles

In applying principles of law to factual situations, the court may find the disputants to be school districts, individuals, or both. Although school law cases generally involve the school district itself, they may, in some instances, concern litigation between individuals; for example, a teacher and a student. In many cases, the principles of law governing the situation are vague, and statutory and constitutional guidance are difficult to find. In such instances, the judges must look to judicial precedent for guidance. Cardozo related the process in this manner:

> Where does the judge find the law he embodies in his judgment? There are times when the source is obvious. The rule that fits the case may be supplied by the constitution or by statute. If that is so, the judge looks no further. The correspondence ascertained his duty is to obey. The constitution overrides a statute, but a statute, if consistent with the constitution, overrides the law of judges. In this sense, judge-made law is secondary and subordinate to the law that is made by legislators. . . . We reach the land of mystery when constitution and statute are silent, and the judge must look to the common law for the rule that fits the case. He is the "living oracle of the law" in Blackstone's vivid phrase.[21]

Interpreting Statutes

The second function of the courts, the task of construing and interpreting statutes, is the most common litigation involving public school operation. Because statutes are merely words, to which many definitions and interpretations may be applied, courts may actually affect the meaning of the legislation. Pound conceives of four ways with which legislation may be dealt by the courts once litigation arises:

1. They might receive it fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will, of superior authority to judge-made rules on the same general subject; and so reason from it by analogy in preference to them.
2. They might receive it fully into the body of the law to be reasoned from by analogy the same as any other rule of law, regarding it, however, as of equal or coordinate authority in this respect with judge-made rules upon the same general subject.
3. They might refuse to receive it fully into the body of the law and give effect to it directly only; refusing to reason from it by analogy but giving it, nevertheless, a liberal interpretation to cover the whole field it was intended to cover.
4. They might not only refuse to reason from it by analogy and apply it directly only, but also give it a strict and narrow interpretation, holding it down rigidly to those cases it covers expressly.[22]

The last hypothesis is probably the orthodox, traditional approach; however, the courts today, in interpreting statutes, tend to adhere more and more to the second and third hypotheses.

The philosophy of the courts toward statutory interpretation varies not only among judges and courts but also in the content of the legislation being interpreted. The courts are generally more willing to grant implied authority to perform educational programs where large sums of public monies are not involved. For cases in which taxing authority is in question or in which large capital outlay programs are at issue, the courts tend to require very specific and express statutory authority in order for a school board to perform.[23]

Determining Constitutionality

The functions and responsibilities of the judiciary in determining the constitutionality of legislation were set out early in *Marbury v. Madison*[24] in prescribing the power of the U.S. Supreme Court. This case shaped the American view of the role of the judiciary. Chief Justice Marshall's landmark opinion stated:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

In determining the constitutionality of statutes, the courts first presume the act to be constitutional and anyone maintaining the contrary must bear the burden of proof. The Florida Supreme Court has related the principle in this manner: "[W]e have held that acts of the legislature carry such a strong presumption of validity that they should be held constitutional if there is any reasonable theory to that end. . . . Moreover, unconstitutionality must appear beyond all reasonable doubt before an act is condemned. . . ."[25] If a statute can be interpreted in two ways, one by which it will be constitutional, the courts will adopt the constitutional interpretation.[26]

With specific regard to the U.S. Supreme Court's review of legislation, either state or federal, the judicial duty in the eyes of Justice Brandeis was that "[i]t must be evident that the power to declare legislative enactment void is one which the judge, conscious of the fallibility of human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility."[27] Using this basic philosophy, Justice Brandeis, in 1936, set out certain criteria for judicial review that are still generally referred to today when considering the standing of litigants before the Supreme Court.

1. The Court will not pass upon the constitutionality of legislation in a friendly, nonadversary proceeding, declining because to decide such questions is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals.
2. The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.
3. The Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.
4. The Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.
5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he or she is injured by its operation. Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right. Thus, the challenge by public officials interested only in the performance of their official duty will not be entertained.
6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself or herself of its benefits.
7. When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether the construction of the statute is fairly possible by which the question may be avoided.[28]

THE PURPOSE OF LAW

AN INVITATION TO JURISPRUDENCE, HARRY W. JONES

[F]ive of law's most viable ends-in-view [are]: Preservation of the public peace and safety, the settlement of individual disputes, the maintenance of security of expectations, the resolution of conflicting social interests, and the channeling of social change. This is no complete inventory of law's tasks, nor is it a neat set of mutually exclusive teleological pigeon holes. There are manifest overlappings—for example, the resolution of conflicting social interests is one of the ways in which law helps to channel the forces of social change—and some of the law's ends-in-view can come into collision with others, as when law's adjustment to social change involves some

unavoidable impairment of the security of individual expectations. In law as in ethics, the hardest task is often not the identification of values, but the assignment of priorities when, in a specific problem context, one value cannot be fully served without some sacrifice of another. But even and particularly when values cut across one another, disinterested and informed judgment on legal and social problems requires that each of the competing ends-in-view be understood in its full claim as an aspect or dimension of what law is *for*: the creation or preservation of a social environment in which, to the degree manageable in a complex and imperfect world, the quality of human life can be spirited, improving and impaired.

STARE DECISIS

Implicit in the concept of common or case law is the reliance on past court decisions that reflect the historical development of legal controversies. Precedents established in past cases form the groundwork for decisions in the future. In the United States, the doctrine of precedent or the rule of *stare decisis,* "Let the decision stand," prevails, and past decisions are generally considered to be binding on subsequent cases that have the same or substantially the same factual situations. The rule of *stare decisis* is rigidly adhered to by lower courts when following decisions by higher courts in the same jurisdiction. Courts can limit the impact of the doctrine of precedent by distinguishing carefully the facts of the case from those of the previous case that established the rule of law. Aside from distinguishing factual situations, courts of last resort can reverse their own previous decisions and change a rule of law that they themselves established.

Stare decisis in American law does not constitute the strict adherence to older decisions that is found in English courts. The American rule of today is probably best stated by Justice Brandeis when he said that "*stare decisis* is usually the wise policy . . ."[29] and by Justice Cardozo, who observed that "I think adherence to precedent should be the rule and not the exception."[30]

NATURE AND AUTHORITY OF JUDICIAL PRECEDENTS, HENRY CAMPBELL BLACK

The Law of Judicial Precedents 10–11 (1912).

Not as a classification, but as exhibiting the chief aspects or applications of the doctrine of precedents, the subject might be broadly divided into five branches, in each of which there is to be noted one general rule or governing principle, as follows:

First. Inferior courts are absolutely bound to follow the decisions of the courts having appellate or revisory jurisdiction over them. In this aspect, precedents set by the higher courts are imperative in the strictest sense. They are conclusive on the lower courts, and leave to the latter no scope for independent judgment or discretion.

Second. The judgments of the highest court in any judicial system—state or national—are binding on all other courts when they deal with matters committed to the peculiar or exclusive jurisdiction of the court making the precedent. Thus, when the U.S. Supreme Court renders a decision construing the federal constitution or an act of Congress, that decision must be accepted by all state courts, as well as the inferior federal courts, as not merely persuasive, but of absolutely conclusive authority. In the same way, when a state supreme court pronounces judgment upon the interpretation of a statute of the state, its decision has imperative force in the courts of the United States, as well as in the courts of another state.

Third. It is the duty of a court of last resort to abide by its own former decisions, and not to depart from or vary them unless entirely satisfied, in the first place, that they were wrongly decided, and, in the second place, that less mischief will result from their overthrow than from their perpetuation. This is the proper application of the maxim, "*stare decisis*."

Fourth. When a case is presented to any court for which there is no precedent, either in its own former decisions or in the decisions of any court whose rulings, in the particular matter, it is bound to follow, it may consult and be guided by the applicable decisions by any other court, domestic or foreign. In this case, such decisions possess no constraining force, but should be accorded such a measure of weight and influence as they may be intrinsically entitled to receive, the duty of the court being to conform its decision to what is called the "general current of authority" or the "preponderance of authority," if such a standard can be ascertained to exist with reference to the particular question involved.

Fifth. On the principle of judicial comity, a court that is entirely free to exercise its independent judgment upon the matter at issue, and under no legal obligation to follow the decision of another court on the same question, will nevertheless accept and conform to that decision, as a correct statement of the law, when such a course is necessary to secure the harmonious and consistent administration of the law or to avoid unseemly conflicts of judicial authority. But comity does not require any court to do violence to its own settled convictions as to what the law is.

RULE OF LAW

1 Commentaries on the Laws of England, William Blackstone, Vol. I, pp. 69–70.

THE RULE OF LAW

The rule of law has two basic relevant meanings: First, "that no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land." Second, "no man is above the law. . . every man, whatever his rank or condition, is subject to the ordinary law. . . and amenable to the jurisdiction of the ordinary tribunals."

—A. V. Dicey

For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments: he being sworn to determine, not according to his own private judgment; but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law,* but that it was *not law*; that is, that it is not the established custom of the realm, as has been erroneously determined. And, hence, it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded.

HOW TO READ A CASE

Karl N. Llewellyn,[31] late professor of law at the University of Chicago, in his work *The Bramble Bush,* probably offers the best and most concise explanation of what to look for when reading case law. Since the case method is employed in presenting most of the materials in this book, it seems appropriate to quote a portion of Llewellyn's comments on reading and analyzing judicial opinions.

> The first thing to do with an opinion, then, is read it. The next thing is to get clear the actual decision, the judgment rendered. Who won? The plaintiff or defendant? And watch your step here. You are after in first instance the plaintiff and defendant below, in the trial court. In order to follow through what happened you must therefore first know the outcome below; else you do not see what was appealed from, nor by whom. You now follow through in order to see exactly what further judgment has been rendered on appeal. The stage is then cleared of form—although of course you do not yet know all that these forms mean, that they imply. You can turn now to what you peculiarly do know. Given the actual judgments below and above as your indispensable framework—what has the case decided, and what can you derive from it as to what will be decided later?
>
> You will be looking, in the opinion, or in the preliminary matter plus the opinion, for the following: a statement of the facts the court assumes; a statement of the precise way the question has come before the court—which includes what the plaintiff wanted below, and what the defendant did about it, the judgment below, and what the trial court did that is complained of; then the outcome on appeal, the judgment; and finally the reasons this court gives for doing what it did. This does not look so bad. But it is much worse than it looks. For all our cases are decided, all our opinions are written, all our predictions, all our arguments are made, on certain four assumptions. . . .
>
> (1) *The court must decide the dispute that is before it.* It cannot refuse because the job is hard, or dubious, or dangerous. (2) *The court can decide only the particular dispute which is before it.* When it speaks to that question it speaks *ex cathedra,* with authority, with finality, with an almost magic power. When it speaks to the question before it, it announces law, and if what it announces is new, it legislates, it makes the law. But when it speaks to any other question at all, it says mere words, which no man needs to follow. Are such words worthless? They are not. We know them as judicial *dicta*; when they are wholly off the point at issue we call them *obiter dicta*—words dropped along the road, wayside remarks. Yet even wayside remarks shed light on the remarker. They may be very useful in the future to him, or to us. But he will not feel bound to them, as to his *ex cathedra* utterance. They came not hallowed by a Delphic frenzy. He may be slow to change them; but not so slow as in the other case. (3) *The court can decide the particular dispute only according to a general rule which covers a whole class of like disputes.* Our legal theory does not admit of single decisions standing on their own. If judges are free, are indeed forced, to decide new cases for which there is no rule, they must at least make a new rule as they decide. So far, so good. But how wide or how narrow, is the general rule in this particular case? That is a troublesome matter. The practice of our case law, however, is I think, fairly stated thus: It pays to be suspicious of general rules which look too wide; it pays to go slow in feeling certain that a wide rule has been laid down at all, or that, if seemingly laid down, it will be followed. And there is a fourth accepted canon: (4) *Everything, everything, everything, big or small, a judge may say in an opinion, is to be read with primary reference to the particular dispute, the particular question before him.* You are not to think that the words mean what they might if they stood alone. You are to have your eye on the case in hand,

and to learn how to interpret all that has been said merely as a reason for deciding that case that way. . .

CASE OR CONTROVERSY

Article III of the U.S. Constitution limits the power of the federal judiciary to "decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."[32] The federal judicial branch may settle conflicts that involve only actual "cases" and "controversies."[33] The determination of what constitutes a case and controversy is left to the judgment of the Supreme Court.

The U.S. courts do not sit to decide questions of law presented in a vacuum, but only to decide such questions as arise in a case or controversy.[34] The two terms can be used interchangeably for we are authoritatively told that a controversy, if distinguishable at all from a case, is distinguishable only in that it is a less comprehensive term and includes only suits of a civil nature.[35]

Whether it is a case or controversy—justiciable in the federal courts—was defined by Chief Justice Hughes in a classic and cryptic statement. He said: "A 'controversy' in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."[36]

Later, Chief Justice Warren said of the case or controversy requirement that "those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part, those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case and controversy doctrine."[37]

It should also be noted that the limitation to "case or controversy" is intimately related to the doctrine of judicial review. In *Marbury v. Madison,*[38] it was central to Marshall's argument that a court has power to declare a statute unconstitutional only as a consequence of the power of the court to decide a case properly before it. There may be unconstitutional statutes, but unless they are involved in a case properly susceptible of judicial determination, the courts have no power to pronounce that they are unconstitutional. The reluctance of courts to pass on constitutional issues, unless absolutely necessary, has led to a rigorous set of rules as to what constitutes a justiciable case or controversy.

THE AMERICAN COURT SYSTEM

In our federal form of government, it is necessary to have a dual judicial system: state and federal. Cases involving public schools may be litigated at either level, and although most actions involve nonfederal questions and are decided by state courts, recent years have brought on a substantial increase in the number of school case decisions handed down by federal courts.

State Courts

State constitutions generally prescribe the powers and the jurisdiction of the primary or main state courts. The legislature, through power granted in the constitution, provides for the specific operation of the constitutional courts, and it may create new and additional courts. State courts may be called upon to rule on the constitutionality of either state or federal laws, and their rulings are final unless there is a conflict with federal judicial precedents. State courts are the final interpreters of state constitutional law and state statutes.[39] The importance of state supreme courts in the judicial system is noted by Nowak and Rotunda:

> The supreme court of a state is truly the highest court in terms of this body of law; it is not a "lower court," even relating to the Supreme Court of the United States. It must follow the Supreme Court's ruling on the meaning of the Constitution of the United States or federal law, but it is free to interpret state laws or the state constitution in any way that does not violate principles of federal law.[40]

State courts can be classified into four categories: courts of last resort, intermediate appellate courts, courts of general jurisdiction, and courts of limited jurisdiction.

Courts of Last Resort

These courts are found at the top of the judicial hierarchy in each state and are established by the state constitution. In 43 states, the official name of this highest court is the Supreme Court. The exceptions are Maryland (Court of Appeals), Maine (Supreme Judicial Court sitting as Law Court), Massachusetts (Supreme Judicial Court), New York (Court of Appeals), and West Virginia (Supreme Court of Appeals). Oklahoma and Texas are unique because they have dual-headed systems that have, respectively, a Supreme Court and a Court of Criminal Appeals as the courts of last resort. Except for Texas and Oklahoma, where civil and criminal cases are separated, all of the courts of last resort have mandatory and discretionary jurisdiction for civil, criminal, and administrative cases. State statute prescribes where types of cases must be taken and which ones may be heard at the discretion of the highest court. A mandatory case refers to an "appeal of right," which the court must hear and decide on the merits.[41]

Discretionary jurisdiction of appellate courts refers to cases in which a party must file a petition to seek redress of the court. The court, then, must exercise its discretion in accepting or rejecting the case.[42]

Intermediate Appellate Courts

These courts have been established in 38 states to hear appeals from trial courts and administrative agencies as specified by state statute.[43] The role of these appellate courts is to review specific trial court proceedings to correct errors in the application of law and procedure[44] and to serve to extend and expand the law for the good of the community. Both of these generic purposes are held in common by both the intermediate appellate courts and the courts of last resort. The intermediate appellate courts hear both mandatory and discretionary cases. In the two-tier appellate state systems, a pattern exists that indicates that the highest court, the court of last resort, tends to control the docket by accepting more discretionary appeals than the intermediate appellate court.[45] Today, as appellate caseloads increase, there is a trend toward creation of new intermediate appellate courts. During the last 30 years, 25 states created two-tier systems establishing intermediate appellate courts.[46]

Courts of General Jurisdiction

These courts are major courts of record from which there exists a right of appeal to the intermediate appellate court or, in some cases, to the court of last resort. The jurisdiction of these courts covers all cases except those reserved for limited or special jurisdiction. Courts of general jurisdiction have court filings in broad areas of civil, criminal, juvenile, and traffic cases, and these are heard by judges in the state court systems throughout the country.[47] These courts hold a variety of names, including common circuit, chancery, district, superior, and juvenile.

Courts of Limited Jurisdiction

These courts are lower trial courts with specified jurisdiction, named municipal, district justice, justice of the peace, small claims, traffic, and probate. About three-fourths of all the cases in these courts deal with traffic offenses. Presently, there are over 13,000 courts of limited jurisdiction in the 50 states.

Federal Courts

Article III of the U.S. Constitution provides in part that: "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."[48] Pursuant to this provision, Congress has created a network of courts. Today, the U.S. federal court system includes district courts, circuit courts of appeals, special federal courts, and the Supreme Court.

Each state has at least one district court, and usually more than two; California, Texas, and New York have four each. Cases litigated before federal district courts may largely be classified into two types: (1) cases between citizens of different states and (2) cases involving litigation of federal statutes or the federal constitution. Cases before district courts are usually presided over by one judge. Decisions of district courts may be appealed to the federal circuit courts of appeals and, in some instances, directly to the U.S. Supreme Court. The 13 circuit courts of appeals include: 1 for the District of Columbia, 1 for all federal districts, and 11 for numbered circuits (see Figures 1.1, 1.2, and 1.3).

In addition, federal courts have been established by the Congress to handle special problems or to cover special jurisdictions. These courts are the courts of the District of Columbia, and the Court of Claims, the Tax Court, the Customs Courts, the Court of Patent Appeals, the Emergency Court of Appeals, and the appeals courts for the U.S. territories.

The U.S. Supreme Court is the highest court in the land, beyond which there is no redress. Cases may be brought before the Supreme Court by appeal, *writ of certiorari,* or through the original jurisdiction of the court. Most school cases that go to the Supreme Court are taken on *writs of certiorari,* certiorari being an original action whereby a case is removed from an inferior to a superior court for trial. Cases may be taken to the Supreme Court from state courts by *writ of certiorari* where a state statute or federal statute is questioned as to its validity under the federal Constitution or where any title, right, privilege, or immunity is claimed under the Constitution. Since most school law cases fall within this category, the *writ of certiorari* is the most common means of getting a case before the Supreme Court.

FIGURE 1.1 *The United States Court System*

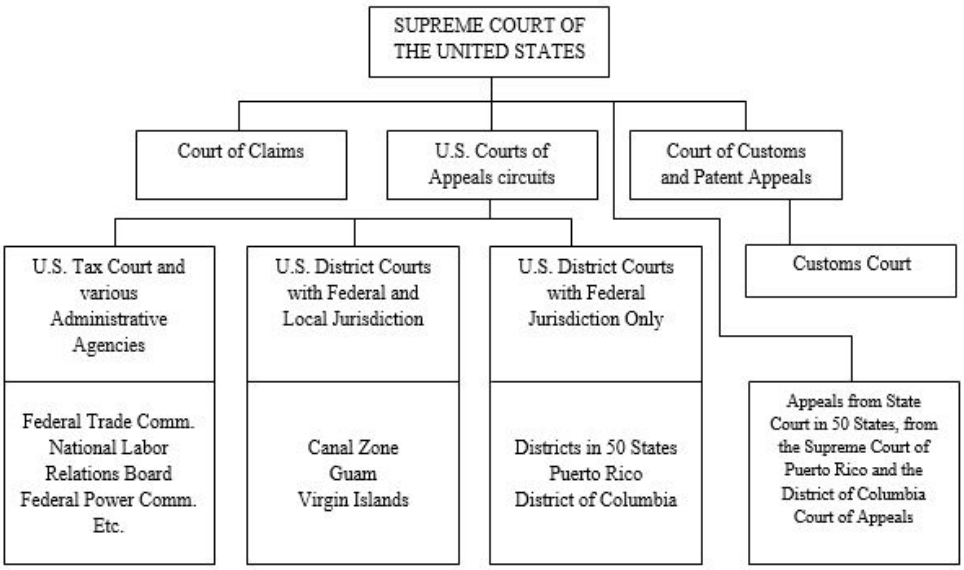


FIGURE 1.2 *General Structure of State Court*

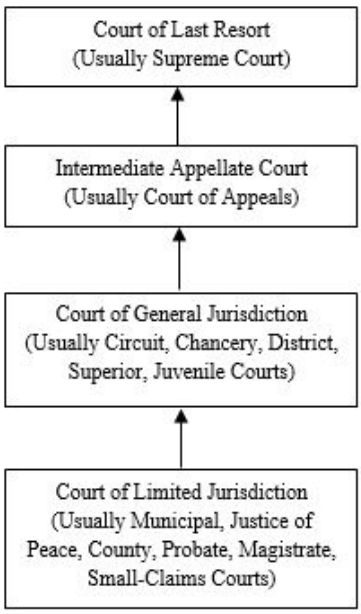
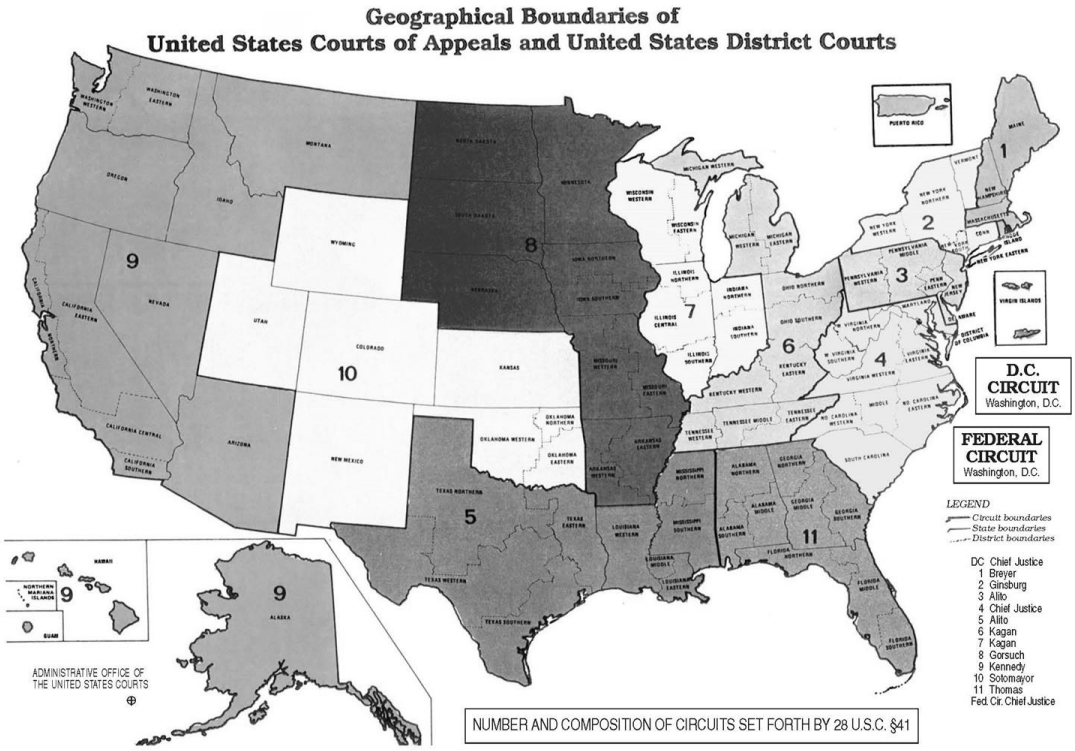


FIGURE 1.3 *The Thirteen Federal Judicial Circuits*



VERTICAL JUDICIAL FEDERALISM: THE LEGAL CONTEXT

Reprinted with permission: G. Alan Tarr and Mary Cornelia Aldis Porter, State Supreme Courts in State and Nation (New Haven and London: Yale University Press, 1988), pp. 5–13.

Federal law is extremely influential in structuring the relations between state supreme courts and federal courts. First of all, it defines the jurisdiction of the federal courts. For although Article III of the United States Constitution grants the federal judicial power to the national government, it does not create a separate system of federal courts (save for the U.S. Supreme Court), leaving Congress free to establish inferior federal courts to assign them the jurisdiction it deems appropriate.

Historically Congress has not vested in the courts it created the full range of judicial power that might be assigned to them. Prior to 1875, for example, the federal district courts did not have general original jurisdiction in cases raising federal questions; that is, cases arising under the Constitution, laws, and treaties of the United States. And although the federal judicial power extends to all civil cases between citizens of different states (the so-called diversity-of-citizenship jurisdiction), the Judiciary Act of 1789 permitted initiation of such suits in federal courts only when the amount in dispute exceeded a specified minimum amount in order to prevent citizens from being summoned long distances to defend small claims. Furthermore, in conferring diversity

jurisdiction on federal courts, Congress has also determined what restrictions shall be placed on the removal of a suit from a state court to a federal district court. Lastly, it is Congress alone that decides whether federal jurisdiction is to be exclusive, thereby precluding initiation of actions in state court, or concurrent. By determining what sorts of cases may be initiated in federal courts and what sorts may not be initiated in state courts, federal law does more than affect the business of federal and state trial courts. Since state supreme courts serve as appellate tribunals within state judicial systems, the mix of cases they receive is vitally affected by the mix of cases at the trial level. Perhaps not surprisingly, then, comparative analysis of the dockets of federal courts of appeals and state supreme courts reveals major differences in the sorts of issues each addresses. Generally speaking, state supreme courts are much more likely to address issues of state law, and federal courts to address issues of federal law, especially federal statutory law. In more substantive terms, state supreme courts issue many more rulings involving tort law, family law and estates, and real property than do federal courts of appeals. On the other hand, federal appellate courts confront public law issues much more frequently—indeed, they compose the single largest category of business for those courts.

Despite these differences, each system of courts may have occasion to rule on issues of both federal and state law. And since federal constitutional or statutory claims may be advanced in a state proceeding, a state court may need to resolve issues of both state and federal law in reaching its decisions. Three legal principles govern the exposition and interrelation of these two bodies of law. First is the supremacy of federal law. Under the Supremacy Clause of the United States Constitution, all inconsistencies between federal and state law are to be resolved in favor of the federal law. Indeed, the Constitution expressly mandates that "the Judges in every state" are bound by this principle and requires that they take an oath to support the Constitution. Second is the authority of each system of courts to expound its own body of law: state courts must not only give precedence to federal law over state law but also interpret that law in line with the current rulings of the U.S. Supreme Court. As the Mississippi Supreme Court put it in striking down a state law prohibiting the teaching of evolution in public schools, "In determining this question we are *constrained* to follow the decisions of the Supreme Court of the United States wherein that court has construed similar statutes involving the First Amendment to the Constitution of the United States."[49] Conversely, in interpreting state law, the federal courts are obliged to accept as authoritative the interpretation of the highest court of the state. Third is the so-called autonomy principle; that is, when a case raises issues of both federal and state law, the U.S. Supreme Court will not review a ruling grounded in state law unless the ruling is inconsistent with federal law. . . . [W]hen a state ruling rests on an "independent state ground," it is immune from review by the U.S. Supreme Court.

As this reference to review by the Supreme Court implies, Congress has established mechanisms to ensure the accuracy and faithfulness of state interpretations of federal law. Foremost among these is the provision for review by the Supreme Court of state rulings that present issues of federal constitutional or statutory law. The result, as the Supreme Court has . . . noted, is that "a state [court] may not impose greater restrictions [on state powers] as a matter of *federal constitutional law* when this court specially refrains from imposing them."[50] This augmentation of the Supreme Court's authority to supervise the development of federal constitutional law by state courts has become increasingly important in recent years. . . .[51]

Several observations can be made on the legal context of state supreme courts' relations with federal courts.

First, it is emphatically federal law rather than state law that structures these relationships.

Second, whereas the legal principles governing these relationships have not changed over time, the institutional arrangements and procedures designed to vindicate those principles clearly have, affecting both the division of responsibilities between state and federal courts and the avenues for interaction between them.

Third, although some changes in the applicable federal statutory law have resulted from a concern for more efficient or rational judicial administration, more frequently they have reflected substantive policy concerns, in particular, a dissatisfaction with or suspicion of rulings by state courts. Efforts during the 1980s to limit the power of federal courts to hear abortion and school prayer cases likewise reflected the injection of policy concerns into jurisdictional issues, although these proposals were, of course, premised on the assumption that state courts would be more likely to rule in line with their sponsors' wishes.[52]

Fourth, despite these recent proposals, the trend has been toward an increased availability of federal forums, which—when combined with decisional and statutory limitations on the powers of state courts—has affected the sorts of cases brought to state supreme courts and the finality of their rulings. Thus, congressional expansion of the types of issues that can be litigated in federal court, as exemplified by the extension of the courts' jurisdiction over federal questions in 1875, has in effect diverted some types of cases to federal forums that might otherwise have been brought to state supreme courts on review. And the expansion of *habeas corpus* has transformed federal review of state supreme courts' criminal justice rulings from occasional intervention to a more regularized and consistent oversight.

PROCESS OF GOING TO COURT

Cases referred to in this book are opinions as rendered by courts of appellate jurisdiction for civil actions in both state and federal courts. In each instance an action was brought in a lower court of *original jurisdiction* and was appealed by the loser to a higher court for a more favorable determination. The party that appeals is the *appellant* and the respondent is the *appellee*. Thus, in the title or style of the case on appeal the first named party, as in *Jones v. School District,* is the appellant, the loser in the lower court who has appealed. The school district is the appellee. However, we should note that in some states, such as California, for convenience of recordkeeping, the party that originally files the complaint remains the first named party on appeal. In this book, we read what the appellate courts have written in rendering a judgment in a particular dispute. These appeals courts are courts of record, where the record of the lower court is brought forth and argued by the attorneys for each side.

Every case in this book began at the lower trial court at either the federal or state level where the aggrieved party brought an action, a trial was conducted, and a judgment rendered on the evidence presented. It may be helpful here to very briefly review how a case gets started, the procedure, the terminology, the pretrial process, and a bit about the trial itself. School law cases nearly always involve civil law rather than criminal law, so the process discussed here is what transpires in civil cases.

FIGURE 1.4 *Difference between Civil and Criminal Law*

	Civil Law	**Criminal Law**
Initiating and Action	Party (plaintiff) Sues Another Individual or Corporation	Government Prosecutes Offender
Types of Offenses	Tort, Contract, Property, Trusts, Assault and Battery, Constitutional and Statutory Interpretations, etc.	Felonies or Misdemeanors, Treason, Theft, Drugs, Murders, Rape, Assault and Battery, Traffic Violations, etc.
Purpose	Compensation Deterrence	Public Peace and Quiet Punishment

	Civil Law	Criminal Law
		Deterrence
		Rehabilitation
Burden of Proof	Preponderance of Evidence	Beyond a Reasonable Doubt
Redress	Money Damages	Capital Punishment
	Equitable Remedies	Prison
		Fines

Beginning the Action

Two types of actions exist: civil and criminal. Civil actions generally occur where an injured party seeks to be compensated for monetary damages, or in equity, where a party seeks an injunction (to prevent an action) or mandamus (to require an action). Civil actions typically involve a wrong against an individual, called a *tort*, where the burden of proof standard that must be met by the plaintiff is "a preponderance of the evidence." Criminal actions, which are much less frequent in school law, occur where the police arrest the offender and the state prosecutes for violation of a criminal statute. Some criminal cases arise when a teacher has been charged with criminal assault and battery, public funds are not properly accounted for, or sexual misconduct. Drugs in today's schools are also a major criminal issue. The burden of proof standard in a criminal case is "beyond a reasonable doubt."

At the outset of a civil action, a party is aggrieved and believes that resort to the law is necessary to remedy the situation. This person first contacts a lawyer, establishes a lawyer-client relationship, and a determination is made as to whether going to court is actually necessary. If a decision is made to proceed to court, the plaintiff's attorney must begin by choosing the proper court in which to sue. The attorney must consider three limitations in choosing a court. First, the court must have appropriate "subject-matter jurisdiction" over the action. Normally, this will be the court of *general jurisdiction*, not a special court of *limited jurisdiction* such as a traffic court, a domestic relations court, or the like. Second, a court of proper venue must be chosen. *Venue* refers to geographic location. State statutes define venue in state courts, and federal statutes define venue in federal courts. Third, a court must be chosen that can obtain "personal jurisdiction" over the defendant. *Personal jurisdiction* is the power of the court to impose a remedy upon the defendant. For example, if a school board is the defendant and statute places it in the jurisdiction of a particular court of general jurisdiction other than where the school board is located, then the plaintiff's case may be stymied at the outset.

After the plaintiff and attorney decide to begin a lawsuit and the appropriate court has been selected, the suit may be commenced formally. The party who initiates an action by filing a complaint is called the *plaintiff* (sometimes called the petitioner). Once the complaint is filed with the appropriate court, a copy (together with a summons) is served on the party named as the *defendant*. The defendant then has a certain number of days, usually 30, within which he must file an answer to the complaint. Failure of the defendant to appear by filing an answer may result in a default judgment. Federal statutes and statutes of many states require the commencement of an action by filing a complaint. The *complaint* sets forth the allegations that the plaintiff believes justify a judgment against the defendant. Filing of the complaint does not automatically notify the defendant of the action; therefore, the plaintiff must then proceed with a *service of process* on the defendant.

Pleading

The defendant in an action must be notified by service of process and be given information about the nature of the claim. The information is conveyed by a *complaint*, *declaration,* or *petition*. This document is the first pleading in an action. Under federal rules and in most states, the *complaint* requires the plaintiff to give sufficient factual information to sustain a cause of action and to permit the case to be pled with the necessary specificity.

After receiving the complaint and being served with summons, the defendant can respond by denial, introducing an affirmative defense, by seeking independent relief from the plaintiff, or any combination of these responses. Briefly, there are several types of denials, the three most common being a general denial, a specific denial of certain allegations in the complaint, and qualified denials that refer to particular averments within allegations.

An affirmative defense may be couched in statutes of limitations (time has expired), *res judicata* (the matter has already been decided), or assumption of risk (in a tort action, plaintiff assumed the risk of injury). A third response by a defendant may be a counterclaim against the plaintiff. Here the defendant seeks recovery against the plaintiff in a cross-complaint.

Discovery

Before trial, both parties may resort to *discovery* as a means of identifying and focusing on the issues in question as revealed by the pleadings. Discovery can record and preserve evidence of witnesses who may not be available for trial, reveal additional facts, and aid in formulating specific issues. Discovery has five basic types. First, a *deposition* is the testimony of a party or witness taken before trial and recorded. Depositions may be oral or written, and are conducted by the opposing attorneys who are responsible for following the procedural rules of a particular state or federal court. A second type of discovery procedure is for the parties to pose written *interrogatories* to each other, to which each party must respond with written answers. Discovery can also involve a procedure known as a *request for the production of documents and things*. Similar to interrogatories, this procedure permits parties to request in writing that the other side provide copies of documents, information, and data that may be used in the trial. A fourth type of discovery procedure is a *request for admission* that may be utilized by each party asking that the other party admit certain matters of fact or application of law to the facts. A fifth frequently used discovery procedure is a request for a *physical or mental examination* of one of the parties to the suit. The requesting party must show "good cause" for this procedure, but, of course, such cause may be readily apparent, particularly in personal injury cases where a defendant may seek to discover if there is an actual injury to a plaintiff and if so, the nature and extent of the injury.

Disposition Without Trial

The court may dispose of a suit before the trial in five basic ways: (1) the judge may enter a default judgment against the defendant if the defendant does not respond to the plaintiff's summons and complaint; (2) the judge may make a *judgment on the pleadings* if there is sufficient information in the plaintiff's complaint and the defendant's response; (3) either party may file a *motion for summary judgment* if there is no dispute as to the facts involved, making a trial unnecessary to establish the facts at issue, and the court then renders a judgment based on this motion and any response; (4) the plaintiff may decide not to pursue the action, in which case he can move for a *voluntary dismissal* (an *involuntary dismissal* also can be obtained against the plaintiff if he fails to prosecute the action

in a timely manner); and (5) a *settlement* is reached out of court by the parties (most civil actions can be settled out of court).

Trial

The case may be tried before a judge or a jury. If tried before a jury, the first matter of business is to select the members of the jury. After the jury is impaneled, the plaintiff's attorney makes an *opening statement*. The defendant's attorney can make an opening statement or reserve it until such time as the defendant's case is put before the court. The trial then proceeds; the plaintiff bears the *burden of proof*.

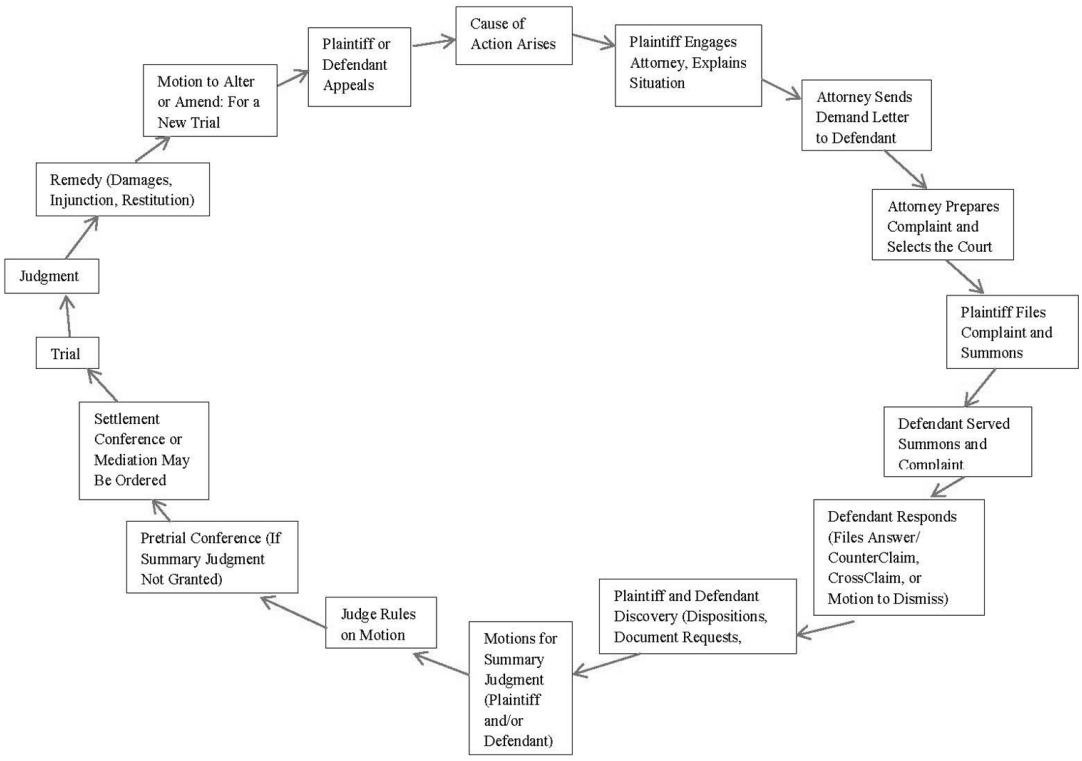
Judgment and Remedy

A *judgment* is rendered as the official decision of the court for or against the plaintiff. Three common types of remedies include: (1) *damages*, a monetary award to the prevailing party; (2) *restitution*, which seeks to prevent the defendant from benefiting from the plaintiff's loss; and (3) *coercive remedy*, which enjoins a party through the issuance of an *injunction*—a court order commanding that the losing party either do or cease doing something.

Appeal

The party that loses may appeal to a higher court. Most states have at least two levels of courts for civil appeals, as the charts in this chapter indicate. In the federal system, trials begin at the federal district court level and may be appealed to the respective federal appellate courts.

FIGURE 1.5 *Outline of Civil Procedure Process for Going to Court*



FINDING THE LAW

The sources of the law emanate from the three branches of government: statutes from the legislative branch, administrative regulations from the executive branch, and court opinions or case law from the judicial branch. All three are subject to constitutions that provide the basic law of both state and federal governments.

The law of higher education presented in this book is primarily case law rendered by appellate courts that primarily interpret the constitutional validity of statutes as enacted by the legislative branch and rules and regulations of administrative agencies. Public colleges and universities are, by definition, in the executive branch of government. Decisions of both federal and state courts are located in case reporters housed in law libraries. In the new age of technology, court decisions can be accessed on the Internet through legal websites or official court websites. The primary sources for computerized access are *Westlaw* and *LexisNexis*.

Each case is reported on a standard format that contains the citation, or legal reference, and the full text of the case as rendered by the court that handed down the decision.

Citations

The court's opinion, as set forth in a case and officially reported, is the primary source of law for purposes of research and citation. The citation contains the *case name*, parties, somebody versus somebody, and the case reporter name, for example, Supreme Court Reporter or Federal Reporter (circuit court decisions or reporters for state appellate courts). An example of the citation of a *state* court decision can be seen in the chart below.

Case Name	Volume Number	State Reporter	First Page
Virginia Education Association v. Davison	294	Va.	109

Case Name	Volume Number	Regional Reporter and Series	First Page	Year of Decision
Virginia Education Association v. Davison	803	S.E.2d.	320	(2017)

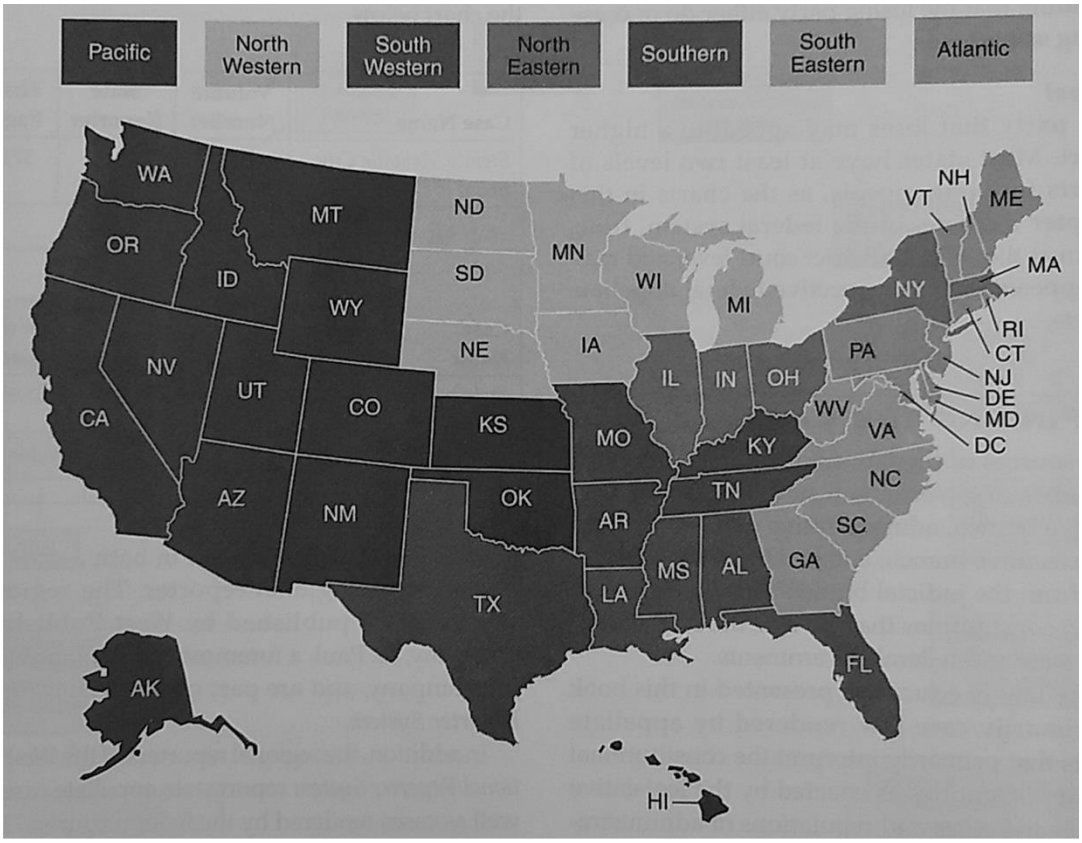
The same case is reported in both a state reporter and a regional reporter. The regional reporters are published by Thomson Reuters, St. Paul, a foremost law book publishing company, and are part of the *West National Reporter System*.

In addition, the regional reporters of the *West National Reporter System* report state appellate cases as well as cases rendered by the federal courts. These include the *Supreme Court Reporter* for decisions of the U.S. Supreme Court, the *Federal Reporter* for decisions of the U.S. Circuit Courts of Appeals, and the *Federal Supplement* for decisions of the federal district courts in each of the federal circuits. In addition, the U.S. Supreme Court publishes its own opinions in the *United States Reports*, and Lawyer's Cooperative publishes the *Lawyer's Edition*. A U.S. Supreme Court case usually includes all three case reporter citations. For example: *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972).

Some cases may be cited with the case name; a case file number, such as No. 108625; and with a *Westlaw* (*WL*) computerized reporter number of 2007 (year) and a long number such as 2046825, indicating the first page in the *Westlaw* identification. Too, citations both federal and state, hard copy or computerized, will show the

designation of the court. A decision by the U.S. Court of Appeals will indicate the number of the federal circuit. For example, the Seventh Circuit case, *Trautvetter v. Quick*, 916 F.2d 1140 (7th Cir., 1990).

FIGURE 1.6 *Map of National Reporter System*



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Below are the names of the reporters in the *West National Reporter System* and the states encompassed by each reporter.

P.	**Pacific Reporter** Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Montana, Nevada, New Mexico, Oklahoma, Oregon, Utah, Washington, Wyoming
A.	**Atlantic Reporter** Connecticut, Delaware, District of Columbia, Maine, Maryland, New Hampshire, New Jersey, Pennsylvania, Rhode Island, Vermont
N.E.	**Northeastern Reporter** Illinois, Indiana, Massachusetts, New York, Ohio

N.W.	**Northwestern Reporter** Iowa, Michigan, Minnesota, Nebraska, North Dakota, South Dakota, Wisconsin
So.	**Southern Reporter** Alabama, Florida, Louisiana, Mississippi
S.E.	**Southeastern Reporter** Georgia, North Carolina, South Carolina, Virginia, West Virginia
S.W.	**Southwestern Reporter** Arkansas, Kentucky, Missouri, Tennessee, Texas
F.	**Federal Reporter** The 13 federal judicial circuits courts of appeals decisions.
F.Supp.	**Federal Supplement** The 13 federal judicial circuits district court decisions. See: The Judicial System, p. 699, for specific state circuits.
Fed.Appx.	**Federal Appendix** Contains unpublished decisions of the U.S. Circuit Courts of Appeal.
U.S.	**United States Reports** U.S. Supreme Court Decisions
S.Ct.	**Supreme Court Reporter** U.S. Supreme Court Decisions
L.Ed.	**Lawyers' Edition** U.S. Supreme Court Decisions

Sources of Legal Material

Commencing research on an education law topic in a law library involves a number of sources, including but not limited to the following:

a) Legal Encyclopedias and Restatements

b) Dictionaries

c) Law Reviews (or Journals)

d) Books on Law

e) Digests

Legal Encyclopedias and Restatements. Legal encyclopedias are helpful to a researcher in framing a topic and delimiting the scope of the research. Two major national legal encyclopedias include: *Corpus Juris Secundum* (*C.J.S.*), and the second legal encyclopedia, *American Jurisprudence.2d* (Second). Both encyclopedias are designated as "second" because their original first editions have now been superseded by a completely new set of volumes. The encyclopedias are in alphabetical order with the law of higher education found under the heading "Colleges

and Universities." Law for primary and secondary education is found under the heading "Schools and School Districts."

C.J.S. discusses the law under the relevant topic and cites case law very extensively with annotations in footnotes. The volumes are updated with pocket supplements. *C.J.S.* has a multivolume general index that is easily understood by both lawyers and nonlawyers.

Am.Jur.2d presents topics a bit more clearly than *C.J.S.* in that it cites the prevailing precedents in a more direct manner and dispenses with discussions of less relevant case law. *Am.Jur.2d* is also kept up to date with pocket supplements. The major components of *Am.Jur.* are *American Law Reports* (*A.L.R.*), *American Law Reports Federal* (*ALR.Fed.*), *Am.Jur.Forms*, *Am.Jur.Trials*, and *Am.Jur.Proof of Facts and Federal Procedure. Am.Jur.2d* also has a volume called the *Am.Jur. Deskbook* that compiles facts and figures that may be relevant to legal researchers.

Several states also have state-specific legal encyclopedias that can be accessed in hard copy or electronically via *Westlaw* or *LexisNexis*.

Restatements. Restatements are authored and published by The American Law Institute (ALI), associated with the American Bar Association (ABA). The American Law Institute was created in 1923 by judges, lawyers, and professors of law. The *Restatements* were felt to be necessary in order to better enunciate the prevailing precedents of the myriad judicial opinions on subjects of common law such as torts and contracts. For example, the American Law Institute first published the original *Restatement of Torts* from 1934 to 1939. The *Restatement (Second) of Torts* is a revision of the original version. In 1992, the Institute undertook a *Restatement (Third) of Torts*, which updates topics within tort law.[53]

Dictionaries. Legal dictionaries are much like ordinary dictionaries such as *Webster*'s, arranged alphabetically by legal words and phrases with definitions for each. The definitions cite case law as authority for the meaning of terms. Several legal dictionaries are available; however, the best known and most widely used are *Black's Law Dictionary* and *Ballentine's Law Dictionary*.

Also, the multivolume set titled *Words and Phrases*, published by the West Group, is a comprehensive, richly annotated source that provides a valuable insight for research. Entries are alphabetical and the citations cover all jurisdictions and identify each court that defines a term.[54] Too, the online full-text databases of *Westlaw* and *LexisNexis* serve as very helpful sources of definitions and reference.

Law Reviews and Journals. These sources are called either *law reviews* or *journals* and are primarily published by law schools with student editors. The publications have names that identify their academic institutions, such as *University of Illinois Law Review* and *Washington University Law Review* or the *University of Kentucky Law Journal*. Articles in law reviews are profusely footnoted and technically written, as a kind of certification of academic quality. Law review articles are not primary sources of law, but may be cited as persuasive legal authority by courts at all levels. There is, of course, a pecking order of prestige among the law reviews, with the publications at *Harvard, Stanford, Yale, Cornell, Michigan, Minnesota*, and *Virginia* always near the top.

Articles and comments are indexed by topic and the author's name in the *Index to Legal Periodicals and Books*, published by H. W. Wilson Company. This *Index* identifies articles as far back as 1908. H. W. Wilson Company also publishes *WilsonDisk*, a disc version of the *Index*. *The Index to Legal Periodicals* is also found online with *Westlaw* and *LexisNexis*.

Another indexed source is the *Current Law Index* (*CLI*) published by Information Access Company (IAC). This source includes books, newspapers, and periodicals under headings developed by the U.S. Library of

Congress. The online version of the *Current Law Index* is titled the *Legal Resources Index* and is accessible via *Westlaw* and *LexisNexis*.

Books. Of course, books, more specifically identified in law as *hornbooks* or *casebooks* or a combination of the two, are valuable sources of information for research. In addition, there are shorter treatments of law called *Nutshells* published by West Publishing Company as well as *Outlines* of the law. Examples of authoritative hornbooks that are valuable for studying constitutional law pertaining to higher education are *Constitutional Law*, 6th ed., by John E. Nowak and Ronald D. Rotunda, Hornbook Series, WestGroup and *Constitutional Law: Principles and Policies*, by Erwin Chemerinsky, published by Aspen Law and Business.

Nutshells, published by West Publishing Company, are an excellent source of prevailing law regarding many topics that may not be the principal focus of hornbooks or casebooks. For example, the Nutshell titled, *The Law of Schools, Teachers and Students,* 4th ed., by Kern Alexander and M. David Alexander, published by West Publishing Company, covers key aspects of primary and secondary law.

Outlines. Summaries of the law are written specifically for courses in law schools and are utilized by students to aid them in their studies. The most commonly used are *Gilbert*'s, *Emmanuel*'s, and *Glannon*'s which summarize various legal subjects in a concise and complete fashion.

Digests. West Publishing Company, the developer of the *National Reporter System*, has created what is known as the *digest system*. The digest system is made possible by a monumental amount of legal analysis. The huge editorial staff at West reads each and every court decision, identifies each of the legal issues, and assigns to each a "headnote." The *headnote* is a term of art that is the substantive part of a classification scheme that assigns and "neatly pigeonholes"[55] each point of law to a "key number." The key number tracks the particular point of law by topic and subtopic from the headnotes of the case in the *National Reporter System* to the "Key Number Digest," which is a vast compilation of keyed headnotes that are set out by topic and subtopic, in all the West's digests. The key number identifies the same headnote from the original case whether the Digest is for a regional reporter, such as the Southern Reporter 2d, or for a particular state's Digest. In other words, a researcher can follow a particular key number and identify all judicial opinions throughout the 50 states that have included the legal issue of that headnote and key number.

Online Legal Research. The two most complete electronic databases for legal research are *Westlaw* and *LexisNexis*. *Westlaw* is owned by the West Group, and *LexisNexis* is owned by Reed Elsevier. Both services are complete sources for legal research providing all federal and state appellate court cases, federal and state statutes, legal periodicals, indices of legal periodicals, federal and state administrative rules and regulations, and more.

Importantly, both systems have online citing sources that update case law and verify the validity of precedents. The *Keycite*, under *Westlaw*, flags judicial decisions, enabling the researcher to check the status of a case. A red flag warns that the case is no longer good law. A yellow flag indicates that the case, or points of law within a case, has been given negative treatment by other courts. *LexisNexis* also has a similar system, known as Shepard's, which gives the history of each case and informs the researcher of the status of the case. Both *Westlaw* and *LexisNexis* cite references and research of the *American Law Reports* (ALR), along with *Restatements*, selected law reviews, and various other legal treatises that may have relevance for a particular case.

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