CHAPTER 1

INTRODUCTION TO THE U.S. LEGAL SYSTEM

This chapter consists of secondary materials from scholars, judges, and other knowledgeable commentators. It addresses seven topics: the common law and civil law systems; the role of lawyers in the U.S.; the federal and state court systems; trial by jury; judicial decision-making; the U.S. Supreme Court; and U.S. legal education. These topics are the building blocks for the seven chapters that follow.

A. THE COMMON LAW SYSTEM

The U.S. legal system is classified as a “common law” system. The following excerpt addresses the differences between the common law and civil law systems.

DR. VIVIENNE O’CONNOR, COMMON LAW AND CIVIL LAW TRADITIONS
International Network to Promote the Rule of Law, 2012

II. Definitions

When we talk about civil law countries or common law countries as groups, we are referring to the fact that each group of countries shares a “distinctive heritage” or a “legal tradition.” “Legal tradition” refers “to a set of deep rooted, historically conditioned attitudes about the nature of law, about the role of law in the society . . . about the proper organization and operation of a legal system, and about the way the law is or should be made, applied, studied, perfected, and taught.” Legal tradition needs to be distinguished from a “legal system,” which “is an operating set of legal institutions, procedures and rules.” France and Germany share the same legal tradition (i.e., civil law), as do Canada and Sierra Leone (i.e., common law); however, France and Germany, and Canada and Sierra Leone, have variations in how their individual legal systems operate.

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III. History

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A. The Civil Law Tradition

The civil law tradition is the oldest and most widely distributed legal system ***, dating back to 450 B.C. ***. Even though it is the older of the two systems, the civil law took exponentially longer to develop than the common law ***.

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Four hundred and fifty B.C. is designated as the beginning of the development of the civil law because this is the year of the Twelve Tablets, the first written law and rudimentary system of dispute resolution in Ancient Rome. The next significant period in the development of the civil law comes in the 6th century A.D., when the Emperor Justinian of Constantinople commissioned the Corpus Juris Civile to be written, which would codify the Roman law on family, inheritance, property, and contracts, among other areas of law. After the fall of the Roman Empire, codified Roman law was no longer in use. However, during the Enlightenment Period in Europe (11th–15th Centuries) after the so-called “Dark Ages,” the Corpus Juris Civile was rediscovered. During this time the first modern European university was founded in Bologna, Italy. Students came to study the civil law from all over Europe and brought this influence back to their own countries.

As well as studying Roman law, scholars at Bologna also studied Cannon Law, developed by the church for its governance and to regulate the rights and obligations of its followers. This coupled with Roman law formed the basis of the laws applied in Europe at this time. Also influential in developing a common legal framework in Europe was commercial law that also developed in Italy and that regulated trade throughout Europe.

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During the Enlightenment period (11th–15th centuries), Continental European countries gradually began moving from customary norms and practices as the basis for solving disputes to formal, written laws. In most cases, national customs were integrated into the civil law sources, which partly accounts for the variations in how civil law legal systems operate in practice. “France’s codification of private law, under Napoleon in 1804, was the world’s first national, systematic and rational codification of law... The Civil Code of Germany of 1900, advanced systematic legal thought still further.” France’s codes were drafted in a way so as to be accessible to ordinary citizens, an ideal replicated today in many civil law countries. Germany’s, on the other hand, [was] more complex. It emphasizes legal precision and represented an ideal whereby a law could be drafted so as to cover every eventuality in a way that was rational, logical and coherent.

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The civil law tradition spread well beyond Europe. As European countries colonized countries in South America, Africa, the Middle East and Asia, they brought their legal systems with them.

B. The Common Law Tradition

The development of common law has been described as a “historical accident,” arising from the conquest of England by the Normans in 1066 A.D. William the Conqueror, in an effort to establish a Norman legal order in a foreign country, deputized a “corps of loyal adjudicators” (or judges) to resolve disputes at the local level and essentially make law. In more serious cases, there was a referral system to the King for adjudication. Juries were also introduced, which represented the local interests of the ordinary person to decide the case. This strategy kept the populace happy and less likely to revolt against the occupying power. Because the jury was comprised of mostly illiterate people, the proceedings were oral, the implications of which can still be seen today in the modern common law system.

In 1701, the Act of Settlement created an independent judiciary. After this, Blackstone, an eminent legal scholar, published his *Commentaries on the Laws of England*, which were carried to colonies and also influenced the development of American law.

IV. Sources of Law

A. The Civil Law Tradition

Parliamentary legislation is the principal source of law in civil law countries. This legislation includes codes, separate statutes and ancillary legislation. Within civil law countries, there is a hierarchy of laws. At the top of the hierarchy is the Constitution, followed by codes and other legislation (emanating from the executive or parliamentary branches depending upon the legal system), then executive decrees, then regulations, followed by local ordinances. Custom, as a rare source of law, sits at the bottom of the pyramid and would rarely be relied upon in court.

This reliance on codes and laws is a central characteristic of the civil law. At the heart of the civil law lies a belief in codification as a means to ensure a rational, logical, and systematic approach to law. Many civil law proponents believe that a code can address all circumstances that might need legal regulation, without the need for judicial interpretation and without the need for judges to refer to case law. Judges generally interpret codes and laws very strictly; they do not read existing legal provisions expansively to create new interpretations or new law.

International treaties and conventions also are sources of law in civil law countries. Most civil law countries are “monist” meaning that when the country ratifies a treaty, it automatically becomes part of domestic law. This means that a judge can automatically apply it and a party in court...
can rely on international law in proceedings. In some countries, the judge can declare a national law or provision to be invalid if it conflicts with an international treaty or convention that the country has ratified.

Traditionally, case law did not play any role in civil law countries as a source of law. The judge would decide each case based on codes or legislation and would not look to another case for guidance even if the facts were identical. This was premised on the belief that the code contains all the information necessary to decide upon the case. It was also premised on the strong belief that the legislature makes the law, not the judges.

More recently, the role of case law has been changing. Settled lines of cases are now considered to have authority and are accepted due to the fact that they ensure consistency in the application of the law.

While case law is eschewed in many cases, “doctrine” which is the writing of prominent legal scholars, is considered an important authority in civil law countries. The origins of this may date back to the “commentators,” a group of scholars in Ancient Rome based in Bologna at the new University who produced authoritative statements on the interpretation of the law. Doctrine is incredibly influential when the law is unsettled. Some areas of law will have one legal scholar who is the national authority and whose opinion is given great weight by judges.

Each code in a civil law country will likely have a set of commentaries that gives expression to the doctrine (and can sometimes summarize settled case law in a particular area of law). For example the criminal code has a set of commentaries that are drafted by the leading scholar(s) in the country on criminal law.

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B. The Common Law Tradition

The focus in the common law was originally on resolving the disputes at hand rather than creating legal principles that would be articulated in a generally applicable code. Common law developed historically on a case-by-case basis from the bottom-up (namely from judges), rather than the civil law that has always been developed top-down by the legislature.

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Many common law lawyers will point with pride to the flexibility and creativity of their system. However, civil law lawyers critique what they perceive to be the unsystematic nature of the common law.

Given the central role of the judge in the common law tradition, it may come as no surprise that judicial opinions were historically the primary source of law. In contrast to the civil law tradition, where judges are tasked with applying the law only, common law judges were tasked with making the law. The development of case law, which was the authoritative source
of law in the common law, led to the creation of precedents and a system called stare decisis in order to ensure certainty, fairness and consistency in the system.

Historically, laws or statutes were viewed as a secondary source of law, their role being to correct judicially-created rules. Today, legislation is far more central in common law countries. In the twentieth and twenty-first centuries, the common law underwent a crisis due to the modern trend to use the law to create new social order: the case-by-case method is not well suited to the idea of bringing about rapid and extensive social change.

Consequently, there is an increasing trend towards codification within the common law tradition, although certain distinctions should be made between a code in a common law country and a code in a civil law country. In a civil law country, the rationale for a code is to create a comprehensive legal regime and general principles on a particular area of law. In the common law, however, codification may not comprehensively address an area of law. It may not even abolish a prior law. In some cases, codes will merely incorporate prior case law, address one particular social issue or bring uniformity to an area of law.

In common law countries, a practitioner should also look for standard operating procedures (SOPs) as a source of law. SOPs are developed, with the same aim as regulations: to provide more concrete guidance to public servants and justice actors. In common law countries, SOPs may reflect both statutory law and case law, translating both into operational guidance for police, other justice actors and public servants.

The final source of law in common law countries is international law, namely treaties and conventions. In the common law tradition, international law is seen as a separate body of law that only begins to apply domestically when it is converted into domestic legislation by the legislature. Given the reliance on case law in the common law tradition, lawyers can invoke international treaties and case laws in court as so-called persuasive precedent but treaty provisions are not binding on the court, until they have been “domesticated” into national legislation.

V. The Court System

A. The Civil Law Tradition

Civil law countries make a theoretical and practical distinction between public law and private law—that does not hold the same importance in common law countries. What difference does this distinction make in practice? It is most evident when looking at the court structure in countries following the civil law tradition. The courts have divided according to public law cases and private law cases. Courts in civil law countries are more specialized than in the common law. There are multiple sets of courts and each has its own jurisdiction, hierarchy, judiciary and procedure. For example, in addition to ordinary courts that deal with
private law matters, there may be Labor Courts, Social Security Courts, Commercial Courts, Administrative Courts and Agriculture Courts addressing public law cases.

The general rule is that private law matters are dealt with by “ordinary courts.” One anomaly is that criminal law is also dealt with by ordinary courts, even though it rightly belongs in public law. Decisions of the ordinary courts can be appealed to Appellate Courts. At the head of the ordinary courts (and above Appellate Courts) sits the Court of Cassation. This court decides only questions of law and the interpretation of statutes. Its purpose is to ensure uniformity in the law. It can either affirm the ruling of the Appellate Court or declare the ruling to be incorrect and refer the case back to another court of appeal for reconsideration. The latter is termed “casser” or “break,” and this is where the name Court of Cassation came from.

Public law matters, namely, administrative law and constitutional law, have their own separate jurisdictions.

Traditionally, in the civil law tradition, there was no supreme administrative court that would decide upon administrative and constitutional law. Instead, like in France today, the Council of State—a government body—acts as the administrative court of last resort.

The court of last resort for constitutional law, established to review whether a law is constitutional, has increasingly become the Constitutional Court. Constitutional Courts exist in [a number of] countries. In other countries there exists a Constitutional Council—a government body like the Council of State—to rule on the constitutionality of legislation. The reason behind the reliance on councils rather than courts is the traditional civil law view that judges cannot quash legislation as this would infringe the separation of powers doctrine (under which judges apply the law and the legislature makes, amends, or repeals the law).

B. The Common Law Tradition

Common law courts are unified, meaning that there is generally one Appeals Court and one Supreme Court in which any case may be subject to final scrutiny. The jurisdiction of inferior courts, which deal with criminal and civil matters, is limited geographically and according to the nature of the subject-matter. At the bottom of the court system may be Magistrate Courts, which originate and still exist today in the United Kingdom. The exact jurisdiction of these courts will vary from country to country. There will also be variance if the country is federal, in which case the rule of law practitioner will need to determine the jurisdiction of federal (national) and state (sub-national) courts.
Of late, there has been a move towards developing specialized courts (also known as “tribunals”) in common law countries such as Employment Courts, Tax Courts, Family Law Courts, and so forth. In contrast to civil law countries, each of these specialized courts will not have its own Supreme Court.

VI. [Judges and Juries]

A. The Civil Law Tradition

Sitting Judge

In addition to investigating judges [who have “broad powers” to investigate cases], there are also sitting judges who hear the case in court. The sitting judge may sit alone for minor cases but, for more serious cases, will sit in a panel of judges (normally, three judges). Because of the different nature of the trial in the civil law system, the judge has a very different role to a common law judge. Rather than being an impartial referee, like a common law judge, the civil law judge is a central part of the trial. The sitting judge is the person who questions witnesses (although oral testimony is not required) and experts, and calls evidence.

Jury and Lay Judges

Juries are more typical in common law countries, but jury trials now exist in many civil law countries, though this depends on the jurisdiction and type of case at hand. As in the common law, the role of the jury is to determine the guilt or innocence of the accused based on the facts presented. In some civil law countries, lay judges are coupled with professional judges to form a type of “mixed jury.” Some systems have one professional judge and two lay judges while others have three professional judges and six lay judges, the latter forming a mini-lay jury.

B. The Common Law Tradition

Judge

The judge in the common law tradition is a much more powerful figure than in the civil law. First and foremost, judges were traditionally vested with the power to make law. Today, they still have this same power but are also bound by statutes that cover many areas of the law. In interpreting statutes, judges in the common law tradition may read provisions much more expansively than judges in the civil law. This has
led to novel interpretations of existing legal provisions and the broadening of the law in certain areas. At trial, the judge acts like a referee with the two parties taking center-stage.

The Jury

Juries have historically played a major role in the common law system. Back in the 12th century when the common law was evolving, juries were responsible for determining cases in their locality. The judge is responsible for interpreting the law and instructing the jury. The role of the jury is to make a finding of fact. The exact number, composition, and selection of the jury vary from country-to-country.

VII. Legal Education and Training

A. The Civil Law Tradition

The education of law students in the civil law tradition is through an undergraduate university degree. The primary reference materials for civil law student are codes and the commentaries to these codes. Case law does not play a major role in legal education. On day one, students begin at Article 1 of the code and the professor brings them through the code systematically. Rather than engaging in an interactive method of teaching, professors in the civil law lecture to a class that is usually very large.

After students complete their undergraduate education, they then make a choice as to what legal profession to pursue. Very early on, graduates must choose whether to become a government lawyer, public prosecutor, advocate, notary, judge or scholar. Lawyers do not often change careers.

If a law graduate wants to become a judge, he or she must attend a special training school for judges, pass exams and be appointed (often by a judicial council). In the alternative in some civil law countries, the judge must undertake a form of apprenticeship coupled with ongoing training.

In some civil law countries, there is an office, or pool, of government lawyers to which a law graduate must apply should he or she want to take on this role. In other civil law countries, the young lawyer must apply to a particular department or agency.

To become an advocate, the law graduate must undergo a period of apprenticeship in the office of an experienced lawyer. To become a notary, a law graduate must also serve an apprenticeship in a notary’s office and take a national exam.

The final career path—becoming an academic—is extremely challenging given the high stature of this position. Unlike in the United
States, where everyone who teaches at a law school is given the title of Professor, in many civil law countries, a professor is a person with a Ph.D who has been awarded a professorial chair. ***

B. The Common Law Tradition

In some common law countries ***, a law degree is an undergraduate degree. In others, like the United States, a law degree is a graduate degree ***.

University classes in the common law countries are usually highly interactive. Rather than professors lecturing to the class, they generally use the “Socratic method” of teaching, where the Professor asks students a series of questions and elicits responses (as well as pointing out inconsistencies in the responses or the logic of the student responses) so as to get the student to think critically.

In the common law educational system, a key learning objective is to demonstrate to students that there can be more than one answer to a particular question or that there may be no one “right” answer at all. It is important to contrast this with the civil law system where it is presumed that the codes and doctrine provide clear guidance and an answer can be easily extracted without the need for judicial interpretation or creativity ***. The common law educational system thus rewards creative and novel interpretations of laws and cases.

In common law countries, case law rather than codes is the primary reference material for law students. Rather than refer to one set of commentaries as a civil law student would, common law students may have several textbooks that may offer differing conclusions on the same legal issue.

A common law student, at the end of his or her education, is not required to choose one particular legal career and stick to it, as a civil law student would. A common law student is more likely to switch roles during his or her career than a civil law student. For example, a practicing lawyer could become a prosecutor, then a judge, and could eventually switch to academia.

In the traditional common law, originating for the United Kingdom, a law student seeking to become a lawyer must undertake an apprenticeship. Also traditional in the common law system ** is the division of the tasks of a lawyer into two distinct fields of practice: barristers and solicitors. To become a solicitor, a law student must undertake an apprenticeship with a senior solicitor as well as undertake professional training courses, generally organized by the Law Society of that country. In order to become a barrister, a law student must also undertake an apprenticeship (oddly
enough called “deviling” in the UK system) as well as complete professional training courses.

Many common law countries [such as the United States] have departed from the traditional split between barrister and solicitor in favor of lawyers who can undertake both roles. In the United States [and certain other countries], a law graduate must complete a bar examination in order to qualify to become a lawyer. Upon passing, they are “admitted to the bar” and are then qualified to practice.

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VIII. Combining the Civil Law and Common Law? “Mixed” or “Hybrid” Systems

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It has been said that today there is no pure system. *** There has been significant borrowing between both. ***

Witness the common law world moving toward codification—a historical trademark of the civil law tradition. *** In the civil law world, we see the introduction of live witness testimony in court, coupled with cross-examination ***. This stands at odds [with] the traditional judge-led trial that has been the rule in the civil law tradition. We also see in the civil law world an increasing reliance on case law to supplement the codes.

Beyond piecemeal borrowing, there are now many systems that are truly a fusion of both the civil law and the common law ***. This can be seen also if we examine reform efforts in both developing and post-conflict countries. The trend appears to be that reformers take the best of each tradition and fuse these elements to create an overall system. *** [O]ne system is not necessarily “better” than the other; they both have their strong points and their weak points. By fusing the best of both worlds, countries undertaking reforms arrive at stronger, more efficient systems of justice. ***

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NOTES AND QUESTIONS

1. What are the essential features of the common law system? What are the essential features of the civil law system?

2. How does the role of the judge differ in the two systems?

3. How do sources of law differ in the two systems?

4. How does the nature of legal training differ in the two systems?

5. Despite its designation as a “common law” system, the U.S. has one of the most extensive code systems in the world. The current United States Code (“U.S.C.”) contains more than 50 distinct titles, each of which contains
hundreds, if not thousands, of individual statutory laws. It is difficult to quantify the number of individual statutes. In 1982, the U.S. Justice Department oversaw an effort to count the number of federal criminal laws, which at the time spanned over 23,000 pages of statutory law. After two years, the study ended inconclusively. The researchers ultimately estimated that the U.S.C. contained approximately 3,000 distinct criminal offenses. See Ronald Gainer, Report to the Attorney General on Federal Criminal Code Reform, 1 Crim. L. Forum 99 (1989). More recent research indicates that the actual number of distinct criminal offenses may be much higher than the originally estimated 3,000. See, e.g., J.S. Baker & D.E. Bennett, The Federalist Society for Law and Public Policy Studies, Measuring the Explosive Growth of Federal Crime Legislation (2004) (concluding that in 2004 there were more than 4,000 crimes in the U.S.C. titles). Of course, given that criminal offenses take up only a fraction of the total U.S.C., it is reasonable to assume that the U.S.C. has hundreds of thousands of statutory laws. These include laws relating to taxation, bankruptcy, the environment, antitrust regulation, securities, intellectual property, labor, immigration, and countless other subjects. There are also a number of rules governing federal trial and appellate court proceedings, including rules addressing civil procedure, criminal procedure, evidence, and appellate procedure.

In addition, each state has a large body of its own criminal and civil statutes. For example, California’s statutory law consists of 29 legal code chapters, each pertaining to a distinct area of law. Similarly, New York has almost 100 chapters of state law in its publications of consolidated law. And the individual states have their own separate rules governing state court trial and appellate court proceedings.

Finally, both federal and state agencies publish and enforce regulations relating to their areas of expertise. The Code of Federal Regulations (referred to as the “C.F.R.”) contains 50 titles that span over 200 volumes. They contain rules published by the numerous Executive departments and agencies of the federal government. The California Code of Regulations (referred to as the “C.C.R.”) contains 28 titles that are designed to regulate over 200 administrative agencies.

6. By the same token, with the advent of the internet, many civil law countries now publish judicial opinions on websites, and those opinions are often cited as precedent in similar cases. See Vincy Fon & Francesco Parisi, Judicial Precedents in Civil Law Systems: A Dynamic Analysis, 26 Int'l Rev. L. & Econ. 519 (2006) (describing the growing role of judicial decisions as persuasive guidance in civil law systems and comparing the use of these published decisions as a type of “soft” precedent). Given the number of statutes and regulations in the U.S., and given the increasing importance of judicial precedent in many civil law countries, is it accurate to classify current legal systems as either purely common law or purely civil law? Or is it more accurate, as Dr. O’Connor noted in the foregoing article, to characterize many systems as “hybrid”? 
7. As discussed in the preceding articles, the common law legal structure was first developed in England in the Middle Ages and has since been adopted by many countries worldwide, including the United States (excluding the State of Louisiana), Canada (excluding Quebec), the United Kingdom (excluding Scotland), Australia, New Zealand, India (excluding the State of Goa), and many more. On the other hand, most countries in Europe, South America, and Africa employ a civil law structure. In total, approximately 35% of countries worldwide utilize a common law structure, while approximately 60% of countries utilize the civil law structure. The remaining approximately 5% utilize some form of hybrid system or have no defined legal structure. See *Percentage of the World Population, Civil Law and Common Law Systems*, JURIGLOBE, http://www.juriglobe.ca/eng/syst-demo/tableau-dcivil-claw.php (last visited Nov. 11, 2015).

B. THE ROLE OF THE LAWYER IN SOCIETY

As in other countries, lawyers play a crucial role in the U.S. legal system—as advocates, counselors, judges, and scholars. The following excerpt discusses various roles that lawyers play, and the methods for regulating the conduct of lawyers.

**THE AMERICAN BAR ASSOCIATION’S MODEL RULES OF PROFESSIONAL CONDUCT—PREAMBLE**

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A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client’s legal affairs and reporting about them to the client or to others.

In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. * * * In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject

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* The Model Rules of Professional Conduct were adopted by the American Bar Association, a voluntary professional organization. Most states have adopted the Model Rules in whole or in part. [Ed.]
to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs. A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer’s duty, when necessary, to challenge the rectitude of official action, it is also a lawyer’s duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.

A lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal
advice, and thereby heed their legal obligations, when they know their communications will be private.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession’s independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession’s relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.
**NOTES AND QUESTIONS**

1. Why are professional responsibility rules (such as those discussed in the above excerpt) necessary?


3. The U.S. is not the only country that has ethical rules governing a lawyer’s conduct. For a discussion of lawyers’ ethical obligations on a global scale, see JAMES MOLITERNO & PAUL PATON, *GLOBAL ISSUES IN LEGAL ETHICS* Ch. 1 (2d ed. 2014) (surveying the roles of lawyers and their professional rules of conduct in the United States, Japan, the European Union, and Russia).

**C. DUAL FEDERAL AND STATE COURTS**

The U.S. judicial system is divided into two separate legal systems: a federal judiciary and state judiciaries. The following article addresses the differences between the two court systems.

**FEDERAL COURTS COMPARED TO STATE COURTS**

United States Courts, 2015
http://www.uscourts.gov/about-federal-courts

**Why Two Court Systems?**

The Judicial Branch has two court systems: federal and state. While each hears certain types of cases, neither is completely independent of the other. The two systems often interact and share the goal of fairly handling legal issues.

The U.S. Constitution created a governmental structure known as federalism that calls for the sharing of powers between the national and state governments. The Constitution gives certain powers to the federal government and reserves the rest for the states.

The federal court system deals with legal issues expressly or implicitly granted to it by the U.S. Constitution. The state court systems deal with their respective state constitutions and the legal issues that the U.S. Constitution did not give to the federal government or explicitly deny to the states.

For example, because the Constitution gives Congress sole authority to make uniform laws concerning bankruptcies, a state court would lack jurisdiction. Likewise, since the Constitution does not give the federal government authority in most family law matters, a federal court would lack jurisdiction in a divorce case.
Comparing State & Federal Courts

The U.S. Constitution is the supreme law of the land in the United States. It creates a federal system of government in which power is shared between the federal government and the state governments. Due to federalism, both the federal government and each of the state governments have their own court systems.

1. Court Structure

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<tr>
<th>The Federal Court System</th>
<th>The State Court System</th>
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<tr>
<td>Article III of the Constitution invests the judicial power of the United States in the federal court system. Article III, Section 1 specifically creates the U.S. Supreme Court and gives Congress the authority to create the lower federal courts.</td>
<td>The Constitution and laws of each state establish the state courts. A court of last resort, often known as a Supreme Court, is usually the highest court. Some states also have an intermediate Court of Appeals. Below these appeals courts are the state trial courts. Some are referred to as Circuit or District Courts.</td>
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<tr>
<td>Congress has used this power to establish the 13 U.S. Courts of Appeals, the 94 U.S. District Courts, the U.S. Court of Claims, and the U.S. Court of International Trade. U.S. Bankruptcy Courts handle bankruptcy cases. Magistrate Judges handle some District Court matters.</td>
<td>States also usually have courts that handle specific legal matters, e.g., probate court (wills and estates); juvenile court; family court; etc.</td>
</tr>
<tr>
<td>Parties dissatisfied with a decision of a U.S. District Court, the U.S. Court of Claims, and/or the U.S. Court of International Trade may appeal to a U.S. Court of Appeals.</td>
<td>Parties dissatisfied with the decision of the trial court may take their case to the intermediate Court of Appeals.</td>
</tr>
</tbody>
</table>
A party may ask the U.S. Supreme Court to review a decision of the U.S. Court of Appeals, but the Supreme Court usually is under no obligation to do so. The U.S. Supreme Court is the final arbiter of federal constitutional questions.

Parties have the option to ask the highest state court to hear the case.

Only certain [state court] cases are eligible for review by the U.S. Supreme Court.

## 2. Selection of Judges

<table>
<thead>
<tr>
<th>The Federal Court System</th>
<th>The State Court System</th>
</tr>
</thead>
</table>
| The Constitution states that federal judges are to be nominated by the President and confirmed by the Senate. They hold office during good behavior, typically for life. Through Congressional impeachment proceedings, federal judges may be removed from office for misbehavior. | State court judges are selected in a variety of ways, including
  - election,
  - appointment for a given number of years,
  - appointment for life, and
  - combinations of these methods, e.g., appointment followed by election. |

## 3. Types of Cases Heard

<table>
<thead>
<tr>
<th>The Federal Court System</th>
<th>The State Court System</th>
</tr>
</thead>
</table>
| - Cases that deal with the constitutionality of a law;  
  - Cases involving the laws and treaties of the U.S.;  
  - Cases involving ambassadors and public ministers;  
  - Admiralty law;  
  - Bankruptcy; and  
  - Habeas corpus issues. | - Most criminal cases, probate (involving wills and estates)  
  - Most contract cases, tort cases (personal injuries), family law (marriages, divorces, adoptions), etc. |
State courts are the final arbiters of state laws and constitutions. Their interpretations of federal law or the U.S. Constitution may be appealed to the U.S. Supreme Court. The Supreme Court may choose to hear or not to hear such cases.

### 4. Article I Courts

Congress has created several Article I or legislative courts that do not have full judicial power. Judicial power is the authority to be the final decider in all questions of constitutional law and all questions of federal law, and to hear claims at the core of habeas corpus issues.

Article I courts are U.S. Court of Veterans’ Appeals, the U.S. Court of Military Appeals, and the U.S. Tax Court.

### 5. Cases in Federal and State Courts

Find out what types of cases are heard in federal courts and state courts. How are they different? How are they similar?

<table>
<thead>
<tr>
<th>State Courts</th>
<th>Federal Courts</th>
<th>State or Federal Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Crimes under state legislation.</td>
<td>• Crimes under statutes enacted by Congress.</td>
<td>• Certain civil rights claims.</td>
</tr>
<tr>
<td>• State constitutional issues and cases involving state laws or regulations.</td>
<td>• Most cases involving federal laws or regulations (for example: tax, Social Security, broadcasting, civil rights).</td>
<td>• “Class action” cases.</td>
</tr>
<tr>
<td>• Family law issues.</td>
<td>• Matters involving interstate and international commerce, including airline</td>
<td>• Environmental regulations.</td>
</tr>
<tr>
<td>• Real property issues.</td>
<td></td>
<td>• Certain disputes involving federal law.</td>
</tr>
<tr>
<td>• Most private contract disputes (except those resolved under bankruptcy law).</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Find out what types of cases are heard in federal courts and state courts. How are they different? How are they similar?
| Most issues involving the regulation of trades and professions. | and railroad regulation. |
| Most professional malpractice issues. | Cases involving securities and commodities regulation, including takeover of publicly held corporations. |
| Most issues involving the internal governance of business associations such as partnerships and corporations. | Admiralty cases. |
| Most personal injury lawsuits. | International trade law matters. |
| Most workers' injury claims. | Patent, copyright, and other intellectual property issues. |
| Probate and inheritance matters. | Cases involving rights under treaties, foreign states, and foreign nationals. |
| Most traffic violations and registration of motor vehicles. | State law disputes when “diversity of citizenship” exists. |
| | Bankruptcy matters. |
| | Disputes between states. |
| | Habeas corpus actions. |
| | Traffic violations and other misdemeanors occurring on certain federal property. |
The Structure of the Federal Courts

With certain notable exceptions, the federal courts have jurisdiction to hear a broad variety of cases. The same federal judges handle both civil and criminal cases, public law and private law disputes, cases involving individuals and cases involving corporations and government entities, appeals from administrative agency decisions, and law and equity matters. There are no separate constitutional courts, because all federal courts and judges may decide issues regarding the constitutionality of federal laws and other governmental actions that arise in the cases they hear.

Trial Courts

The United States district courts are the principal trial courts in the federal court system. The district courts have jurisdiction to hear nearly all categories of federal cases. There are 94 federal judicial districts, including one or more in each state, the District of Columbia, Puerto Rico, and the overseas territories.

Each federal judicial district includes a United States bankruptcy court operating as a unit of the district court. The bankruptcy court has nationwide jurisdiction over almost all matters involving insolvency cases, except criminal issues. Once a case is filed in a bankruptcy court, related matters pending in other federal and state courts can be removed to the bankruptcy court. The bankruptcy courts are administratively managed by the bankruptcy judges.

Two special trial courts within the federal judicial branch have nationwide jurisdiction over certain types of cases. The Court of International Trade addresses cases involving international trade and customs issues. The United States Court of Federal Claims has jurisdiction over disputes involving federal contracts, the taking of private property by the federal government, and a variety of other monetary claims against the United States.

Trial court proceedings are conducted by a single judge, sitting alone or with a jury of citizens as finders of fact.* * *

Appellate Courts

The 94 judicial districts are organized into 12 regional circuits, each of which has a United States court of appeals. A court of appeals hears appeals from the district courts located within its circuit, as well as appeals from certain federal administrative agencies. In addition, the Court of Appeals for the Federal Circuit has nationwide jurisdiction to hear appeals
in specialized cases, such as those involving patent laws and cases decided by the Court of International Trade and the Court of Federal Claims.

There is a right of appeal in every federal case in which a district court enters a final judgment. The courts of appeals typically sit in panels of three judges. They are not courts of cassation, and they may review a case only if one or more parties files a timely appeal from the decision of a lower court or administrative agency. When an appeal is filed, a court of appeals reviews the decision and record of proceedings in the lower court or administrative agency. The court of appeals does not hear additional evidence, and generally must accept the factual findings of the trial judge. If additional fact-finding is necessary, the court of appeals may remand the case to the trial court or administrative agency. Remand is unnecessary in most cases, however, and the court of appeals either affirms or reverses the lower court or agency decision in a written order or written opinion.

In cases of unusual importance, a court of appeals may sit “en banc”—that is, with all the appellate judges in the circuit present—to review the decisions of a three-judge panel. The full court may affirm or reverse the panel decision.

The United States Supreme Court

The United States Supreme Court is the highest court in the federal judiciary. It consists of the Chief Justice of the United States and eight associate justices. The court always sits en banc, with all nine justices hearing and deciding all cases together. The jurisdiction of the Supreme Court is almost completely discretionary, and, to be exercised, requires the agreement of at least four justices to hear a case. (In a small number of special cases, such as boundary disputes between the states, the Supreme Court acts either as the court of first instance or exercises mandatory appellate review). As a general rule, the Court only agrees to decide cases where there is a split of opinion among the courts of appeals or where there is an important constitutional question or issue of federal law that needs to be clarified.

***

Courts 101: An Understanding of the Court System

Integrated Justice Information Systems Institute, 2012

***

State Court System

The organizational structure of a state court is determined by individual state constitutions—none are exactly the same—but the following levels of courts exist in the majority of states.
Courts of Limited Jurisdiction

Courts of limited jurisdiction generally comprise the first tier of the judicial systems in the states. The reference to limited jurisdiction indicates that state legislatures limited the scope of these courts when they were created. These courts usually hear “less serious” or minor cases, including, but not limited to: small claims (e.g. landlord/tenant actions, debt matters, non-injury accident claims, etc.) where, typically, self-represented litigants bring claims of a “limited,” up to a pre-set, monetary value; traffic cases; city ordinance violations; and, specialized cases, such as juvenile or family matters.

Courts of limited jurisdiction also tend to be where the first appearance, charging, and bail setting for criminal cases happens in an arrest or criminal matter.

Courts of General Jurisdiction

Courts of general jurisdiction represent the second tier of the judicial systems in the states, and are considered the “trial courts” in the state systems. They serve a similar function to district courts in the federal system. Although caseloads vary from state to state, general jurisdiction courts typically handle: felony cases, both criminal and civil; higher-level misdemeanor cases; special case types, such as probate, mental health, and juvenile cases; family and domestic violence; and, appeals from limited jurisdiction courts. Courts of general jurisdiction are where most jury trials occur. It should also be noted that some states combine the jurisdiction of the limited and general jurisdiction court into a single general jurisdiction court with different divisions for minor versus major matters, or specialize by case type.

Appellate Courts

Appellate courts are commonly considered review courts only and not courts where citizens initiate cases. All states have an appellate level of court; some have a multi-tiered level. Most appellate matters are cases where one of the parties is not happy with the decision from the trial court and petitions the appeals court in their state to get a review of the matter. Some states have “Intermediate Appellate Courts” (see below), which handle specific appeals to which an appeal is almost guaranteed. Appeals to the “Court of Last Resort” in those states are generally discretionary. There are states, however, which do not have an intermediate appellate court and, in this case, all appeals generally go directly to the single Appellate level “Court of Last Resort.”

State court systems generally follow this structure of limited/high volume courts—trial/general jurisdiction courts—appellate/review courts; however, there are three common variations ** that are important to integrated justice: specialty courts, juvenile courts, and intermediate appellate courts, which have many anomalies at the state level.
Specialty Courts

There are many types of limited or general jurisdiction courts—specialty courts—that have been established to deal with a specific type of case or a specific problem. These courts are established as stand-alone separate courts, a separate division of a larger court, or just a separate docket (calendar) of a larger court. Specialty courts may be part of the Judicial Branch or the Executive Branch, depending on the state constitution. While specialty courts may occur at the limited jurisdiction level, they are more common at the trial level. Some examples include: specific courts assigned to deal with issues such as complex litigation (business courts), tax issues (tax courts), environmental issues (water or environmental courts), or drug offenses (drug courts), and, most recently, gun courts to fast track weapons-specific offenses.

Juvenile Courts

Juvenile courts are special courts or departments of a trial court that deal with underage defendants charged with delinquency—committing offenses that would be criminal matters if committed by an adult, [and] status offenses (violations that occur because of their age[, such as] underage drinking, truancy, [and] runaways)—or minors who are involved in abuse and neglect matters. The normal age of these defendants is under 18, with some states allowing juveniles usually over age 14 to also be charged as adults. The juvenile court does not have jurisdiction in these cases in which minors are charged as adults. The procedure in juvenile court is not adversarial (although the minor is entitled to legal representation by a lawyer), and is seen more as a mediation and consultative environment. There is often the involvement of advocates, social services, and probation officers in the process to achieve positive results and to save the minor from involvement in further crimes; however, serious crimes and repeated offenses can result in sentencing juvenile offenders to a juvenile correctional or detention facility, and later transfer to state prison upon reaching adulthood with limited maximum sentences. Where abuse, neglect, and family support (care and safety of the child) are at issue, the juvenile court may work with foster care agencies and the child may be treated as a ward of the court.

Intermediate Appellate Courts

Many, but not all, states have intermediate appellate courts, which are located between the trial courts of general jurisdiction and the highest court in the state. Any party, except in a case where a defendant in a criminal trial has been found not guilty, who is not satisfied with the judgment of a state trial court may appeal the matter to an appropriate intermediate appellate court. Such appeals are usually a matter of right (meaning the court must hear them); however, these courts address only alleged procedural mistakes and errors of law made by the trial court. They do not generally review the judgment of the lower court (guilt/innocence)
and do not review the facts of the case, which have been established during the trial, nor do they accept additional evidence. Instead, these courts look to see that the process and procedures [were correct] (e.g., jury instructions were correctly provided; evidence was properly admitted; parties were given their rights in court; discovery during the trial process, etc.). These courts usually sit in panels of two or three judges. Moreover, appellate decisions are normally to uphold the verdict/decision of the lower court, to reverse the decision of the lower court, or to return the case for re-hearing.

**NOTES AND QUESTIONS**

1. There is a common saying in the U.S.: “Don’t make a federal case out of it.” The assumption underlying that saying is that federal cases are typically important, while state cases are usually less consequential. See JAMES CLAPP ET AL., LAW TALK: THE UNKNOWN STORIES BEHIND FAMILIAR LEGAL EXPRESSIONS 160–65 (2011) (describing how that phrase originated in New York in the 1940s after the federal judicial system had grown in importance in the 1930s). As discussed above, however, state courts have exclusive or primary jurisdiction over matters such as marriage, divorce, child custody, most types of street crime (e.g., most murders, rapes, and robberies), landlord-tenant disputes, most estate matters, most matters involving real property, most personal injury matters, and most matters relating to professional conduct (such as that of doctors and lawyers). Is it correct to assume that, in general, federal cases are more “important” than state cases?

2. As the preceding pages demonstrate, it is not uncommon for state and federal courts to have jurisdiction over the same subject matter or issues in dispute. For example, in what is known as federal “diversity jurisdiction” under 28 U.S.C. § 1332 (a topic that will be discussed in greater detail in Chapter 3), federal courts have jurisdiction over state law claims when the adverse parties are citizens of different states and the lawsuit involves an amount in controversy in excess of $75,000. In addition to basic “diversity jurisdiction,” there are several situations in which a federal court and a state court may have overlapping jurisdiction based on separate legal grounds, including: a state murder charge and a federal civil rights prosecution (where, for example, the murder involved racial animus); environmental enforcement at both the federal and state level; a violation of both federal and state employment laws, etc. And in various circumstances, alleged violations of the U.S. Constitution or federal statutes can be asserted in either federal or state court. For example, one of the lawsuits comprising the famous school desegregation litigation (Brown v. Board of Education, 347 U.S. 483 (1954)) was originally brought in the Delaware state court system, even though it raised claims based on the Fourteenth Amendment to the U.S. Constitution (equal protection). See Gebhart v. Belton, 33 Del.Ch. 144, 91 A.2d 137 (1952). Brown v. Board of Education will be discussed in greater detail in Chapter 2.
3. Federal judges are nominated by the President of the United States, confirmed by the U.S. Senate, and typically hold their positions for life or until they resign (as long as “good behavior” is maintained). The power of federal judges (including U.S. Supreme Court Justices) is granted by Article III of the U.S. Constitution, and Congress controls the number of judges and justices that are appointed. Since 1869, the number of Supreme Court justices has remained at nine. As of 2014, Congress had authorized 179 federal court of appeals judgeships and 677 federal district court judgeships. For detailed information on the federal appointment process, see http://www.uscourts.gov/judges-judgeships. Although state judges in some states are appointed by the Governor and are granted life tenure, the majority of states have some sort of election scheme whereby judges are elected (by voters residing in the particular jurisdiction) and lose their positions if not re-elected. Terms vary depending on the state. Examples include Minnesota (6-year election terms); Kentucky (8-year election terms); and Pennsylvania (10-year election terms).

4. What are the advantages and disadvantages of a system in which judges are appointed? What are the advantages and disadvantages of a system in which judges are elected? See, e.g., Republican Party of Minn. v. White, 536 U.S. 765, 788–89 (2002) (O’Connor, J., concurring) (criticizing state election policies and noting: “[I]f judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case. Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects.”); Mark Cady & Jess Phelps, Preserving the Delicate Balance Between Judicial Accountability and Independence: Merit Selection in the Post-White World, 17 Cornell J.L. & Pub. Pol’y 343 (2008) (arguing for a middle ground in selecting state court judges, with an initial appointment and a subsequent option for a retention election, and asserting that such a middle ground is preferable because it maintains a meaningful balance between judicial accountability and independence); Peter Olszewski, Sr., Who’s Judging Whom? Why Popular Elections Are Preferable to Merit Selection Systems, 109 Penn St. L. Rev. 1 (2004) (supporting the judicial election system and arguing that popular elections for judges are the most democratic, representative, and efficient method of judicial selection because they give citizens a direct role in choosing the judges who represent them); Mark Behrens & Cary Silverman, The Case for Adopting Appointive Judicial Selection Systems for State Court Judges, 11 Cornell J.L. & Pub. Pol’y 273 (2002) (condemning judicial elections and advocating for states to adopt systems of judicial appointment). In recent years, the U.S. Supreme Court has twice sided with litigants who have raised concerns about ethical conflicts arising out of judicial elections. See Williams-Yulee v. Fla. Bar, 575 U.S. ___, 135 S. Ct. 1656 (2015) (holding that a state regulation that prohibited judicial candidates from personally soliciting to support a campaign fund did not violate the First Amendment’s right to free speech); Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868 (2009) (requiring a state judge to recuse himself from participation in a case involving a party
that had donated $3 million to his election campaign because the situation posed a high risk of actual bias).

**D. TRIAL BY JURY**

One of the seminal features of American law (in both criminal and civil cases) is the right to a jury trial. The following articles discuss the U.S. jury system.

**History of Jury Duty**

U.S. District Court, Western District of Missouri, 2015

http://www.mow.uscourts.gov/district/jury/jury_history.html#grand_jury

**History of the Jury**

By the time the United States Constitution and the Bill of Rights were drafted and ratified, the institution of trial by jury was almost universally revered, so revered that its history had been traced back to Magna Carta. The jury began in the form of a grand or presentment jury with the role of inquest and was started by Frankish conquerors to discover the King’s rights. Henry II regularized this type of proceeding to establish royal control over the machinery of justice, first in civil trials and then in criminal trials. Trial by petit jury was not employed at least until the reign of Henry III, in which the jury was first essentially a body of witnesses, called for their knowledge of the case; not until the reign of Henry VI did it become the trier of evidence. It was during the Seventeenth Century that the jury emerged as a safeguard for the criminally accused. Thus, in the Eighteenth Century, Blackstone could commemorate the institution as part of a “strong and two-fold barrier . . . between the liberties of the people and the prerogative of the crown” because “the truth of every accusation . . . [must] be confirmed by the unanimous suffrage of twelve of his equals and neighbors indifferently chosen and superior to all suspicion.” The right was guaranteed in the constitutions of the original 13 States, was guaranteed in the body of the Constitution and in the Sixth Amendment, and the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases. “Those who emigrated to this country from England brought with them this great privilege ‘as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.’”

*** “The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. ***

[T]he jury trial provisions . . . reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. ***”
History of the Grand Jury

A Grand Jury derives its name from the fact that it usually has a greater number of jurors than a trial (petit) jury. One of the earliest concepts of Grand Juries dates back to early Greece where the Athenians used an accusatory body. In early Briton, the Saxons also used something similar to a Grand Jury System. During the years 978 to 1016, one of the Dooms (laws) stated that for each 100 men, 12 were to be named to act as an accusing body. They were cautioned “not to accuse an innocent man or spare a guilty one.”

The Grand Jury can also be traced to the time of the Norman conquest of England in 1066. There is evidence that the courts of that time summoned a body of sworn neighbors to present crimes that had come to their knowledge. Since the members of that accusing jury were selected from small jurisdictions, it was natural that they could present accusations based on their personal knowledge.

Historians agree that the Assize [court session or assembly] of Clarendon in 1166 provided the ground work for our present Grand Jury system. During the reign of Henry II (1154–1189), to regain for the crown the powers usurped by Thomas Becket, Chancellor of England, 12 “good and lawful men” in each village were assembled to reveal the names of those suspected of crimes. It was during this same period that juries were divided into two types, civil and criminal, with the development of each influencing the other.

The oath taken by these jurors provided that they would carry out their duties faithfully, that they would aggrieve no one through enmity nor deference to anyone through love, and that they would conceal those things that they had heard.

By the year 1290, these accusing juries were given the authority to inquire into the maintenance of bridges and highways, defects of jails, and whether the Sheriff had kept in jail anyone who should have been brought before the justices. “Le Grand Inquest” evolved during the reign of Edward III (1368), when the “accusatory jury” was increased in number from 12 to 23, with a majority vote necessary to indict anyone accused of crime.

In America, the Massachusetts Bay Colony impaneled the first Grand Jury in 1635 to consider cases of murder, robbery and wife beating. As early as 1700, the value of the Grand Jury was recognized as opposing the Royalists. These colonial Grand Juries expressed their independence by refusing to indict leaders of the Stamp Act (1765), and refusing to bring libel charges against the editors of the Boston Gazette (1765). A union with other colonies to oppose British taxes was supported by the Philadelphia Grand Jury in 1770.

By the end of the Colonial Period, the Grand Jury had become an indispensable adjunct of Government: “they proposed new laws, protested
against abuses in government, and wielded the tremendous authority in their power to determine who should and who should not face trial.”

**JURY SYSTEM OVERVIEW**

American Judicature Society, 2015
(formerly available online; AJS dissolved in 2015)

* * *

**Right to a Jury Trial**

The right to a jury trial is governed by three different sets of rules that apply to three different types of cases: civil cases in federal court; civil cases in state court; and criminal cases (whether in federal court or state court).

**Civil cases in federal court**

In civil cases in federal court, the right to a jury trial is governed by the Seventh Amendment:

> In Suits at Common Law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried to a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the Common Law.

It is clear that the Amendment does not provide for jury trials in all federal civil cases because as of the time of the Amendment’s adoption in 1791 there were several kinds of cases that were not “Suits at Common Law,” like suits in equity or admiralty; those suits were not entitled to jury trials in 1791, and still are not. But subsequently many kinds of suits have come into being that did not exist at all in 1791, and the law/equity distinction was abolished in 1938. In this drastically changed legal landscape, it is sometimes difficult to decide what jury trial rights “shall be preserved” under the Seventh Amendment. One rule of thumb is that if the suit seeks money damages—the traditional remedy under the common law—there is almost surely a right to a jury trial, while if the suit seeks only equitable relief—like an injunction—there almost surely is no right to a jury trial. * * *

* * *

**Civil cases in state court**

In civil cases in state court, the right to a jury trial is governed by the state’s constitution and statutes. The Supreme Court has repeatedly held that the Seventh Amendment right to a jury trial applies only to federal courts, not to state courts. As a practical matter, though, most states make jury trials widely available for many kinds of civil cases above the level of small claims court.
Criminal cases

The governing law for criminal cases in both federal and state courts is the Sixth Amendment, which provides in part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . .

While this provision originally only applied to federal criminal prosecutions, in 1968 the Supreme Court decided that a right to trial by jury in most criminal cases is so fundamental that it constitutes an element of due process that the state is obligated to provide by the Fourteenth Amendment’s Due Process Clause. However, the Court later decided that a right to jury trial is constitutionally required only for “serious” offenses. An offense is always “serious” if the potential punishment for the crime is greater than six months’ imprisonment, although sometimes additional statutory and regulatory penalties may make a crime “serious” even if the potential imprisonment is less than six months. Of course, states are free to provide the right to a jury trial even in cases where it is not constitutionally required. And a criminal defendant is always free to waive the right to a trial by jury.

***

Jury Powers

The traditional description of the jury’s role gives it two powers: (1) to decide the facts, and (2) to apply the law to the facts. ***

Power to decide facts

The facts the jury has the power to determine are the nitty-gritty details of the event that is the subject of the litigation. These facts pertain to what are sometimes called the “journalist’s questions:” who, what, when, where, why, and how? The jurors listen to the evidence of each party concerning a disputed fact. Then the jurors, through deliberations, determine which version of a disputed fact they find more convincing. Often, this task requires the jurors to evaluate the credibility of witnesses.

Jurors have a great deal of freedom in determining the facts. No judicial officer is present during the deliberations to impose any particular approach upon the jurors. Jurors are not required to explain the verdict, so what went on in the jury room is usually shrouded in mystery. And even if jurors are willing to talk about the deliberations afterward, the rules of most jurisdictions establish that testimony about what went on in the jury room is usually inadmissible to cast doubt on the verdict.

Nonetheless, this freedom to determine the facts is supposed to be exercised rationally by the jurors, not emotionally or arbitrarily. Thus, for example, it is impermissible to award damages to a plaintiff who has not
proven the case just because the jurors feel sorry for the plaintiff. Similarly, it is impermissible for a jury to decide a case by flipping a coin, or by employing a “quotient verdict” (one arrived at by each juror writing down a damages amount, adding all the figures, and dividing by the number of jurors to get an average).

Due to the secrecy of the deliberations, it is often impossible to determine whether a verdict was arrived at rationally. But there are procedural mechanisms designed to assure, to the extent possible, that jurors use rational processes to reach rational results.

Several mechanisms available to trial judges are designed to remove from jury consideration factual issues on which the evidence is entirely one-sided, thereby avoiding irrational findings by the jury. Primary among these mechanisms are summary judgments and directed verdicts (although the Constitution forbids their use against defendants in criminal cases). Further, trial judges also have mechanisms to deal with irrational jury verdicts after-the-fact, including judgments notwithstanding the verdict, grants of new trials, and additur (ordering a new trial unless the losing party agrees to an increase in the amount of damages awarded by the jury) and remittitur (ordering a new trial unless the winning party agrees to a decrease in the amount of damages awarded by the jury).

Not only do trial judges have some power to prevent irrational jury results, so do appellate judges. Appellate courts have the power to overturn a verdict that is contrary to the great weight of the evidence (although this power does not exist as to an acquittal in a criminal case, since the Double Jeopardy Clause prevents retrial of an acquitted defendant, no matter how irrational the acquittal may have been).

**Power to apply the law to the facts**

The traditional statement that the jury is to take the law given by the judge and apply it to the facts misleadingly suggests that juries have no role in determining what the law is. In fact, juries determine what the law is in every case to a limited extent. This is true because even the clearest instructions on the law still require juries to make some judgments about what the instructions mean (although the more completely a legal term is defined in the instructions, the less room there is for juror interpretation of the law). For example, words describing the burden of persuasion (“by a preponderance of the evidence” in most civil cases; “beyond a reasonable doubt” in all criminal cases) inevitably require jurors to interpret what those phrases mean in the context of the facts of the case, no matter how carefully the phrases are explained. And some important legal questions are explicitly structured so as to provide for juror interpretation of what the law is. A primary example is negligence, which is defined in terms of how a “reasonable person” would have behaved, and the jurors are responsible for determining the behavior of a “reasonable person.” ** **
One mechanism for attempting to limit jury interpretation of law is the “special verdict” form. A special verdict form asks the jurors to answer specific questions about the case, as contrasted with a “general verdict” form that simply asks the jurors to report which party won. Presumably, a jury will engage in more legal interpretation when a general verdict form is used. * * *

NOTES AND QUESTIONS

1. In the U.S., the right to a jury trial is available in most criminal cases and some civil cases. See, e.g., Tull v. United States, 481 U.S. 412 (1987) (noting that a civil plaintiff has a Seventh Amendment right to a jury trial where the claim constitutes an action “at law” as opposed to an action “in equity”); Duncan v. Louisiana, 391 U.S. 145 (1968) (set forth in Chapter 7) (holding that the Sixth Amendment affords criminal defendants an absolute right to a jury trial in cases where a conviction could result in more than six months in jail or more than a $500 fine). Despite this right, however, parties may choose to waive the right to a jury and opt for the case to be decided by a judge (known as a “bench trial”). Why might a party prefer a bench trial over a jury trial? See, e.g., Andrew Leipold, Why Are Judges So Acquittal Prone?, 83 Wash. U. L.Q. 151 (2005) (analyzing criminal acquittal rates in bench trials and finding that, statistically, federal judges acquit defendants far more frequently than juries across all categories of cases). The topic of jury trials will be discussed in greater detail in Chapter 3 and Chapter 7.

2. In addition to the Sixth Amendment right to a jury trial, in criminal cases, the Constitution provides (in the Fifth Amendment) that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury * * *.” A grand jury indictment is not a criminal conviction, but is merely a determination that sufficient evidence exists to warrant taking the defendant to trial. Evidentiary standards and the burden of proof are less rigorous in a grand jury proceeding than in a criminal trial. See, e.g., Lawn v. United States, 355 U.S. 339 (1958) (stating the general rule that a grand jury can rely on any and all evidence in determining whether to return an indictment, even if the evidence was illegally obtained or would be otherwise inadmissible at the defendant’s trial). Unlike the Sixth Amendment right to a jury trial in criminal cases, which applies to the states, the U.S. Constitution does not guarantee the right to a grand jury in state criminal courts, and thus states are under no obligation to convene a grand jury before charging an individual with a crime. See Hurtado v. California, 110 U.S. 516 (1884) (holding that the Due Process clause of the Fourteenth Amendment does not require a grand jury indictment in a state prosecution). Nonetheless, many states have adopted provisions in their own state constitutions (or other laws) that grant a defendant a right to a grand jury indictment before a criminal trial may commence. E.g., New York (granting a defendant a state constitutional right to a grand jury under N.Y. Const. art. I, § 6); Mississippi (granting a defendant a state constitutional right to a grand jury under Miss. Const. § 27). Other states have adopted alternative
preliminary hearing procedures where a judge or prosecutor determines whether there is probable cause to charge a suspect with a crime. E.g., California (providing a statutory right under Cal. Penal Code § 872 to have a preliminary hearing before a judge to determine probable cause). Preliminary probable cause hearings may also be conducted in federal criminal court prior to a grand jury indictment. See Fed. R. Crim. P. 5.1 (stating that a defendant charged with a felony in federal court has a right to a preliminary hearing unless the defendant has already been indicted or waives (gives up) the right to the hearing). Even if a judge deems that there is probable cause to charge the defendant after a Federal Rule 5.1 hearing, however, a defendant charged with a felony in federal court always retains the right under the Fifth Amendment to a grand jury indictment before criminal proceedings may be commenced against him.

3. Trial and appellate judges have authority to overturn a jury verdict in certain limited situations (although the Fifth Amendment’s Double Jeopardy Clause prohibits a court from reversing a jury verdict in a criminal case if the jury finds the defendant not guilty). For example, in criminal cases, judges have the power to grant a “judgment of acquittal,” whereby a judge can set aside a guilty verdict if the judge finds the evidence insufficient to sustain a conviction. See Fed. R. Crim. P. 29. Similarly, in a civil trial, a judge has the authority to set aside a jury verdict and grant “judgment as a matter of law” if “a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on [an] issue.” See Fed. R. Civ. P. 50. Understandably, courts are generally reluctant to overturn a jury’s verdict. Some scholars, however, have argued that judicial discretion to overturn jury verdicts actually reinforces and protects the right to a jury trial in some circumstances. See, e.g., Cassandra Burke Robertson, Judging Jury Verdicts, 83 Tul. L. Rev. 157 (2008) (urging more extensive verdict review powers to ensure that parties are afforded the right to a second (additional) jury trial where there was manifest error in the first jury’s verdict).

4. It is important to recognize the difference between a trial court and an appellate court. At the trial level, the jury (or in some cases the judge) determines the facts of the case; the judge determines the law that will apply; and the trier of fact then applies the law to the facts. The judge can then reject the jury’s verdict in certain circumstances. After a trial, the parties in the case may have an opportunity to appeal the outcome of the trial based on potential legal errors that may have occurred during the trial process. To this end, an appellate court does not generally consider new facts or evidence, but instead usually bases its legal assessment on the facts that were presented in the trial court. An appellate court’s job is to rule on legal issues and to assess whether the trial court made any legal errors during the trial process. There are no juries during the appellate process. An appellate court is usually comprised of a panel of judges (three or more) who must decide the merits of the case by a majority vote. An appellate court reviews the legal issues of a case and then renders a written decision discussing the legal rulings (or decides the case summarily without a written opinion). If the appellate court rules that there were indeed legal errors made during the trial, the appellate court may reverse
the trial court’s decision and send the case back to the trial court for a new trial based on the new legal ruling (or to modify the judgment without another trial). The vast majority of cases included in this casebook are decisions authored and published by appellate courts. The next section will discuss this process of judicial review and judicial decision-making.

E. JUDICIAL REVIEW AND JUDICIAL DECISIONS

Although many legal disputes involve a simple application of the law to the facts, many cases involve disputes over the meaning or constitutionality of the law in question. To that end, trial and appellate courts often engage in a process of decision-making known as “judicial review.” Judicial review is the process by which a court reviews law or legislation to determine its meaning or constitutionality. Judicial review lies at the heart of the American legal system. The following article discusses the concept of judicial review as well as the process by which judges interpret the law and render decisions.

THE COURT AND CONSTITUTIONAL INTERPRETATION

Supreme Court of the United States, 2015
http://www.supremecourt.gov/about/constitutional.aspx

* * *

“EQUAL JUSTICE UNDER LAW”—These words, written above the main entrance to the Supreme Court Building, express the ultimate responsibility of the Supreme Court of the United States. The Court is the highest tribunal in the Nation for all cases and controversies arising under the Constitution or the laws of the United States. As the final arbiter of the law, the Court is charged with ensuring the American people the promise of equal justice under law and, thereby, also functions as guardian and interpreter of the Constitution.

The Supreme Court is “distinctly American in concept and function,” as Chief Justice Charles Evans Hughes observed. Few other courts in the world have the same authority of constitutional interpretation and none have exercised it for as long or with as much influence. A century and a half ago, the French political observer Alexis de Tocqueville noted the unique position of the Supreme Court in the history of nations and of jurisprudence. “The representative system of government has been adopted in several states of Europe,” he remarked, “but I am unaware that any nation of the globe has hitherto organized a judicial power in the same manner as the Americans. . . . A more imposing judicial power was never constituted by any people.”

The unique position of the Supreme Court stems, in large part, from the deep commitment of the American people to the Rule of Law and to constitutional government. The United States has demonstrated an
unprecedented determination to preserve and protect its written Constitution, thereby providing the American “experiment in democracy” with the oldest written Constitution still in force.

The Constitution of the United States is a carefully balanced document. It is designed to provide for a national government sufficiently strong and flexible to meet the needs of the republic, yet sufficiently limited and just to protect the guaranteed rights of citizens; it permits a balance between society’s need for order and the individual’s right to freedom. To assure these ends, the Framers of the Constitution created three independent and coequal branches of government. That this Constitution has provided continuous democratic government through the periodic stresses of more than two centuries illustrates the genius of the American system of government.

The complex role of the Supreme Court in this system derives from its authority to invalidate legislation or executive actions which, in the Court’s considered judgment, conflict with the Constitution. This power of “judicial review” has given the Court a crucial responsibility in assuring individual rights, as well as in maintaining a “living Constitution” whose broad provisions are continually applied to complicated new situations.

While the function of judicial review is not explicitly provided in the Constitution, it had been anticipated before the adoption of that document. Prior to 1789, state courts had already overturned legislative acts which conflicted with state constitutions. Moreover, many of the Founding Fathers expected the Supreme Court to assume this role in regard to the Constitution; Alexander Hamilton and James Madison, for example, had underlined the importance of judicial review in the Federalist Papers, which urged adoption of the Constitution.

Hamilton had written that through the practice of judicial review the Court ensured that the will of the whole people, as expressed in their Constitution, would be supreme over the will of a legislature, whose statutes might express only the temporary will of part of the people. And Madison had written that constitutional interpretation must be left to the reasoned judgment of independent judges, rather than to the tumult and conflict of the political process. If every constitutional question were to be decided by public political bargaining, Madison argued, the Constitution would be reduced to a battleground of competing factions, political passion and partisan spirit.

Despite this background the Court’s power of judicial review was not confirmed until 1803, when it was invoked by Chief Justice Marshall in Marbury v. Madison[5 U.S. (1 Cranch) 137 (1803)]. In this decision, the Chief Justice asserted that the Supreme Court’s responsibility to overturn unconstitutional legislation was a necessary consequence of its sworn duty to uphold the Constitution. That oath could not be fulfilled any other way.
“It is emphatically the province of the judicial department to say what the law is,” he declared.

In retrospect, it is evident that constitutional interpretation and application were made necessary by the very nature of the Constitution. The Founding Fathers had wisely worded that document in rather general terms leaving it open to future elaboration to meet changing conditions. As Chief Justice Marshall noted in *McCulloch v. Maryland*, 17 U.S. 316 (1819), a constitution that attempted to detail every aspect of its own application “would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. . . . Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.”

The Constitution limits the Court to dealing with “Cases” and “Controversies.” John Jay, the first Chief Justice, clarified this restraint early in the Court’s history by declining to advise President George Washington on the constitutional implications of a proposed foreign policy decision. The Court does not give advisory opinions; rather, its function is limited only to deciding specific cases.

The Justices must exercise considerable discretion in deciding which cases to hear, since more than 10,000 civil and criminal cases are filed in the Supreme Court each year from the various state and federal courts. The Supreme Court also has “original jurisdiction” in a very small number of cases arising out of disputes between States or between a State and the Federal Government.

When the Supreme Court rules on a constitutional issue, that judgment is virtually final; its decisions can be altered only by the rarely used procedure of constitutional amendment or by a new ruling of the Court. However, when the Court interprets a statute, new legislative action can be taken.

Chief Justice Marshall expressed the challenge which the Supreme Court faces in maintaining free government by noting: “We must never forget that it is a constitution we are expounding . . . intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.”

**Notes and Questions**

1. As noted in the above excerpt, judicial review is a concept that was articulated in the landmark decision of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The topic will be discussed in more detail in Chapter 2. The concept of judicial review illustrates two important features of the U.S. system of government: “separation of powers” and “checks and balances.”
“Separation of powers” means that the essential functions of government are divided among the three co-equal branches: Legislative, Executive, and Judicial. That phrase, however, is nowhere mentioned in the Constitution. As one U.S. appellate judge has explained:

While the notion of “separation of powers” was a driving force behind the Constitution, it is notable that the words themselves are not found in the text of our Constitution. That is because our federal government is structured around the concept; our Constitution as a whole manifests this principle by giving shape to that government. Article I vests in Congress specific powers, such as the ability to write and enact laws, raise taxes, and declare war; yet it also requires that Congress engage in the affairs of the other branches—Congress creates lower federal courts and has the power to impeach the President and offers a check on Congress in the form of presidential presentment before a bill can become law. Likewise, Article II gives the President the power to conduct war, make treaties, and pardon. * * *

The Constitution gives the executive a role in the other departments by giving the President the power to appoint judges and the authority to execute enacted laws while, concurrently, Article II also makes the executive accountable to the other branches by requiring confirmation of the President’s candidates for officers, judges, and ambassadors of the United States and establishing the impeachment process for judges and the President. Finally, Article III maintains a similar structure: it confers all the judicial power in the Supreme Court, but it gives Congress the authority to create lower courts and make exceptions to the jurisdiction of the federal courts. Each branch, therefore, has a defined role, and yet each branch must coexist, often interdependently, with the others and find balance.


Separation of powers is also related to a second, albeit similar, concept of U.S. law—“checks and balances.” That phrase connotes the fact that each branch of government has some degree of control over the other branches. For example, the President may veto legislation passed by Congress (thereby requiring a 2/3 vote of both houses to override the veto); the Supreme Court (and lower federal courts) may review and invalidate legislation passed by

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1 U.S. CONST. art. I, §§ 1, 7–8.
2 U.S. CONST. art. II, § 2.
3 U.S. CONST. art. II, § 2, cl. 2.
4 U.S. CONST. art. II, § 3.
5 U.S. CONST. art. II, § 2.
7 U.S. CONST. art III, § 2.
8 U.S. CONST. art I, § 8.
9 U.S. CONST. art. III, § 2.
Congress; and Congress may remove the President and members of the Judiciary from office based on certain kinds of misconduct. Together, “separation of powers” and “checks and balances” prevent the usurpation of power by a single branch, ensuring that the United States will preserve its democratic form of government.

2. It is sometimes argued that judicial review undermines the principles of democracy because an unelected judicial body has the power to determine how the law will be applied. Some scholars have argued that such a task is better left to the legislature, which is democratically elected by a majority vote of the citizens. See, e.g., Richard Bellamy, Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy 5 (2007) (raising concern that judicial review gives judges the power to overrule elected officials and negates the notion of democratic representation); Jeremy Waldron, The Core of the Case Against Judicial Review, 115 Yale L.J. 1346 (2006) (expressing concern about giving unelected judges controlling authority on matters that concern the will of the majority). Other scholars, however, argue that judicial review is necessary because the federal judiciary is largely insulated from politics, allowing it to interpret the law in an objective fashion. See, e.g., Corey Brettschneider, Democratic Rights and the Substance of Self-Government 152 (2007) (reasoning that judicial review can, in some instances, support democracy by advancing core democratic principles, such as the minority’s right to participate in the political process); Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 24–26 (1962) (arguing that having the acts of government reviewed by the judiciary is beneficial because the political insulation of federal judges allows them to enforce long-term constitutional values even when those values conflict with short-term political goals). Which perspective on judicial review is most persuasive?

3. The U.S. system of judicial review is unlike that in any other country. See, e.g., Mark Tushnet, Marbury v. Madison Around the World, 71 Tenn. L. Rev. 251 (2004) (comparing judicial review in the U.S. with that in other nations, and concluding that the U.S. system is unique because of the judiciary’s broad authority to interpret the law and thereby bind the Executive and Legislative Branches of government). Should the U.S. style of judicial review be adopted by other nations? Why or why not?

F. THE U.S. SUPREME COURT

Remarks by Chief Justice William H. Rehnquist
Lecture at the Faculty of Law of the University of Guanajuato, Mexico
Thursday, September 27, 2001

* * *

The Supreme Court of the United States has been in existence for more than 200 years. Because it has the power of judicial review—that is, the
authority to declare an act of Congress or of the Executive unconstitutional and void—it is bound on occasion to antagonize these other branches. Fifty years ago, during the Korean War, President Truman seized the country’s steel mills from their private owners in order to avoid a strike. The Supreme Court ordered him to return them to their owners, and he did so.

Some 25 years ago, President Nixon refused to turn over to a court in which a criminal case was pending tapes of his conversations which bore on the case. The Supreme Court told him that he must turn them over. He did so, and resigned from office as a result.

Several years ago, the Court told President Clinton that he was answerable in a private lawsuit even though he was President. He answered.

How has a court so engaged in controversy not only survived, but maintained its authority for more than two centuries? There are a number of reasons, but first and foremost is the fact that it is genuinely independent of both the Executive and the Legislative Branches. We are far from infallible—but our mistakes are our own, and not imposed on us by Congress or the President.

There are nine Justices on the Supreme Court of the United States. Justices are appointed by the President, with the approval of a majority of the Senate. *** [I]n the United States all federal judges appointed under Article III of our Constitution are appointed for life.

My first experience with the Supreme Court was not as a lawyer or as a Justice, but as a law clerk. In December 1951, I had just been graduated from Stanford Law School in Palo Alto, California. I did not start out to be a lawyer—prior to law school, I had studied political science and government with the idea of being a college professor.

In those days, when people did not easily travel across the country for a job interview, the great majority of Supreme Court law clerks were graduates of law schools in the Eastern half of the United States. Justice William Douglas had roots in the West, so he made an effort to select clerks from the West. The chance of getting a clerkship with one of the other Justices seemed remote to me.

But as luck would have it, Justice Jackson came to Stanford to dedicate the new Stanford Law School building in the summer of 1951 and one of my professors arranged for an interview. Justice Jackson was pleasant and rather informal. After a few questions about my background and legal education, he asked whether my last name was Swedish. When I said it was, Justice Jackson told several anecdotes about Swedish clients he had represented while practicing law in New York. It was an enjoyable conversation, but when the interview was over, I was sure that I was not going to get the job. To my surprise, in November I received a letter offering me a clerkship beginning the following February.
Twenty years later, in 1972, I was appointed to the Supreme Court by President Nixon as an Associate Justice. In 1986, I was chosen by President Reagan to be Chief Justice and I will remain in that position until I retire.

* * *

Because I am the Chief Justice, people are often surprised to hear what a small staff I have in my chambers, or office. In addition to my three law clerks, I have two secretaries and one aide. The law clerks have usually been out of law school for just a year or two when they come to the Court and most have first served as law clerks to lower federal court judges. The law clerks serve for only one year. Most of the Justices have four law clerks, but [some] have [only] three because that is the number [they] prefer. One of the most distinguished of the Court’s past Justices, Louis D. Brandeis, was asked why he thought that people respected the Court. His reply was short and pithy: “Because we do our own work.”

Today, the work of the Court consists essentially of three different functions. First, we select which cases we will decide. Second, we actually decide those cases, which consists of studying the papers filed, hearing the oral arguments of the lawyers and voting which way the case will come out. Third, we prepare written opinions supporting and explaining the result reached by the majority, and there are often separate concurring or dissenting opinions by those Justices who do not agree with the reasoning of the majority opinion.

The authority to decide for itself which cases it will hear is essential to a court of last resort such as ours. We have not always had it. For about the first hundred years of our Court’s existence, from 1789 until 1891, it served as an appeals court for the federal trial courts. If a party to a suit in a lower court was dissatisfied, he had a right to a direct appeal to the Supreme Court. As the size and population of the United States increased, so did the number of federal trial courts, and as Congress conferred wider jurisdiction on those federal trial courts, the number of cases filed in the Supreme Court became too numerous for the Court to handle efficiently.

Although Congress created the intermediate courts of appeals—called circuit courts—in 1891, it was not until 1925 that Congress passed the Certiorari Act, which gave the Supreme Court discretion as to which cases to hear. Chief Justice William Howard Taft was the person mainly responsible for the passage of that statute.

Taft was an interesting fellow in his own right. * * * He is the only person ever to serve as both President of the United States and Chief Justice. * * * When he was appointed Chief Justice, the Court had fallen nearly five years behind in its docket. He resolved this caseload congestion in the Court by convincing Congress to give the Court discretion as to which cases to hear. Some members of Congress were doubtful—why shouldn’t every litigant have a right to get a decision on his case from the Supreme Court? Taft responded that in each case, there had already been one trial
and one appeal. “Two courts are enough for justice,” he said. To obtain still a third hearing in the Supreme Court, there should be some question involved more important than just who wins this lawsuit.

Under the Certiorari Act, a party dissatisfied with a decision in either a state court of last resort or a federal appeals court may file a petition for a writ of certiorari with the Supreme Court and the Court decides whether or not to grant the petition and hear the case. Rather than serving as an appellate court that simply attempts to correct errors in cases involving no generally important principle of law, the Court instead tries to pick those cases involving unsettled questions of federal constitutional or statutory law of general interest. When the Court renders a decision, it is binding on and must be followed by the lower courts not only in that case, but in any case that presents the same question.

When I joined the Court in 1972, about 4,000 petitions for certiorari were filed each year with the Court, and we selected about 150 cases to hear on the merits. Today, about 7,000 petitions are filed each year and we hear about 80. Now, if you do the math, you will see that 7,000 petitions per year means an average of about 135 petitions each week. In order to manage this volume, we rely on our law clerks to summarize the petitions.

Although our Court otherwise operates by majority rule, in order to grant a petition for certiorari—and decide to accept a case for decision—it only takes four, rather than five, votes. During the time the Court is sitting, from the first Monday in October through sometime in June, the nine members of the Court meet in conference each week to vote on the petitions and decide which cases to accept. These conferences take place in a conference room in the Supreme Court building. Only the nine Justices are present. The conferences are not open to the public or any Court staff.

Shortly before each conference, I send out a list of the petitions to be decided during that conference that I want to discuss. Each of the other Justices may ask to have additional cases put on the “discuss list.” If at any particular conference there are 100 petitions to be decided, there may be anywhere from 15 to 30 that are on the discuss list. The petitions for certiorari that are not discussed are denied without any recorded vote.

Whether or not to grant certiorari is a rather subjective decision, made up in part of intuition and in part of legal judgment. One important factor is whether the case being considered has been decided differently from a very similar case decided by another lower court. Another factor that makes a difference is whether the lower court decision seems to have incorrectly applied a Supreme Court decision that the Justices believe should have directed the outcome of the case.

Now when a case is filed with the Supreme Court, the Court’s job is to pick from the several thousand cases it is asked to review each year those
cases involving unsettled questions of federal constitutional or statutory law of general interest.

After the Court performs its first function of picking which cases to decide, it must move on to hear and decide them. Several weeks before oral argument is scheduled, the parties must file briefs that conform with specific Court rules. The rules direct what information must be included in a brief, describe the size of paper and type of print, and limit the number of pages. Even the colors of the covers of the briefs are specified: the petitioner’s brief must have a blue cover and the respondent’s must have a red cover. The Court also often receives briefs from amici curiae— or friends of the Court—in particular cases, and these must have a green cover. This color-coding comes in very handy when you have a stack of eight or ten briefs in a particular case and can locate the brief you want by its color without having to read the covers of each.

Each Justice of course prepares for argument in his own way. Some of my colleagues get memos from their law clerks summarizing and analyzing the arguments made by each side. I do not do this because it does not suit my working style. When I begin to prepare for a case that will be orally argued, I first read the opinion of the lower court that is to be reviewed. I find this a good starting point because it has been produced by another court which, like ours, is sworn to uphold the Constitution and laws and has presumably done its best to decide the case fairly. Then I read the petitioner’s brief and then the respondent’s brief. One of my law clerks will have done the same thing so that we can discuss the case. And when we are both ready, that is what we do. * * * We discuss our reactions to certain arguments and if I think the briefs do not cover a particular point adequately, I may ask the clerk to write a memorandum on that point. Then I go back and read the main Supreme Court opinions relied upon by one side or the other in their briefs.

The oral arguments are the only publicly visible part of the Supreme Court’s decision process. It is the time set aside for all nine Justices to gather to hear the advocates for both sides argue the case and to ask our own questions. We hear arguments in the courtroom of the Supreme Court building fourteen weeks out of each year; two weeks each in the months of October through April. During the weeks of oral argument, the Court sits on the bench from ten o’clock in the morning until noon on Monday, Tuesday and Wednesday. On each day, it hears two cases, allotting a half hour to the lawyers representing each side in each case. Oral arguments are open to the public and if you were to visit Washington during an oral argument week, you could come to the Court in the morning and stand in line to see an argument or part of one.

Once a case has been argued, we must decide which way it will come out. For cases argued on Mondays, we meet in conference on Wednesday afternoon. For cases argued on Tuesdays and Wednesdays, we meet in
conference on Friday. At the appointed time the nine members of the Court meet in the conference room. We all shake hands with one another when we come in and we have whatever materials we want with us. As I said before, there is no one in the room except the nine of us. If our conference is interrupted by a knock on the door indicating that there is a message for one of the Justices, the most junior Justice answers the door and delivers it. * * *

The Chief Justice begins the discussion of the cases that have been argued by reviewing the facts and the decision of the lower court, outlining what he understands is the applicable case law and indicating either that he votes to affirm the decision of the lower court or to reverse it. The discussion then proceeds to the most senior Associate Justice, on down to the most junior Justice. The time taken to discuss any particular case obviously depends upon its complexity. By the time the most junior Justice has finished his discussion, it will usually be evident that a majority of the Court has agreed upon a basis for either affirming or reversing the decision under discussion, and I announce how I am recording the vote so that others may disagree with my count if they believe I am mistaken.

Once we have decided which way a case will come out, we must address the third function of the Court: the preparation of written opinions supporting and explaining the result reached by the majority. And, as I said earlier, there are often separate concurring or dissenting opinions by those Justices who do not agree with the reasoning of the majority opinion.

In every case in which the Chief Justice votes with the majority, he decides who will write the opinion of the Court. If the Chief Justice is not in the majority, the most senior Justice in the majority assigns the case. The assignment of cases is, as you would expect, very important to each member of the Court. The signed opinions are to a very large extent the only visible record of a Justice’s work on the Court. As an Associate Justice I eagerly awaited the assignments, and I think my law clerks awaited them more eagerly than I did. If I was assigned 17 or 18 opinions a year, each of my clerks—who serve for only a year—might have an opportunity to work on five or six opinions.

When I assign a case to myself, I sit down with the clerk who is responsible for the case and go over my notes and recollections from conference with him. This usually provides an adequate basis for discussion between me and the clerk of the views expressed by the majority at conference, and of the way in which an opinion supporting the result reached by the majority can be drafted. After this discussion, I ask the clerk to prepare a first draft of a Court opinion and to have it for me in ten days or two weeks. That first draft is really a rough draft that I may very well substantially rewrite.

I go through the draft with a view to shortening it, simplifying it, and clarifying it. I have a rule of thumb that I picked up from a lawyer I worked
with before I came on the Court: If a sentence takes up more than six lines of type on an ordinary page, it is probably too long. The rule is simple, but I apply it to every draft I review.

After I have revised the draft, I return it to the law clerk, who refines it further. We print the finished product so that we may circulate it to the other chambers. And then we wait to see what the reaction of the other Justices will be, especially those who voted with the majority at conference.

If a Justice agrees with the draft and has no criticisms or suggestions, he will send a letter saying that he would like to join in the opinion. If a Justice agrees with the general import of the draft but wishes changes to be made in it before joining, a letter to that effect will be sent. The Justice who is writing the opinion will, if possible, accommodate the suggested changes.

The senior Justice among those who disagree with the result reached by the majority at conference usually assigns the preparation of the dissenting opinion in the case, if there is to be one. The draft dissent will be circulated in due course.

The decision-making process has now been completed. A case in which certiorari was granted somewhere from six months to a year ago has been briefed, orally argued and now finally decided by the Supreme Court of the United States.

* * *

**NOTES AND QUESTIONS**

1. As the above remarks indicate, each year as many as 10,000 losing parties (in both civil and criminal cases) seek review by the U.S. Supreme Court. The Court, however, hears only a small fraction of that number. The Judiciary Act of 1925 granted the Court discretionary review in the vast majority of cases, and the Supreme Court Selections Act of 1988 all but eliminated mandatory appellate jurisdiction in the Supreme Court. If the Supreme Court does decide to review a case, the process is called granting “a petition for writ of certiorari” (“certiorari” is Latin for “to be more informed”). Although there is no formal rule that so provides, unless there is some basis for mandatory jurisdiction (see below), Supreme Court review occurs only if four Justices vote to grant certiorari. That principle (which Chief Justice Rehnquist describes above) has become known as the “rule of four.” See, e.g., Ira Robbins, *Justice by the Numbers: The Supreme Court and the Rule of Four—Or Is It Five?*, 36 Suffolk U. L. Rev. 1 (2002). What is the logic of having discretionary review? Should Supreme Court review be mandatory in significant categories of cases, such as death penalty cases, or cases in which a lower court has declared a law unconstitutional?

2. Chief Justice Rehnquist noted that in 1972, the Court heard about 150 cases per year. By 2001 (the year he gave his remarks), that number had
INTRODUCTION TO THE U.S. LEGAL SYSTEM

44

fallen to 80 cases per year. During the ten years that John G. Roberts, Jr. has served as Chief Justice, that number has continued to fall. For example, in the 2014 term, the Court decided only 66 cases (after full briefing and oral argument), and for the 2013 term, the number was only 68. Erwin Chemerinsky, Chemerinsky: 10 lessons from Chief Justice Roberts’ first 10 years, ABA JOURNAL (Sept. 30, 2015), available at http://www.abajournal.com/news/article/chemerinsky_10_lessons_from_chief_justice_roberts_first_10_years. Commentators have speculated as to why the Court hears so few cases, and why that number has decreased significantly in recent years. See, e.g., Ryan Owens & David Simon, Explaining the Supreme Court’s Shrinking Docket, 53 Wm. & Mary L. Rev. 1219 (2012) (concluding that the decrease in caseload stems from an ideologically fractured court and changes that have eliminated most grounds for mandatory jurisdiction).

3. As Chief Justice Rehnquist’s remarks reveal, the Supreme Court considers several factors when deciding whether to grant review, including: (1) whether there is a split in authority (a conflict) on an important federal issue among the federal appellate courts or state supreme courts, or (2) whether there is an important federal issue that should be addressed by the Court even in the absence of a lower court conflict. A more detailed description of the certiorari process can be found in Rule 10 of the published Supreme Court Rules, available online at http://www.supremecourt.gov/ctrules/2013RulesoftheCourt.pdf.

4. As noted, the Supreme Court’s appellate jurisdiction is almost entirely discretionary. The Court, however, also has “original jurisdiction” over certain types of cases, meaning that in those cases the Supreme Court serves as a type of trial court. Under Article III, Section 2 of the Constitution, the Supreme Court has original jurisdiction “[i]n all cases affecting Ambassadors, other public ministers and Consuls and those in which a State shall be a party.” Additionally, 28 U.S.C. § 1251 prescribes some additional situations in which the Supreme Court’s original jurisdiction may be invoked. In those situations, the Supreme Court is a court of both first and last resort. See generally ROBERT KلونOFF & GREGORY CASTANIAS, FEDERAL APPELLATE PRACTICE AND PROCEDURE IN A NUTSHELL 401–04 (2008) (discussing Supreme Court’s original jurisdiction).

5. Once the Supreme Court grants review in a case, the parties to the case file written briefs and present oral arguments. In many Supreme Court cases, amicus curiae (“friend of the Court”) briefs are filed as well. Both briefing and oral arguments are important, but most experts agree that briefs play a greater role in the outcome than oral argument. See, e.g., Ruth Bader Ginsburg, Remarks on Appellate Advocacy, 50 S.C. L. Rev. 567, 567–68 (1999) (observations of a sitting Supreme Court justice, who notes that briefing is far more important in the Court’s decision-making process, and stating, “Oral argument is fleeting—here today, it may be forgotten tomorrow”); Terry Rombeck, Justice Takes Time for Q & A, LAWRENCE J.—WORLD, Oct. 30, 2002, at 5B, available at http://www2.ljworld.com/news/2002/oct/30/justice_takes_time/ (interviewing Justice Clarence Thomas regarding oral argument,
and quoting the Justice as stating: “I don’t see a need for all those questions . . . I think justices, 99 percent of the time, have their minds made up when they go to the bench”); Nancy Winkelman, Just a Brief Writer?, 29 Litig. 50, 52 (2003) (noting that “judges overwhelmingly agree that cases are decided primarily on the basis of the briefs”). For a detailed look at the role of oral arguments and briefing in the Court’s decision-making process, see Isaac Unah, The Supreme Court in American Politics 118 (2010).

6. As Chief Justice Rehnquist noted, every Justice on the U.S. Supreme Court has at least three law clerks to assist in research, opinion writing, and other tasks. Most clerks have completed a clerkship with a lower court judge and may also have had a brief period in private practice. Clerking on the Supreme Court is perhaps the most prestigious job that a recent U.S. law school graduate can hold. The role of law clerks in the work of the Court should not be underestimated. For example, as Chief Justice Rehnquist’s remarks illustrate, law clerks frequently write the first drafts of opinions. Also, law clerks play a major role in evaluating the petitions for certiorari that are filed in the Court. A recent study has shown that law clerks play a major role in influencing the cases that the Court chooses to review. See Ryan Black & Christina Boyd, The Role of Law Clerks in the U.S. Supreme Court’s Agenda-Setting Process, 40 Am. Pol. Research 147 (2012) (detailed study demonstrating impact of law clerks on the certiorari process). Should a recent law school graduate have such a large role in the Court’s review process?

7. The U.S. Constitution is written in extremely broad terms. A major debate among the Justices and among constitutional law scholars concerns how the document should be interpreted in resolving cases before the Court. Several competing approaches have been proposed.

Some justices and scholars have embraced interpreting the Constitution based upon the “original intent” of the framers who drafted the document. That approach often involves a complex historical analysis of the personal and public writings of the framers around the time that the Constitution was drafted (1787). This theory has its supporters and its critics. See, e.g., Jamal Greene, The Case for Original Intent, 80 Geo. Wash. L. Rev. 1683, 1705 (2012) (arguing that scholars need to consider the framers’ intent in constitutional analysis because it is a “time-honored form of ethical argument” that allows for a more comprehensive view of constitutional interpretation); Robert Bennett, Originalist Theories of Constitutional Interpretation, 73 Cornell L. Rev. 355 (1988) (asserting that the original intent argument is subject to major analytical problems, including (1) a historical problem in compiling all relevant historical documents to decipher comprehensive intent, (2) a “summing” problem whereby it is difficult to formulate one coherent intent because each of the founders may have had a distinct subjective intent, and (3) a malleability problem whereby a finding of general intent can be manipulated in many different ways).

Another approach is to interpret the Constitution by its “plain meaning” or “original text,” which does not look solely at the intent of the framers, but rather at the meaning of constitutional terms as they were understood at the
time they were drafted. Once again, that approach requires an historical analysis of societal language and understandings at the time the Constitution was drafted. That theory also has its supporters and critics. See, e.g., ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990) (warning of the dangers of interpreting law based on politics rather than text, and stating that the textualist approach is the only approach sufficient to protect the democratic legitimacy of the judiciary because it does not consider political influence); Antonin Scalia, Address Before the Attorney General’s Conference on Economic Liberties in Washington, D.C.—June 14, 1986, in ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 103 (1987) (future Supreme Court Justice argues that the appropriate constitutional inquiry is “the most plausible meaning of the words of the Constitution to the society that adopted it—regardless of what the Framers might secretly have intended”). But see, e.g., Michael Dorf, Foreword: The Limits of Socratic Deliberation, 112 Harv. L. Rev. 4, 4 (1998) (noting that “[b]ecause textualism as practiced by its proponents on the Court is backward-looking, it is particularly ill-suited to the problems of a rapidly changing world to which the Court must constantly apply statutory and constitutional text”); Robert Post, Theories of Constitutional Interpretation (Yale Faculty Scholarship Series, Paper 209, 1990), available at http://digitalcommons.law.yale.edu/fss_papers/209/ (criticizing the plain meaning approach, and stating: “[I]f for any reason that meaning has become questionable, it is no help at all to instruct a judge to follow the ‘plain meaning’ of the constitutional text. A meaning that has ceased to be plain cannot be made so by sheer force of will”).

Finally, some scholars follow a “pragmatic” approach to interpretation. That approach maintains that the Constitution is a living document that is meant to evolve over time based on changing norms, technology, and other circumstances. Thus, the pragmatist does not view the original meaning or intent of the document to be the sole (or even primary) principle guiding interpretation. Once again, that approach has both supporters and detractors. See, e.g., STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 18 (2005) (promoting the pragmatic constitutional interpretive approach and the concept of a “living constitution,” and stating that the Constitution is “a continuing instrument of government” to apply to new subject matter); Richard Posner, Foreword: A Political Court, 119 Harv. L. Rev. 31 (2005) (stating that pragmatism is preferable because it allows judges to focus on the practical consequences of their decisions and often creates more socially desirable outcomes); Daniel Farber, Legal Pragmatism and the Constitution, 72 Minn. L. Rev. 1331, 1378 (1988) (supporting a pragmatic approach to constitutional interpretation and concluding that “[t]he pragmatist’s answers may be less elegant, but in the end I believe they are more satisfying than those that any grand theory could provide”). But see, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed. 1997) (criticizing the pragmatic approach to constitutional interpretation because it undermines the principles of democracy and allows judges to wrongfully place themselves in the role of the legislature); Jeffrey Rosen, Overcoming Posner, 105 Yale L.J. 581, 601 (1995)
(criticizing the pragmatic approach and stating: “In addition to being hard to reconcile with democracy, it requires a degree of empirical rigor and prophetic ability that is virtually impossible for run-of-the-mill ** judges to achieve”).

In analyzing U.S. Supreme Court cases interpreting the Constitution (including many of the cases in this textbook), it is useful to reflect upon which interpretative approach the Court is using to decide the dispute. Sometimes more than one approach may be involved.

RUTH BADER GINSBURG, THE ROLE OF DISSenting OPINIONS

The 20th Annual Leo and Berry Eizenstat Memorial Lecture
October 21, 2007
Associate Justice
Supreme Court of the United States

* * *

Artworks in my chambers display in Hebrew letters the command from Deuteronomy: Zedek, zedek tirdof—“Justice, justice shalt thou pursue.” These postings serve as ever-present reminders of what judges must do “that they may thrive.” In the Supreme Court of the United States, with difficult cases on which reasonable minds may divide, sometimes intensely, one’s sense of Justice may demand a departure from the majority’s view, expressed in a dissenting opinion. This audience, I thought, might find of interest some reflections on the role dissents play in the U.S. judicial system.

Our Chief Justice, in his confirmation hearings, expressed admiration for the nation’s fourth Chief Justice, John Marshall, in my view, shared by many, the greatest Chief Justice in U.S. history. Our current Chief admired, particularly, Chief Justice Marshall’s unparalleled ability to achieve consensus among his colleagues. During his tenure, the Court spoke with one voice most of the time.

In Chief Justice Roberts’s first year at the helm, which was also Justice O’Connor’s last term on our bench, it appeared that the Chief’s hope for greater unanimity might be realized. In the 2005–2006 Term, 45% of the cases we took up for review were decided unanimously, with but one opinion for the Court, and 55% were unanimous in the bottom line judgment. This past term, however, revealed that predictions of more consensus decision-making were off the mark. We spoke with one voice in only 25% of the cases presented, and were unanimous in the bottom line judgment less than 40% of the time. Fully one-third of the cases we took up—the highest share in at least a decade—were decided by a bare majority of five.

Typically, when Court decisions are announced from the bench, only the majority opinion is summarized. Separate opinions, concurring or
dissenting, are noted, but not described. A dissent presented orally therefore garners immediate attention. It signals that, in the dissenters’ view, the Court’s opinion is not just wrong, but importantly and grievously misguided. Last term, a record seven dissents were summarized from the bench, six of them in cases the Court decided by 5–4 votes.

I described from the bench two dissenting opinions. The first deplored the Court’s approval of a federal ban on so-called “partial-birth abortion.” Departing from decades of precedent, the Court placed its imprimatur on an anti-abortion measure that lacked an exception safeguarding a woman’s health. Next, I objected to the Court’s decision making it virtually impossible for victims of pay discrimination to mount a successful Title VII challenge. (Commenting on these orally announced dissents, Linda Greenhouse, the New York Times’ star Supreme Court reporter, wrote that last term will be remembered as the one in which I “found [my] voice, and used it.” That appraisal surprised my husband, my children, my chambers staff, and even my colleagues at the Court. All of them have heard me use my voice, sometimes to stirring effect. But it is true, as Linda Greenhouse knew, that only six times before, in thirteen terms on the Court, and never twice in the same term, did I find it appropriate to underscore a dissent by reading a summary of it aloud in the Courtroom.)

Our practice of revealing dissents, it bears emphasis, is hardly universal. In the civil law tradition that holds sway in Europe, and in countries once controlled by a continental power, courts issue a collective judgment, written in an impersonal style. The author of the judgment is neither named nor otherwise identifiable. Disagreement, if it exists, is not disclosed. That pattern prevails without exception in French tribunals, and it is also followed by the European Court of Justice, the High Court of the European Union, seated in Luxembourg.

The British common law tradition lies at the opposite pole. In appeals in that tradition, there was conventionally no “opinion for the court” disposing of a case under review. Instead, the judges hearing the matter composed their own individual opinions which, taken together, revealed the court’s disposition. Changes in British practice and in some European tribunals have brought these divergent systems closer together. The European Court of Human Rights, for example, seated in Strasbourg, publishes signed dissenting opinions. But, by and large, the historical traditions hold.

Our system occupies a middle ground between the continental and the British patterns. In the earliest days of our national existence, the U.S. Supreme Court, like the House of Lords, Britain’s highest tribunal, issued *seriatim* opinions. Each Justice spoke for himself whenever more than a memorandum judgment issued. But John Marshall, who served as Chief Justice from 1801 until 1835, thought that practice ill-advised. In its place, he established the practice of announcing judgments in a single opinion for
the Court, which he generally wrote himself. Opinions that speak for the Court remain the custom today. But unlike courts in civil law systems, and in line with the British tradition, each member of the Court has the prerogative to speak out separately.

What is right for one system and society may not be right for another. The civil law-style judgment is suited to a system in which judges train for and embark on career service soon after university graduation. Promotions in such systems generally depend upon the recommendation of longer-tenured, higher-ranking judges. Common law judges, in contrast, are recruited at middle age from the senior ranks of the practicing bar or of law faculties.

In civilian systems, the nameless, stylized judgment, and the disallowance of dissent, are thought to foster the public’s perception of the law as dependably stable and secure. Our tradition, on the other hand, safeguards the independence of the individual judge and prizes the transparency of the process of wielding judicial power.

No doubt, as Chief Justice Roberts suggested, the U.S. Supreme Court may attract greater deference, and provide clearer guidance, when it speaks with one voice. And I agree that a Justice, contemplating publication of a separate writing, should ask himself: Is this dissent or concurrence really necessary? Consider the extra weight carried by the Court’s unanimous opinion in Brown v. Board of Education [set forth in Chapter 2]. In that case, all nine Justices signed on to one opinion making it clear that the Constitution does not tolerate legally enforced segregation in our Nation’s schools. With similar heft, in a follow-up case, Cooper v. Aaron, all nine Justices jointly authored a statement for the Court powerfully reaffirming—in the face of official resistance in Little Rock, Arkansas—that desegregation in public schools is indeed the law of the land.

On the utility of dissenting opinions, I will mention first their in-house impact. My experience teaches that there is nothing better than an impressive dissent to improve an opinion for the Court. A well-reasoned dissent will lead the author of the majority opinion to refine and clarify her initial circulation. An illustration: I wrote for the Court in the Virginia Military Institute case [set forth in Chapter 2], which held that VMI’s denial of admission to women violated the Equal Protection Clause. The published opinion was ever so much better than my first draft, thanks to Justice Scalia’s attention-grabbing dissent.

Sometimes a dissent is written, then buried by its author. An entire volume is devoted to the unpublished separate opinions of Justice Brandeis. He would suppress his dissent if the majority made ameliorating alterations or, even if he gained no accommodations, if he thought the Court’s opinion was of limited application and unlikely to cause real harm in future cases.
On rare occasions, a dissent will be so persuasive that it attracts the votes necessary to become the opinion of the Court. I had the heady experience once of writing a dissent for myself and just one other Justice that became the opinion of the Court from which only two of my colleagues, in the end, dissented.

Are there lasting rifts sparked by sharply worded dissents? Justice Scalia spoke to that question nicely. He said: “I doubt whether any two [J]ustices have dissented from one another’s opinions any more regularly, or any more sharply, than did my former colleague Justice William Brennan and I. I always considered him, however, one of my best friends on the Court, and I think that feeling was reciprocated.” The same might be said about my close friendship with Justice Scalia.

Describing the external impact of dissenting opinions, Chief Justice Hughes famously said: “A dissent in a Court of last resort is an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.”

A classic example is Justice Benjamin Curtis’s dissent from the Court’s now notorious 1856 decision in Dred Scott v. Sanford. The Court held, 7–2, in Dred Scott that people of African descent whose ancestors were brought here as slaves could never become American citizens. Justice Curtis disagreed in an opinion remarkable for its time. At the founding of our Nation, he wrote, Blacks were “citizens of at least five States, and so in every sense part of the people of the United States,” thus “among those for whom and whose posterity the Constitution was ordained and established.”

Dissents of this order, Justice Scalia rightly commented, “augment rather than diminish the prestige of the Court.” He explained: “When history demonstrates that one of the Court’s decisions has been a truly horrendous mistake, it is comforting . . . to look back and realize that at least some of the [J]ustices saw the danger clearly and gave voice, often eloquent voice, to their concern.”

Though Justice Scalia would not agree with me in this further example, I would place Justice Breyer’s dissent in [the October 2006] term’s school integration cases in the same category. In those cases, the Court invalidated student assignment plans adopted in Seattle, Washington and Louisville, Kentucky. The plans were designed by the cities’ authorities to counter resegregation in the local public schools. The question was whether local communities had leeway to use race-conscious criteria for the purpose of bringing about the kind of racially integrated education Brown v. Board of Education anticipated. The Court held, 5–4, that the Constitution proscribed Louisville’s and Seattle’s efforts.

Justice Breyer’s exhaustive dissent concluded: “[T]he very school districts that once spurned integration now strive for it. The long history
of their efforts reveals the complexities and difficulties they have faced. . . .

[T]hey have asked us not to take from their hands the instruments they have used to rid their schools of racial segregation, instruments . . . they believe are needed to overcome the problems of cities divided by race and poverty. . . . The last half-century has witnessed great strides towards racial equality, but we have not yet realized the promise of Brown. To invalidate the plans under review is to threaten [Brown’s promise]. . . . This is a decision . . . the Court and the Nation will come to regret.”

One of the two dissenting opinions I read from the bench in the 2006–2007 term serves as my last illustration of an appeal “to the intelligence of a future day.” Seven years ago, the Court held Nebraska’s ban on so-called “partial-birth” abortion unconstitutional, in part because it contained no exception safeguarding the health of the woman. Three years later, in a deliberate effort to undo the Court’s ruling, Congress passed a federal ban on the same procedure, also without a health exception. The federal ban was promptly challenged and found unconstitutional in the lower courts. A Supreme Court, which no longer included Justice O’Connor, held, 5–4, that the federal ban survived review for constitutionality.

I recalled, in my dissent, that the Court had repeatedly reaffirmed the State’s unconditional obligation, when regulating abortion, to safeguard the woman’s health. Not only did the Court, last term, refuse to take seriously once solid precedent demanding a health exception, but the majority also, and alarmingly in my judgment, resurrected “ancient notions about women’s place in the family and under the Constitution.” Both the federal ban, and the majority’s approval of it, I observed, were endeavors “to chip away at a [constitutional] right declared again and again by th[e] Court,” and, until the Court’s volte-face, “with increasing comprehension of its centrality to women’s lives.” “A decision” of the character the Court rendered, I said in conclusion, “should not have staying power.”

I turn now to another genre of dissent, one aiming to attract immediate public attention and to propel legislative change. My example is the second dissent I read from the bench last term. The case involved a woman, Lilly Ledbetter, who worked as an area manager at a Goodyear tire plant in Alabama—in 1997, the only woman in Goodyear to hold such a post. Her starting salary (in 1979) was in line with the salaries of men performing similar work. But over time, her pay slipped. By the end of 1997, there was a 15 to 40 percent disparity between Ledbetter’s pay and the salaries of her fifteen male counterparts. A federal jury found it “more likely than not that [Goodyear] paid [Ledbetter] an unequal salary because of her sex.” The Supreme Court nullified that verdict, holding that Ledbetter filed her claim too late.

It was incumbent on Ledbetter, the Court said, to file charges of discrimination each time Goodyear failed to increase her salary commensurate with the salaries of her male peers. Any annual pay decision
not contested promptly (within 180 days), the Court ruled, became grandfathered, beyond the province of Title VII (our principal law outlawing employment discrimination) ever to repair.

The Court’s ruling, I observed for the dissenters, ignored real-world employment practices that Title VII was meant to govern: “Sue early on,” the majority counseled, when it is uncertain whether discrimination accounts for the pay disparity you are beginning to experience, and when you may not know that men are receiving more for the same work. (Of course, you will likely lose such a less-than-fully baked case.) If you sue only when the pay disparity becomes steady and large enough to enable you to mount a winnable case, you will be cut off at the court’s threshold for suing too late. That situation, I urged, could not be what Congress intended when, in Title VII, it outlawed discrimination based on race, color, religion, sex, or national origin in our Nation’s workplaces.

Several members of Congress responded within days after the Court’s decision issued. A corrective measure passed the House on July 31, 2007. Senator Kennedy introduced a parallel bill, with 21 co-sponsors. The response was just what I contemplated when I wrote: “The ball is in Congress’s court.... to correct [the Supreme] Court’s parsimonious reading of Title VII.”

Another type of dissent that may sound an alarm and propel change in the law is one at the intermediate appellate court level. When a judge on a mid-level court writes separately, he or she may persuade other courts at that level, thus creating a conflict among appellate courts in different regions of the country, one that the Supreme Court eventually may resolve. An impressive dissent, even in the absence of a division among intermediate courts, may alert the Supreme Court that an issue is difficult, important, and worthy of the Justices’ attention.

* * * I will continue to give voice to my dissent if, in my judgment, the Court veers in the wrong direction when important matters are at stake. I stress important matters because I try to follow Justice Brandeis’s counsel. He cautioned that “in most matters it is more important that the applicable rule of law be settled than that it be settled right.” One might put in that category an ambiguous provision of a complex statutory regime—the [tax code], for example. Justices take comfort in such cases from the knowledge that Congress can amend the provision if it believes the Court has gone astray.

On when to acquiesce in the majority’s view, and when to take an independent stand, Judge Jerome Frank wrote of the model Brandeis set:

Brandeis was a great institutional man. He realized that . . .

* The measure was later enacted as the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111–2, the first bill signed into law by President Obama. [Ed.]
and handicap it in the doing of its fundamental job. Dissents . . . need to be saved for major matters if the Court is not to appear indecisive and quarrelsome. . . . To have discarded some of [his separate] opinions is a supreme example of [Brandeis’s] sacrifice to [the] strength and consistency of the Court. And he had his reward: his shots [were] all the harder because he chose his ground.

In the years I am privileged to serve on the Court I hope I will be granted similar wisdom in choosing my ground.

**NOTES AND QUESTIONS**

1. Dissenting opinions, by their very nature, demonstrate to the public that the court is in disagreement about a particular issue. Is it important to publish different interpretations of the law? Or do dissenting opinions cause too much confusion and contribute to a lack of respect for the law?

2. Over the past two centuries, several important dissenting opinions later formed the bases for majority opinions in landmark cases. For example, Justice Harlan’s dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), a case upholding “separate but equal” facilities used to separate blacks and whites, represents one of the most important dissents in U.S. history. His dissent was undoubtedly influential in the seminal case of *Brown v. Board of Education*, 347 U.S. 483 (1954), when the Supreme Court rejected the “separate but equal” doctrine and ruled that racial segregation in schools was unconstitutional. Justice Blackmun’s dissenting opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986), a case that upheld criminal prohibitions on consensual homosexual sex, is another example of a highly influential dissenting opinion. His dissent was a key factor in the decision by the Supreme Court to overrule *Bowers* 17 years later in *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that it was unconstitutional to criminalize consensual homosexual sex). (The subject of gay rights is also discussed in Chapter 2.) For a discussion of the history of dissenting opinions, see Edward McGlynn Gaffney, Jr., *The Importance of Dissent and the Imperative of Judicial Civility*, 28 Val. U.L. Rev. 583 (1994) (analyzing the role of dissenting opinions over the past two centuries and concluding that such opinions play a crucial part in the development of appellate precedent).

3. Dissenting opinions have long been important in the United States, but in recent years they have become increasingly important in other parts of the world. For example, as Katalin Kelemen notes in her article, *Dissenting Opinions in Constitutional Courts*, 14 German L.J. 1345 (2013), published dissenting opinions are becoming more common throughout European legal systems.

4. In addition to dissenting opinions, there are times when an appellate judge will write a concurring opinion. One major reason for a concurring opinion is to discuss issues or points not addressed by the majority. Because of
the importance of both concurring and dissenting opinions, the excerpts in the following chapters include many such opinions.

**G. LEGAL EDUCATION IN THE UNITED STATES**

A career as a lawyer or legal scholar in the United States almost always involves formal legal education in a law school. The following article discusses the current law school experience in the United States.

**LEGAL EDUCATION IN THE UNITED STATES: WHO’S IN CHARGE? WHY DOES IT MATTER?**

Cheryl Rosen Weston  

**I. Regulators and Stakeholders in U.S. Legal Education**

Just as the regulation of lawyers has increased, so has regulation of legal education. Yet the forces which shape legal education are complex and include the government, voluntary institutions, professional organizations, the market, and even the media.

The role of the federal government in legal education in the United States is indirect. There is nothing equivalent to a Ministry of Education as found in other countries. The United States Department of Education does not approve law schools. Rather, it is required to maintain a list of agencies deemed suitable for accrediting higher education institutions, law schools among them. The list is divided into two segments: regional accrediting authorities, which focus on general standards for college and universities, and specialist accrediting bodies, which focus on distinct subject-matter programs.

The accreditation process is non-governmental and voluntary, but it has an important effect on law students. In the broadest sense, it serves as a status symbol that enhances the value of the degree offered. In relation to the power of the federal government, it is an essential prerequisite for attaining federal financial support. In the United States, students are individually responsible for a significant proportion of the costs of their education. The federal government provides approximately 70 percent of all financial aid to post-secondary students in the United States, **amounting [as of 2006] to more than $67 billion per year. Eighty percent of U.S. law students use educational loans as their primary source of financial aid. Law schools receive federal funds in a variety of other ways including research grants and payment for contracted services. Thus, the power of the federal government in legal education is largely the power of the purse. Financial aid, although principally in the form of loans requiring repayment, makes legal education widely available to those academically qualified. The ensuing debt impacts career choices because salary needs**
are influenced by loan repayment demands. The requirement that students attend accredited law schools to qualify for financial aid significantly influences their choice of law school.

The role of state governments is similarly indirect, but more powerful. It is illegal to practice law in the United States without a license and licensure is the exclusive province of state government. State authorities, located within the judicial branch, are responsible for determining admission to the bar and continuing eligibility to practice law. Typically, states require proof of competence, character, and fitness as the prerequisites of licensure. Competence is described as having a suitable educational credential, plus obtaining a passing grade on a bar examination. Thus the determination of what constitutes a “suitable educational credential” is a required precondition of entry into the profession under state law. Of the fifty-six jurisdictions that admit lawyers to practice, twenty will not permit an applicant to sit for the bar examination without having first graduated from an ABA [American Bar Association]-approved law school. Of the remaining, eleven other jurisdictions permit non-ABA-approved school graduates to take the exam only if they have been licensed in another state and have practiced there from periods ranging from three to ten years; twenty jurisdictions have varying provisions permitting graduates of foreign law schools to take the bar exam; and seven states permit taking the exam conditioned upon law office study, or an office/law school combination of studies. A handful of jurisdictions have unique requirements, such as a certain number of credits obtained at an ABA-approved school, a degree from a provisionally ABA-approved school, or additional years of law study. Unless one has completed his or her legal studies outside of the United States, or wishes to take the bar after being licensed and having practiced for a number of years in a different state, few states will license an individual who has graduated from a non-ABA-approved law school. In effect, state governments influence legal education by heavily favoring ABA-accredited schools in the licensing process.

U.S. law schools are subject to myriad regulations that, though unrelated to schools’ educational mission, potentially impact the educational process. For example, laws concerning employment, including working conditions and prohibitions against discrimination; laws affecting student admissions, such as disability accommodations; and the management of student records may be addressed on the federal, state, and/or local level. Law schools located within larger colleges or universities must comply with institution-wide hierarchical policies addressing such diverse issues as course approvals and faculty tenure. Consequently, the indirect nature of federal and state control of legal education is supplemented by numerous legal requirements of a diverse nature which must be satisfied on an ongoing basis.
Neither public nor private law schools are immune from financial distress. Alumni and employers of school graduates see themselves as stakeholders in the institution, and they are identified by the administration as potential donors. In addition, a strong pool of student applicants is critical to financial viability. The need to court these funding sources, as well as to attract dollars from grant-bestowing entities, places pressure on law schools to effectively market themselves to multiple constituencies and distinguish themselves from peers. In recent years the publication of U.S. News and World Report’s annual ranking of law schools has undisputedly impacted individual schools’ ability to attract students, much to the consternation of administration and faculty critical of the accuracy of the rankings yet willing to manipulate data and take actions to improve their institutions’ rank. It is increasingly common for law schools to identify themselves as special in a variety of ways, including overall quality, distinct areas of specialization, flexible class scheduling, emphasis on the use of technology, and/or regional or global focus. Individual schools see themselves as participants in a competitive market and seek to distinguish themselves in order to gain advantage.

Three voluntary organizations are of particular importance to the structure of legal education: the National Conference of Bar Examiners, the American Association of Law Schools, and above all, the American Bar Association.

The National Conference of Bar Examiners (NCBE) was created in 1931 as a non-profit corporation that works in conjunction with others to develop, maintain, and apply reasonable and uniform standards of education and character for eligibility for admission to practice law. The NCBE develops the Multistate Bar Examination (MBE) (a multiple choice exam on substantive areas of law) and the Multistate Professional Responsibility Examination (MPRE) (a multiple choice exam on the law of lawyer conduct) as well as the less-widely used Multistate Performance Test (MPE) (comprised of three ninety-minute questions attempting to determine lawyering skills) and the Multistate Essay Examination (MEE) (comprised of six thirty-minute essay questions within ten pre-announced areas of substantive law). In addition, the NCBE conducts character examinations, publishes statistical information, performs research, and assists bar admission authorities in general matters.

The American Association of Law Schools (AALS) is a non-profit association of more than 150 law schools. The purpose of the association is “the improvement of the legal profession through legal education.” It serves as the learned society for law teachers and is legal education’s principal representative to the federal government and to other national higher education organizations and learned societies. Membership consists of law schools; individual faculty and administrative
staff are involved in the AALS’s governance activities and participate in [numerous] sections of subject-matter interest.

The AALS is known for its annual meeting, a national gathering of law faculty that offers workshops and scholarly presentations, its faculty recruitment conference, and an applicant registry service. It further plays an important role in participating in ABA-accreditation site visits to member schools, reviewing conditions of key concern to faculty.

Chief among influential voluntary organizations is the American Bar Association. The ABA is a membership organization claiming membership of over 400,000 of the United States’ [more than 1 million] lawyers. The ABA seeks “to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law.” While the ABA’s membership consists of a minority of the profession, it has no substantial competitors.

In the context of legal education, the primacy of influence of the ABA results from its position as the sole accreditor of law schools recognized by the United States government. The organization first published standards for law schools in the late 1920s. A decade later, twenty states required bar applicants to be graduates of ABA-approved schools. The accreditation process is accomplished by way of a determination of whether the school has satisfied the ABA’s Standards for Approval of Law Schools. The process has two primary components, self-study and site visits.

The self-study process commences more than a year in advance of the year of the site visit. The process contemplates consultation with all constituencies of the school, including the faculty, administration, students, and alumni as well as the bench and bar. The resulting document identifies the components of the law school’s educational program and its goals; it also analyzes the school’s strengths, weaknesses, and educational output, such as bar examination performance and placement data in relation to its goals.

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Site visit teams for schools seeking provisional approval—those determined to be operating in substantial compliance with the accreditation standards with a reliable plan for attaining full compliance within three years—are visited annually by teams of five to seven members.

Fully approved schools are normally visited by seven-member teams. Teams consist of a lawyer, judge, or public member; a university administrator; and members of faculty or staff at other law schools. The visit, typically lasting three days, consists of numerous classroom visits; time spent examining clinical programs, including field placements; and evaluation of the library, physical facilities, technological capabilities, and student and administrative services. The visit encompasses extensive
conversations with the dean; meetings with individual faculty, professional staff, and student leaders; and open meetings with students. Also expected is a records review including a sample of examinations, student-written work, faculty scholarship, admission files, and financial records. The culmination of the visit results in a site evaluation report tendered to the ABA Accrediting Committee, which is composed of legal educators, judges, practicing lawyers, bar examiners and public non-lawyer members. The committee finds full compliance and continues accreditation, specifically identifies non-compliance, or seeks additional information. The entire process occurs every seven years.***

*** When the ABA site visit is to an AALS member school, one member of the ABA site evaluation team is an AALS member responsible for both participating in the ABA review and writing a separate report to the AALS membership review committee for compliance with its membership requirements.***

The final major influence on the American law school is the institutional faculty. Embedded in U.S. higher education is the value of faculty governance. Within the constraints of budget, accreditation, and rules of the parent institution, faculty members are responsible for the fundamental decisions concerning curriculum and program, hires, employment security, and job duties.***

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II. The Resulting Shape of Legal Education

A. Law School Offerings

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The first year of instruction is largely standardized and consists of courses in contracts, torts, property, criminal law, and civil procedure. Students are exposed to a substantial amount of doctrine and focus on mastering basic legal reasoning and analysis. In the 1870s, Professor Christopher Langdell of Harvard Law School promoted the practice of learning law through the analysis of appellate court opinions, commonly referred to as the case method. Case books evolved into compilations of “Cases and Materials,” supplementing the selected opinions with notes and problems. Classes consist of varying degrees of lecture and calling upon students to explicate the reasoning and holding of the opinions, statutes, and rules under consideration. Within these courses, the focus varies. Emphasizing national or local law, looking for rules or identifying policy considerations, examining the impacts of other disciplines, or focusing on the problem method and cultivating practitioner’s skills are some of the distinct approaches that distinguish schools or the predilections of individual law teachers.
The second- and third-year curriculum offerings are far more diverse. Trends indicate an explosive growth in the number of course offerings. A recent study found that between 1994 and 1997, eighty-three responding law schools added 1,574 new courses and seminars, with a mean of nineteen and a median of fifteen new courses added. Upper-level courses include large sections of courses addressing subjects of core contemporary legal knowledge such as evidence, administrative law, constitutional law, taxation, trusts and estates, labor law, and business associations. Numerous seminars, often reflecting individual faculty members’ areas of interest, are common. A significant number of additional courses focus on skills training, whether through focus on legal writing, simulation courses [such] as negotiations, trial advocacy, alternative dispute resolution, or various field and clinical placements.

A review of the history of law school offerings must be seen, not as the transition from the vocational training of the apprenticeship model to the ivory tower, but rather as an attempt to strike a balance between skills-based training and the theoretical study of law as science.

### B. Law School Teachers

The continuing debate over what law schools should teach is accompanied by the question of who shall teach it. The creation of the academic law school gave rise to the profession of law professor. Early law schools were staffed by practitioners and judges. The transition to the academic law school brought recognition that the talents of one distinguished within the profession do not necessarily translate into skill as a teacher.

Academic affiliation gave rise to the role of law teacher as scholar. It became expected that as academics, law professors would contribute to the body of legal knowledge, chiefly through scholarly publications. The view of law as a science further generated interest in empirical research and exploration of the “law and” disciplines. Law professors as social thinkers advanced schools of thought, such as legal realism and critical legal studies. Law professors also became activists both as technicians, drafting legislation and model laws, and as policy consultants on a national and international level. These roles are accepted within our society as a natural extension of professorial duties. They are clearly distinct, however, from teaching, and call for different talents.

As clinical programs and skills-oriented courses became more integrated into the curriculum, the lack of talented practitioners on staff became a real deficiency. Law schools have attempted to fill the gap by hiring clinicians—full-time instructors with practice experience who combine classroom instruction with supervision of students in practice
settings, or specialize in teaching legal writing—and adjuncts—local practitioners and judges with specialization or skills expertise who wish to teach on a part-time basis. 

NOTES AND QUESTIONS

1. For many years, law school has remained a three-year graduate program (commencing after a student completes an undergraduate degree, which typically involves a four-year program). In recent years, however, some scholars have proposed limiting law school to two years. For example, in a 2013 New York Times opinion article entitled, Make Law Schools Earn a Third Year, Professor Samuel Estreicher and Dean Daniel Rodriguez proposed changes that would make students eligible to take the bar exam after two years of law school, with a third year being optional. The article argues that a two-year program would cut educational costs for students and would thus provide more financial flexibility for students to work in less lucrative public interest fields. The Estreicher/Rodriguez proposal is available at http://www.nytimes.com/2013/01/18/opinion/practicing-law-should-not-mean-living-in-bankruptcy.html. President Barack Obama has also voiced his support for two-year law school programs. Speaking at New York’s Binghamton University in 2013, the President opined that law schools should eliminate the required third year of education. As he stated, students would “be better off clerking or practicing in a firm [in their third year] even if they weren’t getting paid that much * * *.” See Phillip Rucker, Obama Emphasizes Focus on Middle Class in Biden’s Home Town of Scranton, WASH. POST, August 23, 2014, available at https://www.washingtonpost.com/politics/obama-at-binghamton-university-comments-on-law-schools-tuition-congress/2013/08/23/b2b804e8-0c1b-11e3-8974-f97ab3b3c677_story.html. Some scholars, however, have criticized the two-year proposal. See, e.g., Erwin Chemerinsky & Carrie Menkel-Meadow, Don’t Skimp on Legal Training, N.Y. TIMES, Apr. 14, 2014, available at http://www.nytimes.com/2014/04/15/opinion/dont-skimp-on-legal-training.html (arguing that law schools need to expand (rather than reduce) their curriculum to keep up with modern legal issues). What benefits would two-year programs have over the traditional three-year model? What are the costs of a two-year approach? Which approach is preferable?

2. Some law schools offer a curriculum that is heavily focused on legal doctrine. Numerous scholars have supported a law school model that focuses more on practical skills and less on pure legal doctrine. See, e.g., James Moliterno, The Future of Legal Education Reform, 40 Pepp. L. Rev. 423 (2013) (arguing that in addition to basic legal doctrine, law schools need to focus more on practical skills necessary to be an effective lawyer); Susan Sturm & Lani Guinier, The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity, 60 Vand. L. Rev. 515, 516 (2007) (stating that the current law school curriculum “over-emphasizes adjudication and discounts many of the important global, transactional, and facilitative dimensions of legal practice,” and arguing that law schools need to focus more on offering
practical skills necessary for effective advocacy). In recent years, many law schools have increased significantly their offerings in practical skills. What should the balance be between traditional law school courses and courses offering practical training or experience?