Legal and Ethical Environment of Business Version 3 0 3rd edition Lau Solutions Manual

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Chapter 2

The Court System

Chapter Introduction

This chapter provides a comprehensive view of U.S. court system, and how it affects the conduct of businesses and individuals. It explains the roles played by the three branches of government, the ways in which the other two branches of government balance the judiciary, and the structures of state and federal courts. The primary difference between trial and appellate courts, as well as how the Supreme Court does its work will be highlighted in this chapter.

Introduction Outline

- Companies have to make a barrage of decisions daily, from product development to marketing to strategies to maintain growth, but most of these are based on sound business acumen rather than legal requirements.
    - If a company does violate a law, however, it must be held accountable.
- Whether a suit is brought by a supplier, customer, employee, shareholder, or other stakeholder, litigation is a fact of life for companies.
- Liability exposure can be minimized, but it cannot be entirely eliminated.

1. The Third Branch

- Understand the constitutional basis for the judicial branch.
- Explore the differences among the three branches of government.
- Learn about the Chief Justice's role in judicial administration.
- Explore the concept of judicial review.
- Become familiar with how the other two branches check and control the judiciary.

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Section Outline

- Article I of the Constitution allocates the **legislative** power to Congress, which is a bicameral body composed of the House of Representatives and the Senate. Congress makes laws and represents the will of the people in doing so.
- Article II of the Constitution creates the **executive** power in the president and makes the president responsible for enforcing the laws passed by Congress.
- Article III of the Constitution establishes a separate and independent **judiciary**, which is in charge of applying and interpreting the meaning of the law.
- The U.S. Supreme Court sits at the top of the federal judiciary as the supreme court of the land.
- The Constitution is remarkably short in describing the judicial branch.
    - Under the Constitution, there are only two requirements to becoming a federal judge: nomination by the president and confirmation by the Senate.
    - There are no age, citizenship, or qualification requirements.
- It is commonly accepted that the three branches of government are coequal, but in reality they are very different.
    - The three branches consume vastly different resources in serving the public, with the entire federal court system consuming less than two-tenths of 1 percent of the federal budget.
    - The judiciary is designed to be the most remote branch from the people.
    - In addition to being unelected, federal judges have life tenure and can be removed from office only through impeachment.
- Federal judiciary is a small entity as compared to other federal bureaucracies.
    - The Supreme Court and the district and appellate courts are part of the federal judiciary.
- The **Administrative Office** of the United States Courts runs the day-to-day issues for all the courts, such as payroll and rent.
    - A second component of the judiciary is the **Federal Judicial Center**, an agency dedicated to conducting research on judicial administration and providing judicial education.
    - A third component is the **United States Sentencing Commission (USSC)**, established by Congress to make recommendations on how to establish uniformity in

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federal criminal sentencing.

- The **chief justice** oversees the overall operation of the federal courts and represents the courts to the other branches of government.
    - When it comes to hearing and deciding cases, the chief justice is "first among equals": he has no more power than any of the other justices, known as **associate justices**.
- The Supreme Court is a well-known institution today, but it wasn't always that way.
    - The Supreme Court did not even get its own building until 1932, years after the nation's capital was established in Washington, DC.
- **Judicial review** is the power of courts to declare legislative or executive acts unlawful.
    - Judicial review means that any federal court can hold any act of the president or the Congress to be unconstitutional.
    - It is an extraordinary power in a democracy, as an unelected life-tenured person or group of persons overturns the acts of a popularly elected branch of government.
- The executive branch plays a critical role in "checking" the judiciary.
    - The president can control the judiciary by making careful judicial selections.
    - The power of the president to name federal judges is absolute—he is not required to consult with any other individual in making his choice.
    - Judicial nominees, especially to the Supreme Court, are under so much scrutiny now that sometimes even the president's own party will turn against a nominee.
    - Presidents hope, and believe, that their selections reflect their own ideologies and beliefs.
        - Federal judges are notoriously independent, however, and many demonstrate little hesitance to overrule their nominating president if they believe it necessary to do so.
        - The president also serves as a check on the judiciary by being the primary means of enforcing judicial decisions.
- No matter how much a president may disagree with a judicial decision, it is a testament to the republican form of government, and the rule of law, that the president faithfully executes a federal court's decision.
- The Congress can also play an important role in "checking" the judiciary.
    - The most obvious role is in confirming judicial selections.
    - It also controls the judiciary through its annual budgetary process.
    - Congress can control the judiciary by determining how the courts are organized and

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what kind of cases the courts can hear.

- The Constitution gives Congress the authority to determine the courts' jurisdictions.
  - Congress has used this authority in the past to take away controversial cases from judicial consideration.

The Chief's Report to Congress

https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf

Supreme Court Virtual Tour

http://supremecourt.c-span.org/VirtualTour.aspx

The Little Rock Nine

http://www.npr.org/templates/story/story.php?storyId=14091050

Exercises

Section 1 – The Third Branch

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1. Do you believe that judicial review is a good thing for American democracy? Why or why not?

   Answer: There is no right or wrong answer for this question, as scholars, lawyers and judges themselves are often split on the answer. Either way a student answers, it's important to ask the student to explain why he or she chose a particular answer.

   This question is designed to challenge students to think about the role of judges in American democracy, or indeed, any judicial system with judicial review. Point out to students that "majority rule," while it may work in their school club or social network when deciding a date for a formal event or where to eat dinner, is not really the way democracy works at the governmental level. The majority rule is reflected in the legislative and executive branches, which undergo regular elections. The majority rule is subverted, however, each time a court exercises judicial review to overturn an executive or a legislature.

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Students should be aware that the purpose of judicial review isn't to create tyranny or violence against democracy, but to protect the Constitution. Chief Justice Marshall himself said in *Marbury v. Madison* that "the powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written… It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. Between these two alternatives there is no middle ground." Marshall's primary concern was that without judicial review, Congress may simply ignore the Constitution or change it to suit its purposes. Judicial review, then, is the power that gives the courts to ensure Congress and the president obey the principles of limited power set forth by the Constitution.

Point out to students that although judicial review means courts can direct the other two branches of government, in modern day society there have been relatively few challenges to this exercise of power, which is never accompanied by force. Early American history records instances where Presidents or Congresses tried to ignore judicial rulings, but even highly controversial cases such as *Bush v. Gore* in 2000 did not result in massive social unrest, as the American public has learned to accept judicial supremacy in Constitutional matters through judicial review.

Some students may feel more strongly about how judicial review can result in unpopular decisions, particularly on "hot button" social issues such as public displays of religion, gay rights, suicide rights, use of stem cells, or abortion rights.

This question can also raise issues of comparative international law. Many foreign jurisdictions, including nascent ones, look to the United States Supreme Court as a case study on how courts exercise judicial review while maintaining moral authority and broad support. Many of these jurisdictions, such as Russia, China, and Pakistan, are struggling to establish judiciaries with powers of judicial review, which many in those countries see as essential toward establishing modern democratic institutions.

2. How does the Constitution guarantee judicial independence? Do you think judges have enough independence? Too much?

   Answer: The Constitution guarantees judicial independence by providing that judicial

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salaries can never be reduced, and by allowing Article III judges to serve lifetime appointments, subject only to impeachment for removal. After an early initial attempt to impeach Justice Samuel Chase for partisan activities failed, impeachment proceedings against federal judges have centered on serious allegations of misconduct or harassment.

There is an ongoing debate about whether judicial independence is under attack. Retired Justice Sandra Day O'Connor has used much of her time post-retirement to mount a steady defense of judicial independence. Judges, having no natural constituency, rely on members of the bar and academe to protect against these attacks. The attacks can come in many forms, such as heated political rhetoric (Pat Robertson once called judges no better than Al Qaeda), attempts to strip jurisdiction (many proposed federal and state laws would prohibit judges from hearing controversial cases), attempts to direct jurisprudence (Congress once considered a federal law prohibiting any federal judge from citing foreign law as persuasive authority), or outright attempts to intimidate judges (South Dakota considered, but thankfully rejected, legislation that would strip judges of judicial immunity and subject them to possible incarceration for judicial actions and decisions).

Encourage students to think about what would happen if any of these attempts passed. Many citizens see the judiciary as remote and unapproachable, but the judiciary remains in many ways a fragile institution worthy of protection so that it can carry on its work without interference.

3. How much money do you think federal judges should be paid?

Answer: Students' answers will vary. All across the country, at both state and federal levels, judges are starting to become vocal over the issue of judicial pay. These pay levels have been stagnant for a very long time. At the federal level, judicial pay is tied to Congressional salaries, making any pay raises exceedingly difficult. The result is that judges, all of whom could easily make many times more as partners at private law firms, are left frustrated and angry at the lack of movement on judicial pay. Chief Justice Roberts has called this issue a constitutional crisis that threatens judicial independence and the quality of the judiciary itself going forward, as judicial candidates from varied backgrounds drop out of consideration due to pay issues, leaving only independently wealthy individuals to consider judgeships. On the other hand, many private citizens believe that the current salary the judges receive is

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sufficient because they also receive non-monetary benefits like, lifetime tenure, respect and admiration, and the thrill of being a federal judge.

It might also be fun for students to compare judicial salaries with other professions that similarly have to make judgments.

4. Do you believe that Congress should have the ability to remove cases from federal courts? If so, what types of cases are appropriate for removal?

   Answer: Article III of the Constitution states that the Supreme Court has appellate jurisdiction, both as to law and fact, "with such exceptions, and under such regulations as the Congress shall make." This exceptions clause was the basis for Ex Parte McCardle, a case in which the Supreme Court held that Congress could validly strip the Supreme Court of subject matter jurisdiction. McCardle has not been overruled, and this issue remains relevant today as Congress debates whether to strip jurisdiction from controversial cases such as cases involving public displays of religion. Congress recently attempted to strip courts of jurisdiction involving detainees in Guantanamo Bay through the Military Commissions Act of 2006. In this question, instructors can explore how students feel about Congressional efforts to strip jurisdiction from courts. These attempts raise questions about the separation of powers, but allowing some types of cases to go to courts raises other questions about how a government should respond to external or internal threats, especially in time of war.

5. What options does a president have if he disagrees with a federal court's opinion? What options does Congress have if it disagrees with a federal court's opinion?

   Answer: The president serves as a check on the judiciary by being the primary means of enforcing judicial decisions. No matter how much a president may disagree with a judicial decision, it is a testament to the republican form of government, and the rule of law, that the president nonetheless faithfully executes a federal court's decision.

   The Congress can also play an important role in "checking" the judiciary. Congress can control the judiciary by determining how the courts are organized and what kind of cases the courts can hear. The Constitution also gives Congress the authority to determine the courts' jurisdictions. Congress has used this authority in the past to take away controversial cases

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from judicial consideration.

6. Should a federal court force desegregation on a community that is overwhelmingly against it?

   Answer: More than a century after the Civil War, and more than fifty years after *Brown v. Board of Education* and the incident at Central High School in Little Rock, Arkansas, there is still no consensus answer to this question. Most Americans probably believe that racial equality is important enough of an ideal that not even local preferences for segregation, or separate but equal, should override the ideal. This question challenges students to consider the role of courts in bringing about societal change—other as leaders of that change, or as followers.

7. Under what circumstances do you believe the Senate can legitimately refuse to hold hearings on a President's nomination to the Supreme Court?

   Answer: Responses will vary.

Additional Exercises

1. Is transparency needed in the selection/nomination of federal judges? What difference would it make if they had fixed terms?
2. The U.S. Supreme Court is considered the most powerful judicial body in the world. What other body can challenge its power or position?

2. Activists and Strict Constructionists

- Explore the strict constructionist, or originalist, judicial philosophy.
- Explore the judicial activist philosophy.
- Learn about the modern origin of the divide between these two philosophies.
- Examine the evolution of the right to privacy and how it affects judicial philosophy.
- Explore the biographies of the current Supreme Court justices.

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Section Outline

- The majority of a judge's work has nothing to do with politics.
  - Even at the Supreme Court level, most of the cases heard involve conflicts among circuit courts of appeals or statutory interpretation.
- In general terms, judges are thought to fall into one of two ideological camps.
  - On the politically conservative right, judges are described as either **strict constructionists** or **originalists**.
    - The role of judges is therefore to strictly interpret the Constitution, and nothing more.
  - Strict constructionists also believe that the Constitution contains the complete list of rights that Americans enjoy and that any right not listed in the Constitution does not exist and must be earned legislatively or through constitutional amendment.
    - Judges do not have the power to "invent" a new right that does not exist in the Constitution.
      - These judges believe in **original meaning**, which means interpreting the Constitution as it was meant when it was written, as opposed to how society would interpret the Constitution today.
  - On the politically liberal left are judges who are described as activist.
    - **Judicial activists** believe that judges have a role in shaping a "more perfect union" as described in the Constitution and that therefore judges have the obligation to seek justice whenever possible.
      - They believe that the Constitution is a "living document" and should be interpreted in light of society's needs, rather than its historical meaning.
      - They believe in a broad reading of the Constitution, preferring to look at the motivation, intent, and implications of the Constitution's safeguards rather than merely its words.
  - The phrase "right to privacy" today is widely accepted as a form of litmus test for whether a judge (or judicial candidate) is a strict constructionist or activist.

SCOTUS Justices: Does Politics Weigh into their Decisions?

http://www.youtube.com/watch?v=1-6euo8Rxio

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Justice Antonin Scalia on the Record

https://youtu.be/FrFj7JAyutg

FDR's Fireside Chats on his Court Packing Plan

https://youtu.be/aUBH1dygxyE

Justice Sotomayor Opens Up

https://youtu.be/1XsduxjSC8k

Biographies of the Current Supreme Court Justices

http://www.supremecourt.gov/about/biographies.aspx

Exercises

Section 2 – Activists and Strict Constructionists

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1. Read Justice Stewart's dissent in the *Griswold* case here: http://www4.law.cornell.edu/supct/html/historics/USSC_CR_0381_0479_ZD1.html. Although he believes Connecticut's law is "uncommonly silly," he nonetheless believes that it's not unconstitutional. Do you think that judges have an obligation to overturn "uncommonly silly" laws?

   Answer: Students' answers will vary. A student's answer to this question will reveal whether he or she believes in judicial conservatism or activism. While nearly all the students will probably believe that a state law restricting the sale of contraceptives only to married persons is bad (and probably dangerous) policy, they may divide on the question of what judges should do about it. If some students answer the question affirmatively, they should be asked about the criteria they would use to judge a law as silly. If some students answer the question in the negative, they should be asked if there is any amount of scientific evidence about the dangers to life and health posed by this law that would persuade them to change their minds.

2. Modern judicial confirmation hearings have been described as an intricate dance between nominees and Senators, with the nominees giving broad scripted answers that reveal little about their actual judicial philosophy. Do you agree with this characterization? Do you think

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any changes should be made to the confirmation process?

Answer: Students' answers will vary. However, the confirmation hearings for Roberts, Alito, Sotomayor, and Kagan have all been characterized by a lack of detail about the nominee's judicial philosophy. The nominees rarely answer the question posed, and instead adhere closely to scripted lines regarding fairness and following the law. Even Justice Kagan herself wrote withering commentaries on the nature of confirmation hearings. The question of reforming confirmation hearings is vexing, however. The Constitution requires nominees to be confirmed with the advice and consent of the Senate, and the dawn of the 24 hour news cycle, 30-second sound bites (witness Sotomayor's "wise Latina" controversy), and hyper-partisan political lobbying groups mean that nominees have little choice but to follow extremely safe and noncommittal routes to confirmation.

3. If you were president, what characteristics would you look for in nominating federal judges?

Answer: Students' answers will vary. This question provides students the opportunity to discuss how presidents make judicial nominations. The Constitution only requires that judges be nominated by the president and confirmed by the Senate, so the choice is strictly the president's. Some presidents rely on Senators; others rely on their staffs or Vice Presidents, while others still rely strictly on their own choices (although this is increasingly unusual). In addition to choosing nominees that can win confirmation in a political environment, presidents have to consider characteristics such as temperament and judicial philosophy. These characteristics may not always be obvious (consider how hard it would be to discern one's judicial philosophy without asking directly how they would rule on specific cases). It would be challenging for students to consider what characteristics they would look for if they had to make this choice. Which of the following would matter the most and why?

- Education
- Judicial experience
- Temperament
- Ratings from outside organizations
- Race
- Gender

4. If an elected legislature refuses to grant citizens a right to privacy, do you believe it is

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appropriate for the courts to do so? Why or why not?

Answer: Students' answers will vary. This question challenges students to once again consider the role of judges in protecting civil liberties and safeguarding Constitutional rights. The right to privacy is not mentioned in the Constitution, but concepts involving privacy are part of many provisions of the Bill of Rights. Modern courts have greatly expanded that right, not just in abortion cases but also in cases involving sale of contraceptives, inter-racial marriage, and homosexual sodomy. Students can also sometimes confuse privacy intrusions between government and private actors, and it may be helpful to point out the differences.

5. If a president believes that the Court has reached the wrong result, should the president be able to change the Court by increasing its numbers or forcing early retirement?

   Answer: There is no right or wrong answer for this question, as scholars, lawyers and judges themselves are often split on the answer. Either way a student answers, it's important to ask the student to explain why he or she chose a particular answer. Other than FDR's court-packing plan, no president has attempted to physically restructure the court itself in order to achieve a political agenda. Even FDR, who was enormously popular and commanded majorities in both houses of Congress, ran into a firestorm of public criticism when he presented his court-packing plan, forcing a public retreat from the plan.

6. What might the consequences be to having a Supreme Court comprised entirely of originalist judges or entirely of activist judges? Is that ever likely to happen? Why or why not?

   Answer: The Court remains closely divided between judicial conservatives and judicial liberals, with conservatives poised to control the Court's direction. However, if a situation does arise when a Supreme Court comprises entirely of either originalist judges or activist judges then a balance in opinion would be missing which is crucial in the judicial system. It is not very likely to happen since judges are appointed by the president belonging to the Democratic or Republican Party who would select a judge with right wing or left wing ideals. Additionally, since federal judges are appointed for lifetime, the turnover rate for federal judgeships is low.

Additional Exercises

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1. Search online and prepare a list of prominent originalists and judicial activists. What have been their contributions toward shaping the modern judicial system?
2. What are the benefits of the "right to privacy"? Discuss the global equivalents of this term, if any.

3. Trial and Appellate Courts

- Learn the differences between the state and federal constitutions.
- Understand subject matter jurisdiction.
- Explore the state and federal court systems.
- Distinguish the work of trial and appellate courts.

Section Outline

- In many American cities, both a state and a federal courthouse are present.
    - These courts hear different types of cases, involving different laws, different law enforcement agencies, and different judicial systems.
    - The rules governing the procedures used in these courts are known as **civil procedure** or **criminal procedure** and are sometimes so hard to understand they confound experienced attorneys and judges.
- There are fifty-one separate legal systems in the United States: one federal and fifty in the states.
    - Within each legal system is a complex interplay among executive, legislative, and judicial branches of government.
    - The foundation of each of these systems of government is a constitution.
    - The dynamic power sharing between state and federal governments is known as federalism and is a key feature of the republican form of U.S. government.
- The rules of **subject matter jurisdiction** dictate whether a case is heard in federal or state court.
    - Lawsuits involving state laws are generally heard in state courts.
        - Most criminal laws, for example, are state laws.
        - Domestic issues such as divorce and family law are also handled at the state

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level.

- Child custody and adoption laws are state based.
- Property and **probate** laws are also based on state law.
- The laws surrounding contracts are also enacted at the state level (although most are based on a common law called the **Uniform Commercial Code [UCC]**).
- The law of **torts** is state based.

- Federal court subject matter jurisdiction is generally limited to cases involving a **federal question**—either the federal Constitution or a federal law.
  - Cases involving the interpretation of treaties to which the United States is a party are also subject to federal court jurisdiction.
    - Any case involving the United States as a party is properly litigated in federal court.
- In **original jurisdiction** cases, lawsuits between states can be filed directly with the U.S. Supreme Court.
- Sometimes it's possible for a federal court to hear a case involving a state law.
  - These cases are called **diversity jurisdiction** cases, and they arise when all plaintiffs in a civil case are from different states than all defendants and the amount claimed by the plaintiffs exceeds seventy-five thousand dollars.
    - Diversity jurisdiction cases allow one party who feels it may not receive a fair trial where its opponent has a "home court" advantage to seek a more neutral forum to hear its case, a process called **removal**.

- Within both the federal court and the state court system, there is a hierarchy of higher and lower courts. The diagram in Figure 2.7 demonstrates this hierarchy.
  - The U.S. Supreme Court is the highest court in the country, and all courts are bound to follow precedent established by the U.S. Supreme Court through the doctrine of **stare decisis**.
  - Cases are filed in a U.S. District Court, the trial court in the federal system.
    - Under the court administration system, there are ninety-four judicial districts in the country.
    - As a trial court, the U.S. district courts hear civil and criminal trials.
      - The trials may be **bench trials** (heard only by the judge), or they may be jury trials.
      - At the trial, witnesses are called and their testimonies are recorded,

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word for word, into a **trial record** (transcript of what was said in the courtroom along with supporting documentation).

- ❖ At the conclusion of the trial, if the losing side is unhappy with the outcome, it is entitled as a matter of right to appeal its case to the U.S. Circuit Court of Appeals.

- In all fifty states, a trial court of **general jurisdiction** accepts most types of civil and criminal cases.
  - These courts are called various names such as superior court, circuit court, or district court.
  - There may be other courts of **limited jurisdiction** at the state level, such as traffic court, juvenile court, family court, or small claims court.
- In certain cases that involve a federal constitutional right, a party that loses at the state Supreme Court level can appeal to the U.S. Supreme Court for review.
- Whenever an appeal is filed, the trial record is forwarded to the appellate court for review.
  - Appellate courts do not conduct new trials and are unable to recall witnesses or call new witnesses.
  - The trial court's duty is to figure out the facts of the case.
    - ❖ This process of fact-finding is an important part of the judicial process, and a great deal of deference is placed on the judgment of the fact finder (**trier of fact**).
    - ❖ The trier of fact is typically the jury or the judge in the case of a bench trial.
  - On appeal, the appellate judge cannot substitute his or her interpretation of the facts for that of the trier of fact, even if the appellate judge believes the trier of fact was wrong.
  - The issues on appeal are therefore limited to **questions of law** or legal errors.
- In most cases, the best remedy a litigant can hope for is for the court of appeals to send the case back to a trial court (a process called **remand**) for reconsideration or perhaps a new trial.

Exercises

Section 3 – Trial and Appellate Courts

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1. Do you think that the "home court advantage" that justifies diversity jurisdiction still exists? Why or why not?

   Answer: Students' answers will vary. Students may struggle to understand the need for diversity jurisdiction. This question is designed to force them to consider the possibility of defending a lawsuit in a state where local rules, judges or jurors might be sympathetic to the other side. Instructors can challenge students to think of scenarios where this might occur, and ask them how they would feel if they had to defend in such a situation. Instructors can also point out the differences between state and federal rules and procedures, differences that may make the difference between win and loss in litigation.

2. Should states retain the ability to grant more civil rights than the federal Constitution? Can you think of historical examples of this happening? What implications does this have for the future?

   Answer: Students' answers will vary. This question challenges students to consider the nature of federalism and how it plays out in terms of everyday protection for citizens. States retain broad police powers to regulate for purposes of health, morals and public safety and can therefore have far more latitude than the federal government in passing laws, as long as those laws don't violate a federal constitutional right. Examples could include laws on gay marriage, medical marijuana, minimum wage, health care, educational rights, employment discrimination (many states expand the scope of impermissible discrimination beyond that protected by federal law), consumer safety, financial regulation, and environmental protection. Instructors can challenge students to consider where this will lead the nation in the future—could states like South Carolina and California, for example, become so divergent that they run the risk of losing some form of federal identity?

3. Stare decisis requires courts to respect and follow established precedent. Why do you think stare decisis is important in our common-law system? What do you think would happen if courts were not bound to stare decisis?

   Answer: Stare decisis is critical in a common-law system, where judges have the ability to interpret the meaning of legislation and in so doing, change the practical effects of

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legislation or in some cases overturn that legislation completely. Stare decisis provides stability and predictability, not just to lower courts but also to legislatures and citizens. Judges must think very carefully before overruling a prior case. Even if they would have ruled differently if they had heard the original case, judges considering overturning prior precedent must consider other factors before overturning. Unwillingness to adhere to stare decisis can result in chaos in public policymaking, and can also open the courts to accusations of political interfering and bias.

4. Under what circumstances do you think the Supreme Court should feel comfortable abandoning a prior precedent? Do you think the answer differs depending on whether you believe in judicial originalism or activism?

   Answer: Students' answers will vary. Most members of the Supreme Court feel that stare decisis should bind the Court unless there has been a major change in society or the prior decision was fundamentally flawed. Well known examples include Brown overturning Plessy (holding that separate but equal, which Plessy sanctioned, is unconstitutional) and *Lawrence v. Texas*, which overturned the *Bowers v. Hardwick* decision sanctioning criminal penalties for sodomy. The answer should not change depending on whether a judge follows originalism or activism, but activists on both sides routinely charge judges with failing to show fidelity to principles of stare decisis.

Additional Exercises

1. What could be an easy way to determine a case as civil or criminal?
2. How, in your opinion, can subject matter jurisdiction neutralize the "home court advantage"?

4. The Certiorari Process

- Understand the Supreme Court's jurisdiction, including what kinds of cases are selected for review.
- Explore what happens when lower courts of appeal disagree with each other.
- Learn about the Supreme Court's process in hearing and deciding a case.

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Section Outline

- The Supreme Court's jurisdiction is discretionary, not mandatory.
    - This means the justices themselves decide which cases they want to hear.
        - For the justices to hear a case, the losing party from the appeal below must file a petition for a **writ of certiorari**.
- During the 2014 term (a **term** begins in October and ends the following June), the Supreme Court received approximately 7,033 petitions.
    - Of these, about 5,488 were **in forma pauperis**, leaving only approximately 1,534 paid petitions.
        - In forma pauperis, petitions are filed by indigent litigants who cannot afford to hire a lawyer to write and file a petition for them.
            - For example, in the case of *Gideon v. Wainwright*, a poor defendant convicted of burglary without being represented by a lawyer filed a handwritten in forma pauperis writ of certiorari with the Supreme Court. The Court granted the writ, heard the case, and ruled that he was entitled to have a lawyer represent him and that if he could not afford one, then the government had to pay for one.
    - Of the 7,033 petitions filed in the 2014 term, 75 cases were eventually argued.
        - Typically, the cases fall into one of three categories.
            - The first category is a case of tremendous national importance, such as the *Bush v. Gore* case to decide the outcome of the 2000 presidential election.
            - Second, the justices typically take on a case when they believe that a lower court has misapplied or misinterpreted a prior Supreme Court precedent.
            - By far, the majority of cases granted by the Supreme Court fall into the third category, the **circuit split**.
- There are thirteen circuit courts of appeals in the United States (see Figure 2.8).
    - Eleven are divided geographically among the several states and hear cases coming from district courts within their jurisdiction.
    - A circuit split arises when the circuit courts of appeals disagree with each other on the meaning of federal law.
    - When a petition for writ of certiorari is filed with the Supreme Court, the party that

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won the case in the appeal below (called the respondent) files an opposition.

- The conference works on the **rule of four**—only four justices (a minority) need to agree to hear a case for the petition to be granted.
    - The vast majority of cases are dismissed, which means the decision of the lower court stands.
- Each Supreme Court justice is permitted to hire up to four law clerks every term to assist with his or her work.
    - Many justices rely on their clerks to read the thousands of filed petitions and to make recommendations on whether or not to grant the case.
        - This arrangement, called a cert pool (the clerk assigned to the case writes a memo that is circulated to all the justices), has been criticized as giving too much power to inexperienced lawyers.
    - If a petition is granted, the parties are then instructed to file written briefs with the Court, laying out arguments of why their side should win.
        - At this point, the Court also allows nonparties to file briefs to inform and persuade the justices. This type of brief, known as an **amicus brief**, is an important tool for the justices.
- After the justices have read the briefs in the case, they hear oral arguments from both sides.
    - After the oral arguments, the justices once again meet in conference to decide the outcome of the case.
        - Unlike the other branches of government, the justices work alone.
            - If the chief justice is with the winning side, he or she decides which justice writes the majority opinion, which becomes the opinion of the Court.
            - If the chief justice is in the minority, then the most senior of the justices in the majority decides who writes the **majority opinion**.
            - Dissenting justices are entitled to write their own **dissenting opinions**, which they do in hopes that one day their view will become the law.
            - Occasionally, a justice may agree with the outcome of the case but disagree with the majority's reasoning, in which case he or she may write a **concurring opinion**.
            - After all the opinions are drafted, the Court hands down the decision to the public.

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The U.S. Supreme Court

http://www.youtube.com/v/_6Noye3MKkg

Amicus Briefs

http://www.vpcomm.umich.edu/admissions/legal/gru_amicus-ussc/um.html

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Exercises

Section 4 – The Certiorari Process

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1. Do you believe that Supreme Court oral arguments should be televised, as government proceedings are on C-Span? Why or why not?

   Answer: Students' answers will vary. In an effort to make the government more transparent and accessible, many government proceedings are televised on C-Span, including Congressional hearings and debates. For a long time, several members of Congress have argued that the Supreme Court, which does not permit any live broadcast of any kind of its oral arguments, should permit cameras to record the oral arguments. The Justices say, however, that allowing cameras would fundamentally alter the dynamic of oral argument, and judge and advocate would both play to the camera rather than each other. There is also a fear that in search for a 30-second sound byte, a news editor may choose to focus on just a few words or phrases rather than capture the overall tone of the argument. Recently, the Supreme Court relented somewhat on this issue, announcing that beginning with the 2010 term, audio recordings of each argument would be made and released each Friday.

2. Do you think the Supreme Court should act more as a court of last resort, especially in serious cases such as capital crimes, or should the Supreme Court continue to accept only a very small number of cases?

   Answer: Students' answers will vary. Since 1925, the Supreme Court has been a court of discretionary jurisdiction, choosing only to hear cases that it wishes to hear. Some have criticized this, charging that the Supreme Court should serve as a check on the appellate courts and hear cases even if they don't pose a circuit split or present a major question of

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statutory interpretation. If the Court was required to hear every case on appeal, however, it would likely alter the Court's workload dramatically, resulting in increased backlog and wait times, as well as shorter opinions of lower quality.

Additional Exercises

1. Do you think the rule of four can be considered as controversial in a few situations? Why or why not?
2. Would the introduction of more circuits speed up the proceedings or make it more complex in nature? If no, would it be better to reduce the number of circuits? How?

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The Legal and Ethical Environment of Business, Version 3.0

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CHAPTER 2
The Court System

THE THIRD BRANCH

Learning Objectives

- Understand the constitutional basis for the judicial branch
- Explore the differences among the three branches of government
- Learn about the Chief Justice's role in judicial administration
- Explore the concept of judicial review
- Become familiar with how the other two branches check and control the judiciary

CONSTITUTIONAL BASIS OF THE THREE BRANCHES

Legislative branch

- Created by Article I of the Constitution at the federal level
  - This branch is responsible for drafting laws

Executive branch

- Created under Article II of the Constitution
  - This is another name for the office of the president and its related agencies

Judiciary

- Created by Article III of the Constitution and by various state constitutions and laws
  - This is the branch of government dedicated to the administration of justice

NOMINATION AND TENURE OF A FEDERAL JUDGE

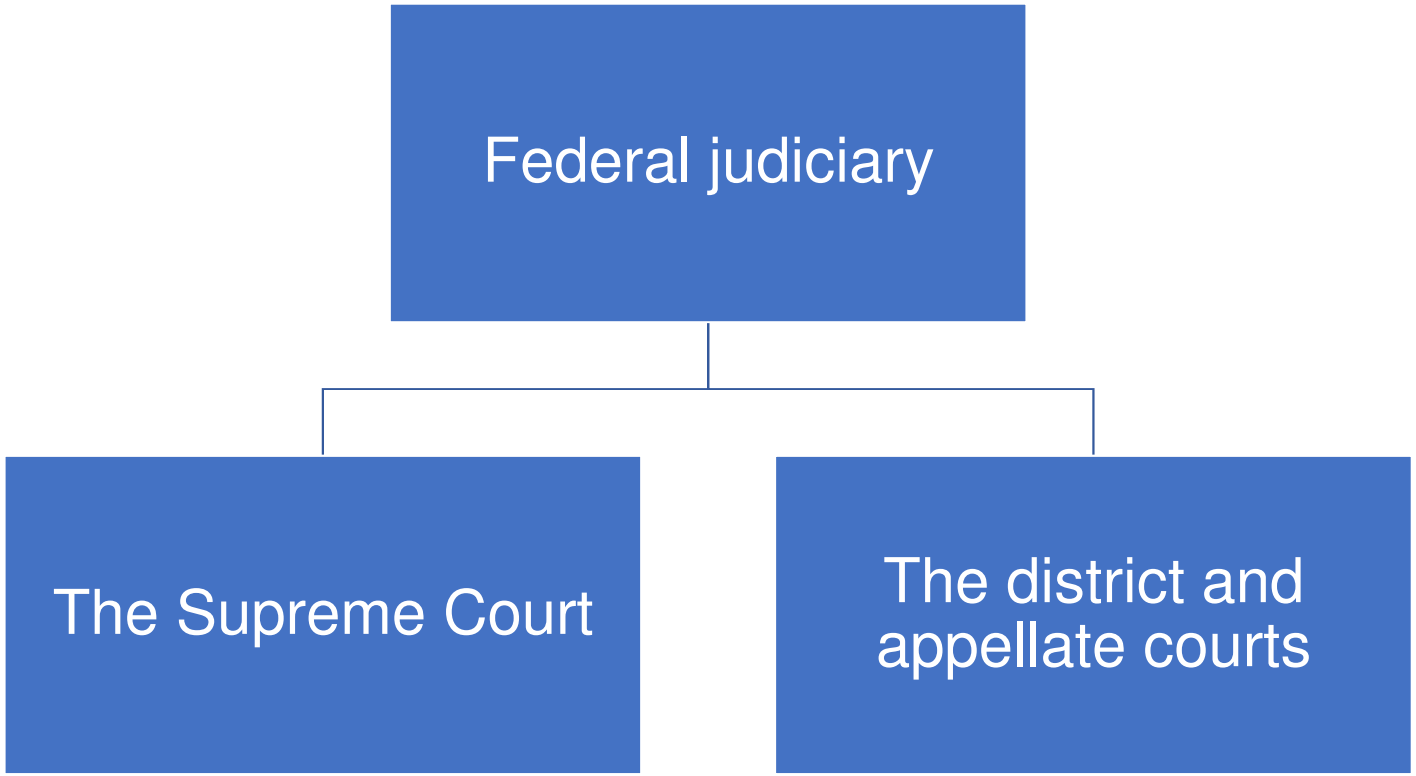
- Requirements to become a federal judge
  - Nomination by the president
  - Confirmation by the Senate

- Constitution guarantees that judges are relatively free from political interference by providing them with:
  - Lifetime tenure
  - Salary that cannot be reduced

DIFFERENCES AMONG THE THREE BRANCHES

- The three branches of government are different as:
  - The judiciary is the only unelected branch of government
  - They consume different resources in serving the public
    - The entire federal court system consumes less than two-tenths of one percent of the federal budget
  - The federal judiciary works in relative anonymity
  - The judiciary is designed to be the most remote branch from the people
    - Federal judges have life tenure and can be removed from office only through impeachment

JUDICIAL HIERARCHY



JUDICIAL ADMINISTRATION

- **Administrative Office:** Responsible for rent, payroll, budget, and other administrative matters relating to the functioning of the federal judiciary

- **Federal Judicial Center:** Dedicated to conducting research on judicial administration and providing judicial education

- **United States Sentencing Commission (USSC):** Commission created by Congress to explore ways to establish uniformity in federal criminal sentencing

ROLE OF JUSTICES IN JUDICIAL ADMINISTRATION

- **Chief justice:** In the U.S. Supreme Court, the representative of the judicial branch to other branches and the administrative head of the judiciary

- **Associate justice:** In the U.S. Supreme Court, one of the eight regular members of the Court

JUDICIAL REVIEW

- Power of courts to declare legislative or executive acts unlawful
  - Power that rests with each of the more than eight hundred federal judges, from the trial courts through the appellate courts

CHECKING AND CONTROLLING THE JUDICIARY

- The legislative and executive branches play a critical role in checking the judiciary
  - President can control the judiciary by making careful judicial selections
  - Power of the president to name federal judges is absolute
  - President is the primary means of enforcing judicial decisions

- Role of Congress in checking the judiciary
  - Confirms judicial selections
  - Controls the judiciary through its annual budgetary process
  - Determines organization of the courts and what kind of cases the courts can hear

ACTIVISTS AND STRICT CONSTRUCTIONISTS

Learning Objectives

- Explore the strict constructionist, or originalist, judicial philosophy
- Explore the judicial activist philosophy
- Learn about the modern origin of the divide between these two philosophies
- Examine the evolution of the right to privacy and how it affects judicial philosophy
- Explore the biographies of the current Supreme Court justices

STRICT CONSTRUCTIONISTS JUDICIAL PHILOSOPHY

- **Strict constructionists:** Politically conservative judges who adhere to the view that:
  - The Constitution should be interpreted in light of its original meaning when it was adopted
  - New rights should be granted by the legislative process rather than through judicial review

- **Originalists:** Jurists who subscribe to original meaning
  - **Original meaning:** The view that the Constitution should be interpreted in light of what the Founding Fathers meant when they wrote the document

JUDICIAL ACTIVISTS

- Judges who adhere to the view that the Constitution is a living document that should adapt and change with the times
  - Believe that the political process is flawed and that majority rule can lead to the baser instincts of humanity becoming the rule of law
  - Safeguard the voice of the minority and the oppressed
  - Preferring to look at the motivation, intent, and implications of the Constitution's safeguards rather than merely its words

MODERN ORIGIN

- Modern characterization of judges as politically motivated can be traced to the Great Depression
  - New Deal - Legislative package that increased the size and role of the government in private commercial activity

- Federal judges are appointed for lifetime
  - Turnover rate for federal judgeships is low

BIOGRAPHIES OF THE CURRENT SUPREME COURT JUSTICES

- John Roberts
  - Nominated by George W. Bush in 2005
  - Young, smart, and a popular judge with solid republican credentials
  - Re-nominated and confirmed by the senate as chief justice

- Samuel Alito
  - Nominated by George W. Bush
  - Been on the Court only for only a few years
  - Demonstrated to be ideological than pragmatic in opinions

BIOGRAPHIES OF THE CURRENT SUPREME COURT JUSTICES

- Sonia Sotomayor and Elena Kagan
  - Nominated by Barack Obama in the year 2009 and 2010 respectively
  - Regarded as moving the court neither in terms of activism nor originalism in direction

TRIAL AND APPELLATE COURTS

Learning Objectives

- Learn the differences between the state and federal constitutions
- Understand subject matter jurisdiction
- Explore the state and federal court systems
- Distinguish the work of trial and appellate courts

DIFFERENCES BETWEEN STATE AND FEDERAL CONSTITUTIONS

- Many American cities have both state and federal courthouse, hearing different types of cases involving:
  - Different laws
  - Different law enforcement agencies
  - Different judicial systems

PROCEDURES

- **Civil procedure:** Rules governing litigation in civil cases
- **Criminal procedure:** Rules governing litigation in criminal cases
- United States has fifty-one separate legal systems
  - One federal and fifty in the states

SUBJECT MATTER JURISDICTION

- Rules of subject matter jurisdiction dictate whether a case is heard in federal or state court
  - **Subject matter jurisdiction:** Authority of a court to hear cases in a specific subject area or matter
- Lawsuits involving state laws are heard in state courts
- Child custody, adoption, property, and probate laws are state laws
  - **Probate:** Legal process of administering a deceased person's property

SUBJECT MATTER JURISDICTION

- Laws surrounding contracts are passed at the state level

- **Uniform Commercial Code (UCC):** Model statute that seeks to provide uniformity to contracts law among the different states
  - It is not a law until state legislatures adopt it as law

- Law of torts is state based
  - **Tort:** Any civil wrong, other than a breach of contract

FEDERAL COURT SUBJECT MATTER JURISDICTION

- Limited to cases involving:
  - **Federal question:** Any case involving a federal law or the federal Constitution gives rise to subject matter jurisdiction in federal courts
  - **Original jurisdiction:** Small category of cases that allows the U.S. Supreme Court to hear a case for a first time rather than on appeal
    - Example - Lawsuits between states

STATE AND FEDERAL COURT SYSTEMS

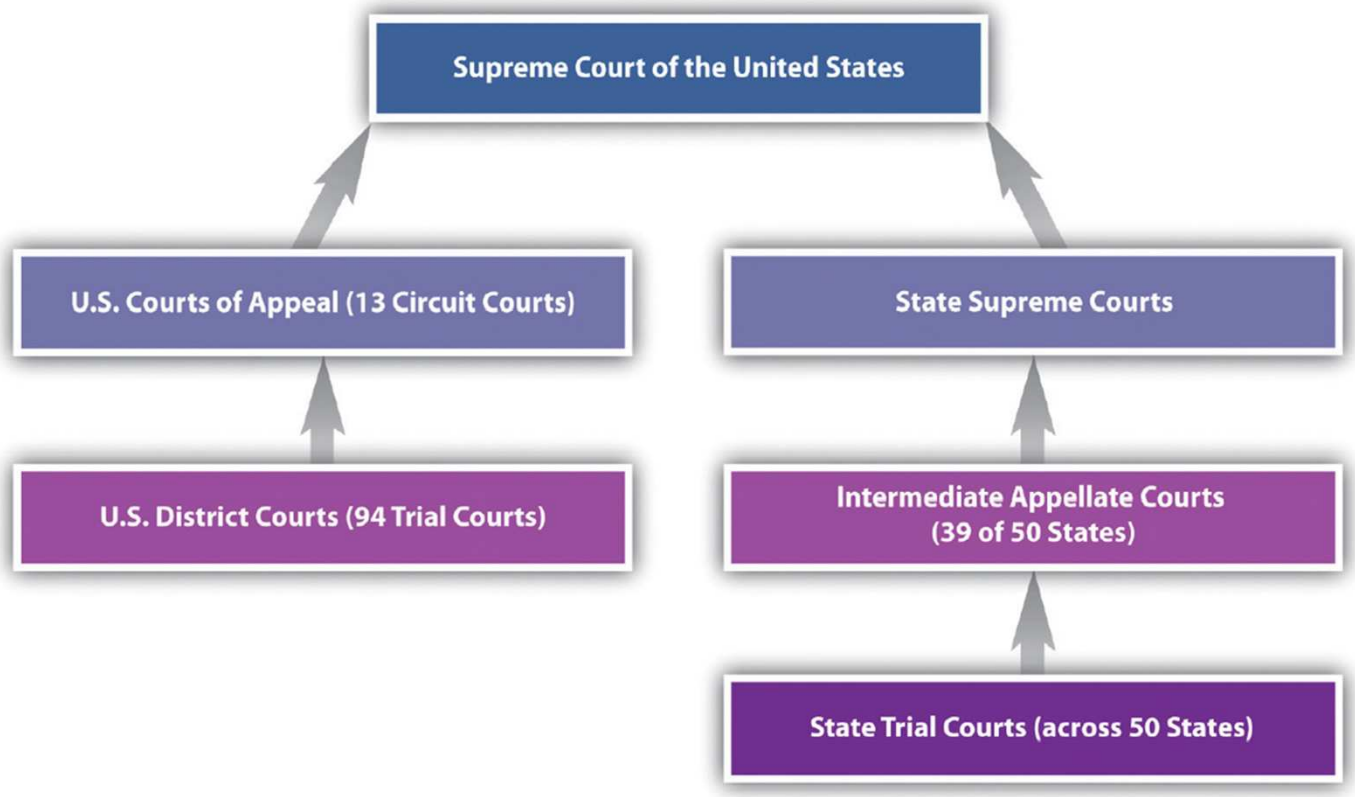
- Federal court can hear a case involving a state law
  - **Diversity jurisdiction:** Power of federal courts to hear a case based on state law if all plaintiffs are from different states than all defendants and damages claimed exceed seventy-five thousand dollars
    - Allows a party, apprehensive about receiving a fair trial over opponents home court advantage to seek a neutral forum to hear its case through removal
      - **Removal:** Process of moving a case from state court to federal court under diversity jurisdiction

STATE AND FEDERAL COURT SYSTEMS

- There is a hierarchy within both federal and state court systems

- The U.S. Supreme Court is the highest in the country and all courts are bound to follow as per stare decisis
  - **Stare decisis:** Literally, “let the decision stand”
    - Doctrine that requires lower courts to follow prior precedents in similar cases by higher courts whenever possible

FIGURE 2.7 - STATE AND FEDERAL COURT SYSTEMS



TRIAL AND APPELLATE COURTS

- Under court administration system, there are ninety-four judicial courts in the country
- Single judicial districts or multiple judicial districts is based on the population of the state
- Districts are named for their geographical location

WORK OF TRIAL AND APPELLATE COURTS

- As a trial court, U.S district courts hear civil and criminal trials
  - Trials may be bench trials or jury trials
    - **Bench trial:** A case heard only by a judge, wherein the judge acts as both trier of law and trier of fact

- Witnesses' testimonies are recorded into a trial record
  - **Trial record:** The transcript of all proceedings related to litigation at a trial court, along with accompanying paperwork such as memoranda and briefs

WORK OF TRIAL AND APPELLATE COURTS

- At the conclusion of a trial, if the loosing side is unhappy with the outcome, it is entitled as a matter of right to appeal to the U.S Circuit Court of Appeals
  - There are thirteen circuit courts of appeals in the United States spread geographically through the states

- A party loosing an appeal at the circuit court level can appeal to one more time to the U.S Supreme Court for review

WORK OF TRIAL AND APPELLATE COURTS

- A trial court of general jurisdiction accepts most types of civil and criminal cases
  - **General jurisdiction:** Power of a court to hear a broad array of civil and criminal matters without limitation

- Other courts of limited jurisdiction at the state level are traffic court, juvenile court, family court or small claims court
  - **Limited jurisdiction:** Type of jurisdiction in which a court is restricted to hearing cases in a specific subject matter or threshold damages amount

WORK OF TRIAL AND APPELLATE COURTS

- The trial record is forwarded to the appellate court for review whenever an appeal is filed
  - Trial court's duty is to figure out the facts of the case

- Fact finding is important in judicial process and great deal of deference is given to the judgment of the fact finder
  - **Trier of fact:** Fact-finding entity, such as a jury

WORK OF TRIAL AND APPELLATE COURTS

- On appeal, the appellate judge cannot substitute his or her interpretation of the facts for that of the trier of fact
  - Even if the appellate judge believes the trier of fact was wrong
  - The issues on appeal are limited to questions of law
    - **Questions of law:** Strictly legal issues, such as which evidence to admit, that are resolved by the judge during a trial

REMAND

- Deference to the trier of fact means that appeals are rarely won:
  - Even if a litigant is successful in persuading a court of appeals that legal error has taken place, it doesn't automatically win the case
  - Best remedy a litigant can hope is, for the court of appeals to issue a remand
    - **Remand:** Process of sending a case from an appellate court back to the trial court for further action in accordance with the appellate court's instructions

THE CERTIORARI PROCESS

Learning Objectives

- Understand the Supreme Court's jurisdiction, including what kinds of cases are selected for review

- Explore what happens when lower courts of appeal disagree with each other

- Learn about the Supreme Court's process in hearing and deciding a case

SUPREME COURT'S JURISDICTION

- Jurisdiction of the Supreme Court is discretionary

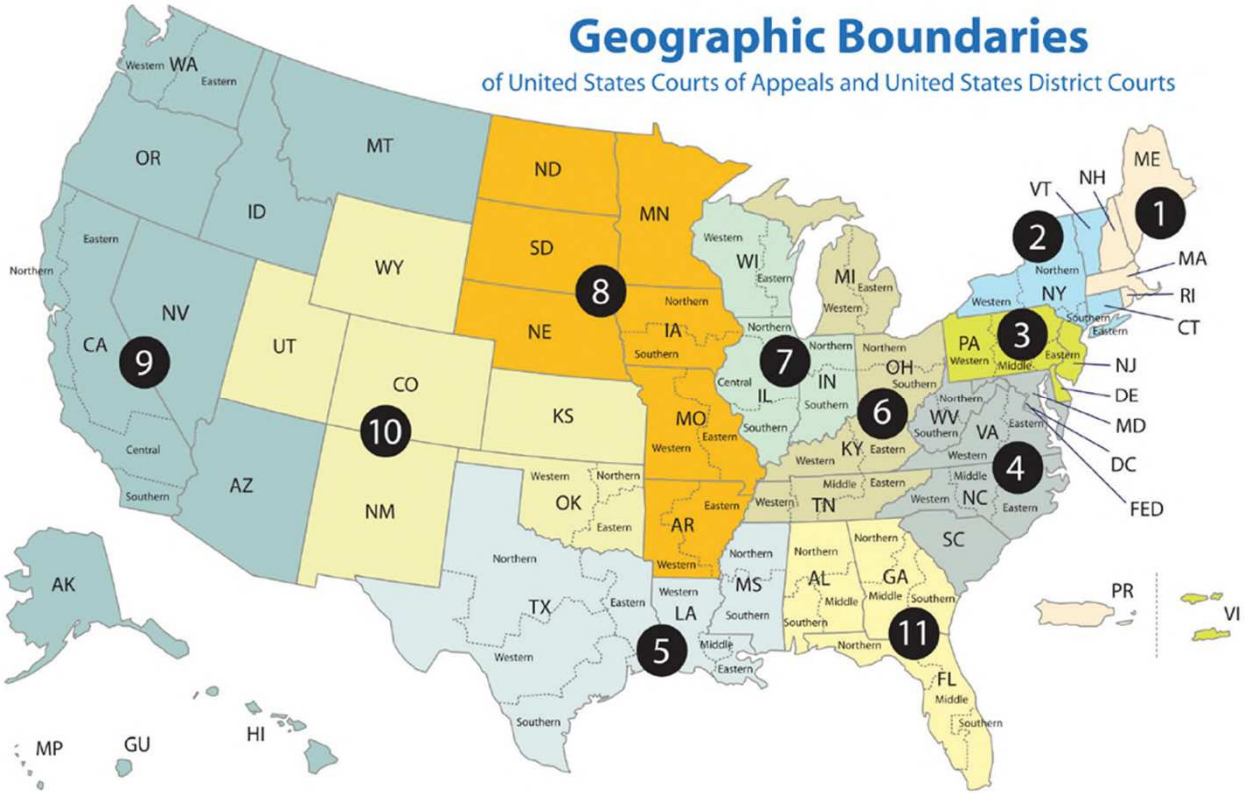
- For justices to hear a case, the loosing party must file:
  - **Writ of certiorari:** Petition filed with a supreme court arguing why the case should be heard
    - **Term:** When used by the Supreme Court, a period of time when the Court is in session, from October until June

  - **In forma pauperis:** Leave by a court to indigent litigants to proceed without paying any fees

SUPREME COURT'S JURISDICTION

- Cases fall into one of three categories
  - Cases of tremendous national importance
  - Case where justices believe that lower courts have misapplied or misinterpreted a prior Supreme Court precedent
  - **Circuit split:** Split among the federal circuit courts of appeals on the meaning of a federal law

FIGURE 2.10 - GEOGRAPHY OF U.S. FEDERAL COURTS



THE CERTIORARI PROCESS

- When a petition for writ of certiorari is filed with the Supreme Court, the party that won the case in the appeal files an opposition

- **Rule of four:** Supreme Court rule that only four justices need to agree for a case to be heard

- In a term each Supreme Court justice is permitted to hire up to four law clerks for assistance
  - Cert pool - Many justices rely on their clerks to read the thousands of filed petitions and to make recommendations on whether or not to grant the case

THE CERTIORARI PROCESS

- If a petition is granted, the parties are then instructed to file written briefs with the Court
  - Laying out arguments of why their side should win

- At this point, the Court allows nonparties to file an amicus brief
  - **Amicus brief:** Filed by nonlitigants, with permission of the court, to inform and persuade a court
    - Otherwise known as friend-of-the-court brief

SUPREME COURT'S PROCESS IN HEARING

- After the justices have read the briefs in the case, they hear oral arguments from both sides
- After the oral arguments, the justices meet in conference to decide the outcome of the case
- Justices work alone in their conferences
- Task of drafting legal opinions is initiated after deciding which side should win

TYPES OF OPINION

- Opinions are the only way that justices communicate with the public and the legal community
  - **Majority opinion:** Opinion of the court, written by a single judge and joined by other judges who voted the same way
  - **Dissenting opinion:** Opinion of a judge who disagrees with the outcome and reasoning employed by the court majority
  - **Concurring opinion:** Opinion written by a judge who agrees with the majority's outcome but disagrees with their reasoning

SUPREME COURT'S PROCESS IN DECIDING A CASE

- After all the opinions are drafted, the Court hands down the decision to the public

- Except in rare instances, all cases are heard and decided in the same term
  - As the Court maintains no backlog