



Amy Coney Barrett was confirmed as a U.S. Supreme Court justice in 2020. At her confirmation hearings, Democrats expressed concern that her religious beliefs would unduly influence her opinions. She was approved by the U.S. Senate, 55–43.



Supreme Court nominee Ketanji Brown Jackson testifies during her Senate Judiciary Committee confirmation hearing on Capitol Hill in Washington. She was confirmed by the U.S. Senate, 53–47, in April 2022.



THE RULE OF LAW

Law in a Changing Communication
and Political Environment

CHAPTER OUTLINE

Rule of Law

Body of the Law

- Constitutions
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[FEATURE] Cases for Study

- Marbury v. Madison*
- U.S. v. Alvarez*

LEARNING OBJECTIVES

- 1.1 Define rule of law and explain the role of law in society.
- 1.2 Describe the six original sources that create laws of journalism and mass communication.
- 1.3 Describe the structure of the U.S. judicial system and how cases move through the appeals process.
- 1.4 Find and feel comfortable using legal research resources.
- 1.5 Understand how to read and brief a case.

RULE OF LAW

In 2020, then-U.S. Attorney General Bill Barr addressed college students in Michigan, and told them the rule of law “is the lynchpin of American freedom.” As the nation’s top lawyer in the country, he said its “essence” is that “whatever rule you apply to in one case must be the same rule you would apply to similar cases,” and that it “requires the law be clear, that it be communicated to the public, and that we respect its limits.”¹ Not long after his speech, however, a federal judge accused Barr and the U.S. Justice Department of hiding how they decided that former President Trump should not be charged with obstructing special counsel Robert Mueller’s investigation of Russian interference in the 2016 presidential election.²

In 2021, Katie Wright, mother of Daunte Wright, a 20-year-old biracial man who was shot and killed during a traffic stop by a Minnesota police officer, questioned Americans’ faith in the rule of law. “The last few days everybody has asked me what we want, what do we want to see happen. Everybody keeps saying ‘justice.’ But unfortunately, there’s never going to be justice for us. Justice would bring our son home to us. Knocking on the door with his big smile. Coming in the house. Sitting down. Eating dinner with us. . . . I do want accountability—100 percent accountability. But even then, when that happens, if that even happens, we’re still going to bury our son. . . . So when people say ‘justice,’ I just shake my head.”³

For an increasing number of Americans, this kind of disconnect between the rule of law and what some scholars term a rule *by* law, reveals yet more evidence of growing concerns about trust in U.S. democracy and the rule of law. As one legal scholar put it, “there are a lot of tough questions surrounding this one little phrase, the rule of law.”⁴

The ancient Greek philosopher Aristotle said people are basically self-interested; they pursue their own interests in preference to the collective good or the cause of justice. However, self-interest is ultimately shortsighted and self-destructive. A lumber company that seeks only to generate the greatest immediate profit ultimately deforests the timberlands it depends on.⁵ Astute people therefore recognize that personal interests and short-term goals must sometimes give way to broader or longer-term objectives. Everyone benefits when people adopt a system of rules to promote a balance between gain and loss, between cost and benefit and between personal and universal concerns. Aristotle called this balance the “golden mean.” Human interests are served and justice is best achieved when a society adopts a system of law to balance conflicting human objectives and allow people to live together successfully.⁶

Belief in the power of law to promote this balance and restrain human injustice is the foundation of the U.S. Constitution and the **rule of law**. Quoting President John Adams, the U.S. Supreme Court said the notion that “our government is a government of laws, not of men” is central to our constitutional nature.⁷ “Stripped of all technicalities, [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how [government] will use its coercive powers in given circumstances, and to plan . . . on the basis of this knowledge.”⁸

In essence, laws establish a contract that governs interactions among residents and between the people and their government. Legal rules establish the boundaries of acceptable behavior

and empower government to punish violations. The rule of law limits the power of government because it prohibits government from infringing on the rights and liberties of the people. This system constrains the actions of both the people and the government to enhance liberty, freedom and justice for all.

But the strength of the rule of law is only as effective as the trust and faith placed in it by citizens.⁹ And trust in government institutions, which includes the legal system, has been declining in the United States since the 1960s. Only about one-quarter of Americans in 2021 said they could trust their government to do what is right just about always (2%) or most of the time (22%), according to the Pew Research Center. That is down significantly from the beginnings of the survey in 1958, when 75 percent of Americans thought they could trust their government always or most of the time. Additionally, about two-thirds of Americans in 2020 reported thinking that their political system needed major changes or reform.¹⁰

And laws, of course, are not the only way that citizens govern interactions among themselves and their government. Democratic norms and unwritten rules occur throughout government operations and local communities, and concerns about the erosion of such norms has grown in recent years, particularly during the Trump administration, but also dating as far back as the 1970s.¹¹ In the digital age, the increasing power of technology and corporate influence on American life led Harvard Law professor Lawrence Lessig to posit that the lives of U.S. citizens are increasingly regulated by four forces: law, social norms, the market, and architecture (mostly digital technologies at this point).¹² Each one of these forces acts to regulate media, and depending on the situation, may hold more power over it. While technology continues to impact and challenge laws in the U.S. and worldwide, law remains a dominant organizing force in and among societies.

In 1964, as the United States expanded what many then believed was an illegal military action in Vietnam, Harvard legal scholar Lon Fuller articulated what would become a foundational understanding of the rule of law. In Fuller's view, the rule of law was a set of standards that established norms and procedures to encourage consistent, neutral decision making equally for all. Fuller's formal, conceptual definition has been criticized because it does not provide specific guidance to those drafting, interpreting or applying the law.¹³ As one legal scholar noted, the rule of law is created through its application. It "cannot be [understood] in the abstract."¹⁴ Additionally, some critical studies of law characterize the labeling of "neutral" legal principles and doctrines as problematic. These scholars see the law as often indeterminate and a product of those who hold power.¹⁵

For Fuller, the rule of law established eight "desiderata," or desired outcomes, to guide how laws should be created and employed. The rule of law requires laws to be (1) general and not discriminatory, (2) widely known and disseminated, (3) forward-looking in their application rather than retroactive, (4) clear and specific, (5) self-consistent and complementary of each other, (6) capable of being obeyed, (7) relatively stable over time, and (8) applied and enforced in ways that reflect their underlying intent.

As a mechanism for ordering human behavior, the law functions best when it makes clear, comprehensible and consistent distinctions between legal and illegal behavior. People can only obey laws that they know about and understand. Good laws must be publicly disseminated and sufficiently clear and precise to properly inform citizens of when and how the laws apply (as well as when they do not).

INTERNATIONAL LAW

FOUR FOUNDATIONS OF THE RULE OF LAW

The World Justice Project has articulated four foundations of the rule of law based on internationally accepted universal standards. Accordingly, a system of the rule of law exists when:

1. All individuals and private entities are accountable under the law.
2. The laws are fair, clear, public, and stable.
3. The processes by which the laws are enacted, administered, and enforced are open, robust and timely for all.
4. Those who apply the law are competent, ethical, independent, neutral, and diverse.¹⁶

Many argue that any movement toward a universal rule of law is a form of imperialism that tramples the unique priorities of individual nations and limits the freedom of different peoples to create distinct, culturally appropriate systems of law.¹⁷

Vague laws fail to define their terms or are unclear. They are unacceptable because people may avoid participating in legal activities out of uncertainty over whether their actions are illegal. This tramples people's freedom. In 2018, the U.S. Supreme Court by a vote of 5–4 struck down a provision of the Immigration and Nationality Act¹⁸ as unconstitutionally vague.¹⁹ The law practically required the deportation of any immigrant convicted of an “aggravated felony” or “crime of violence.” The Court reasoned that applying the provision’s imprecise language “necessarily devolves into guesswork and intuition, invites arbitrary enforcement, and fails to provide fair notice,”²⁰ all of which violate the basic tenets of due process. These core elements of due process, Justice Neil M. Gorsuch wrote in concurrence, are foundational to the Constitution’s original meaning and basic to the rule of law.²¹

INTERNATIONAL LAW

U.S. RULE OF LAW DOES NOT RANK FIRST

An international index ranks the United States 27th among 139 countries in how citizens experience the rule of law.²² The World Justice Project report put the United States behind the Nordic countries, the Czech Republic and Japan but well ahead of Afghanistan, Cambodia and Venezuela. Overall, the World Justice Project noted that deterioration in the rule of law is spreading worldwide.

The study found relative weaknesses in the U.S. respect for equal treatment of citizens and absence of discrimination, and the timeliness and impartiality of criminal justice.

Clear laws define their terms and detail their application in order to limit government officials’ **discretion**. Clear laws advance the rule of law by reducing the ability of officials to apply

legal rules differently to their friends and foes. “True freedom requires the rule of law and justice, and a judicial system in which the rights of some are not secured by the denial of rights to others,” one observer noted.²³

Good laws accomplish their objectives with minimum infringement on the freedoms and liberties of the people. Well-tailored laws advance specific government interests or prevent particular harms without punishing activities that pose no risk to society. A law that sought to limit noisy disturbances of residential neighborhoods at night, for example, would be poorly tailored and **overbroad** if it prohibited all discussion out of doors, anywhere at any time.

The rule of law requires the law to be internally consistent, logical and relatively stable. To ensure slow evolution rather than rapid revolution of legal rules, judges in U.S. courts interpret and apply laws based upon the **precedents** established by other court rulings. Precedent, or **stare decisis**, is the legal principle that tells courts to stand by what courts have decided previously. As the U.S. Supreme Court has written, “[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”²⁴ The principle holds that subsequent court decisions should adhere to the example and reasoning of earlier decisions in similar factual situations. Reliance on precedent is the heart of the common law (discussed later) and encourages predictable application of the law. The Supreme Court’s 2022 decision to overrule *Roe v. Wade*, however, raised questions among some commentators about whether the current Court is committed to the principles of stare decisis. A Congressional report in 2018 found that the Court has reversed itself only 141 times, or on average, less than once a year since 1851.²⁵

Although the application of prior rulings promotes the rule of law by increasing the consistency and uniformity of legal decision making,²⁶ it does not always happen. Sometimes precedents are unclear or seem to conflict. Then the rule of law can be ambiguous.²⁷ Especially where constitutional values are at issue, courts may “not allow principles of stare decisis to block correction of error,” the California Supreme Court said.²⁸

In 2010, for example, a “bitterly divided” U.S. Supreme Court ruled 5–4 in *Citizens United v. Federal Election Commission* that certain federal limits on campaign finance violated the Constitution. Observers noted that the decision made “sweeping changes in federal election law”²⁹ and “represented a sharp doctrinal shift.”³⁰ Some said the Court had ignored binding precedent. Others argued that “the central principle which critics of this ruling find most offensive . . . has been affirmed by decades of Supreme Court jurisprudence.”³¹ Thus, the conflict centered less on *whether* to apply precedent and more on *which* precedents to apply.

BODY OF THE LAW

The laws of the United States have grown in number and complexity as American society has become increasingly diverse and complicated. Many forms of communication and the laws that govern them today did not exist in the 1800s. Technology has been a driving force for change

in the law of journalism and mass communication. U.S. law also has developed in response to social, political, philosophical and economic changes. Employment and advertising laws, for example, emerged and multiplied as the nation's workforce shifted and the power of corporations grew. Legislatures create new laws to reflect evolving understandings of individual rights, liberties and responsibilities. Even well-established legal concepts, such as libel—harm to another's reputation—have evolved to reflect new realities of the role of communication in society and the power of mass media to harm individuals.

The laws of journalism and mass communication generally originate from six sources.

Constitutions

Statutes

Common Law

Equity Law

Administrative Law

Executive Orders

Constitutions

Constitutional law establishes the nature, functions and limits of government. The U.S. Constitution, the fundamental law of the United States, was framed in 1787 and ratified in 1789. Each of the states also has a constitution. These constitutions define the structure of government and delegate and limit government power to protect certain fundamental human rights. "Constitutions are checks upon the hasty action of the majority," said President William Howard Taft in 1911. "They are self-imposed restraints of a whole people upon a majority of them to secure sober action and a respect for the rights of the minority."³²

Given the legacy of British religious oppression and the revolution against the Crown that formed this country, it should not be surprising that the U.S. Constitution protects individual liberties sometimes at the expense of much larger groups. The First Amendment, for example, generally protects an individual's right to speak very offensively, while laws in other countries are far more likely to punish hate speech, name-calling, denial of the Holocaust, criticism of government officials, anti-religious speech and much more.

The U.S. Constitution establishes the character of government, organizes the federal government, and provides a minimum level of individual rights and privileges throughout the country. It creates three separate and coequal branches of government—the executive, the legislative and the judicial—and designates the functions and responsibilities of each. The executive branch oversees government and administers, or executes, laws. The legislative branch enacts laws, and the judicial branch interprets laws and resolves legal conflicts.

POINTS OF LAW

THE THREE BRANCHES OF FEDERAL GOVERNMENT

The Executive

The president, the cabinet and the administrative agencies execute laws.

The Legislative

The Senate and the House of Representatives pass laws.

The Judicial

The three levels of courts review laws and adjudicate disputes.

Separation of government into branches provides checks and balances within government to support the rule of law. For example, “restrictions derived from the separation of powers doctrine prevent the judicial branch from deciding **political questions** . . . that revolve around policy choices and value determinations” because the Constitution gives the legislative and executive branches express authority to make political decisions.³³ This does not necessarily mean that the judiciary is immune from politics. An increasingly polarized political climate has raised the stakes for judicial appointments and elections. A 2019 study by two Harvard researchers indicated that as nominations to the U.S. Supreme Court become more contentious, partisan rhetoric about the courts can change public perceptions of the court’s role as immune from political questions.³⁴

The **Supremacy Clause** of the Constitution establishes the Constitution as the supreme law of the land and resolves conflicts among laws by establishing that all state laws must give way to federal law, and state or federal laws that conflict with the Constitution are invalid. In a similar way, some federal laws preempt state laws, which in turn may preempt city statutes. Here, too, a changing political climate can affect debate about the Supremacy Clause and the balance of state and national legislative power. In recent years, some state legislatures have introduced bills attempting to increase their power over immigration,³⁵ telecommunication policy,³⁶ and gun ownership.³⁷ This tension is always present in U.S. law, but is often elevated during times of social change and political partisanship.

As the bedrock of the law, the Constitution is relatively difficult to change. There are two ways to amend the Constitution. The first and only method actually used is for both chambers of Congress to pass a proposed constitutional amendment by a two-thirds vote in each. The second method is for two-thirds of the state legislatures to vote for a Constitutional Convention, which then proposes one or more amendments. All amendments to the Constitution also must be ratified by three-fourths of the state legislatures. When Mississippi recently became the last state to ban slavery by ratifying the Thirteenth Amendment to the Constitution, the vote was only symbolic. The needed three-fourths of states ratified the amendment in 1865.³⁸

In many ways, state constitutions are distinct and independent from the U.S. Constitution they mirror. Under the principle of **federalism**, states are related to, yet independent of, the federal government and each other. Federalism encourages experimentation and variety in government. Each state has freedom to structure its unique form of government and to craft state constitutional protections that exceed the rights granted by the U.S. Constitution. For example, the U.S. Constitution says nothing about municipalities; states create and determine the authority of cities or towns. While the federal right to privacy exists only through the U.S. Supreme Court's interpretation of the protections afforded by the Fourth Amendment to the Constitution, Washington state's constitution contains an explicit privacy clause that protects individuals from disturbances of their private affairs.³⁹

Congress has approved only 33 of the thousands of proposed amendments to the U.S. Constitution, and the states have ratified only 27 of these. The first 10 amendments to the Constitution, which form the Bill of Rights, were ratified in 1791 after several states called for increased constitutional protection of individual liberties. In fewer than 500 words, the Bill of Rights expressly guarantees fundamental rights and limits government power. For example, the First Amendment (see Chapter 2) prevents government from abridging the people's right to speak and worship freely. State constitutions are amended by a direct vote of the people.

Statutes

The U.S. Constitution explicitly delegates the power to enact statutory laws to the popularly elected legislative branch of government. City, county, state and federal legislative bodies enact **statutory law**. Like constitutions, statutes are written down; both types of law are called **black-letter law**, meaning formally enacted, written law that is available in legal reporters or other documents.

INTERNATIONAL LAW

U.S. COURTS MAY (OR MAY NOT) APPLY INTERNATIONAL LAWS

It may seem strange, but U.S. courts do not have a certain and fixed method for dealing with international laws. Judges and academics have debated the topic for decades because the Constitution does not clearly establish how foreign laws should be applied in cases decided in the United States. Once a rather theoretical question, exploding global commerce and communications give this topic increased urgency and impact.

The Constitution delegates exclusive power over war and foreign relations to the Congress and the president.⁴⁰ The Constitution's Supremacy Clause establishes three sources of law: the Constitution itself, "laws made in pursuance" to the Constitution, and "Treaties."⁴¹ Because laws can be adopted only through action of the U.S. Senate or state legislatures, some argue that U.S. courts need not recognize the law of other nations.⁴²

Others claim that the Constitution's establishment of the courts⁴³ implicitly conveys the responsibility to incorporate international law as enforceable common law when they

generally and consistently rely upon it to guide decisions.⁴⁴ Thus, if courts use international law, it binds. But what if some U.S. states do and others do not?

The resulting uncertainty can create inconsistency in the application of the law and undermine the rule of law.

Legislatures make laws to respond to—or predict and attempt to prevent—social problems. Statutory law may be very specific to define the legal limits of particular activities. All criminal laws are statutes, for example. Statutes also establish the rules of copyright, broadcasting, advertising and access to government meetings and information. Statutes are formally adopted through a public process and are meant to be clear and stable. They are written down in statute books and codified, which means they are compiled into topics by codes, and anyone can find and read them in public repository libraries.

Laws can change. Even the U.S. Constitution—the foundational contract between the U.S. government and the people—can be changed through amendment. Other laws—statutes, regulations and rules—may be repealed or amended by the federal, state and local bodies that adopted them, and they may be interpreted or invalidated by the courts. In its landmark 1803 ruling in *Marbury v. Madison* (excerpted at the end of this chapter), the Supreme Court established the courts' power to interpret laws. The Court held that “[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule.”⁴⁵

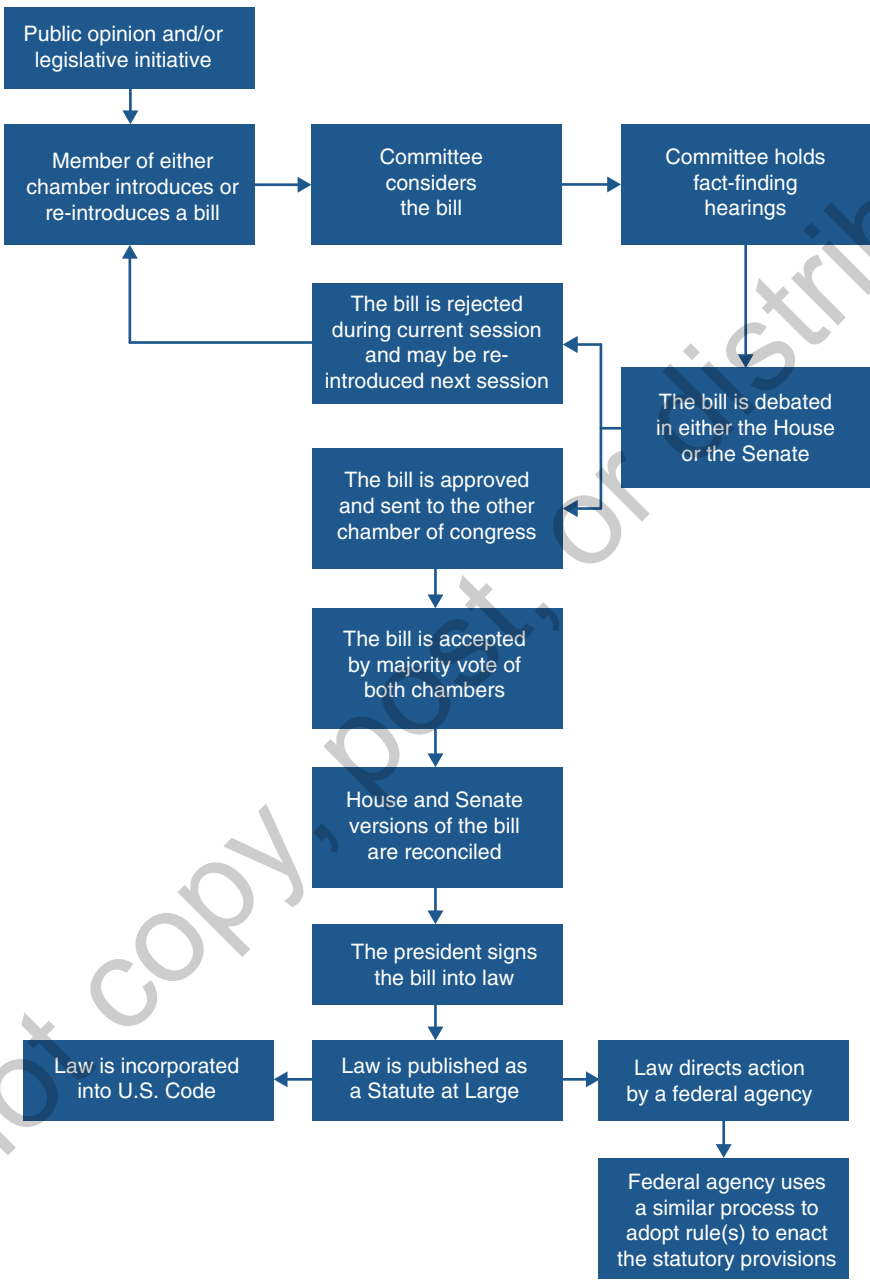
When the language of a statute is unclear, imprecise or ambiguous, courts determine the law's meaning and application through a process called statutory **construction**. Statutes may be difficult to interpret because they fail to define key terms. For example, if the word “meeting” is not defined in an open-meetings law, it is unclear whether the law applies to virtual meetings online.⁴⁶ When a statute suggests more than one meaning, courts generally look to the law's preamble, or statement of purpose, for guidance on how the legislature intended the law to apply. Courts may use legislative committee reports, debates and public statements to guide their statutory interpretation.

Courts tend to engage in **strict construction**, which narrowly defines laws according to their literal meaning and clearly stated intent. The effort to interpret laws according to the “plain meaning” of the words—the **facial meaning** of the law—limits any tendency courts might have to rewrite laws through creative or expansive interpretation. This **deference** to legislative intent reflects courts' recognition that the power to write laws lies with the publicly elected legislature (see Figure 1.1).

In 2020, the 117th U.S. Congress seated its most diverse group of new members. According to the Pew Research Center, almost a quarter of voting members (23%) of the U.S. House of Representatives and Senate are racial or ethnic minorities. There has been a long-running trend toward higher numbers of non-white lawmakers on Capitol Hill: This was the sixth Congress to break the record set by the one before it.

Courts may invalidate state statutes that conflict with federal laws, or city statutes that conflict with either state or federal law. However, courts try to interpret the plain meaning of a statute to avoid conflicts with other laws, including the Constitution. Courts review the constitutionality of a statute only as a last resort. When engaging in constitutional review,

FIGURE 1.1 ■ How a Bill Becomes a Law



courts generally attempt to preserve any portions of the law that can be upheld without violating the general intent of the statute. For example, the U.S. Supreme Court struck down the Communications Decency Act⁴⁷ without undermining the balance of the comprehensive Telecommunications Act of 1996 (see Chapter 9).



“The Squad” photo

Known as “The Squad,” these four Democratic members of the U.S. House of Representatives were elected in 2018: Ayanna Pressley of Massachusetts, Ilhan Omar of Minnesota, Alexandria Ocasio-Cortez of New York, and Rashida Tlaib of Michigan. All are said to represent the diversity of young progressives in the left wing of the party.

In what some call “one of the greatest legal events” in U.S. history,⁴⁸ the Supreme Court in *Marbury v. Madison*⁴⁹ established the Court’s power of **judicial review**—that is, the power to strike down laws the Court finds to be in conflict with the Constitution. The Court said the constitutional system of checks and balances implicitly provided the judicial branch with authority to limit the power of the legislative branch and to bar it from enacting unconstitutional laws. The Court acknowledged that the Constitution gave the legislative branch the power to make laws, but Article III empowered the judicial branch to determine whether the actions of other branches of government were unconstitutional.

In *Marbury*, the Court gave itself the authority to limit the power of Congress to enact laws. As the final arbiters of law in the United States, the courts must ensure that actions of the legislative and executive branches conform to the U.S. Constitution, *Marbury* held. “Why courts should have this ultimate power . . . in a democratic order remains the largest and most difficult issue of constitutional law,” according to one scholar.⁵⁰

Judicial review allows all courts to examine government actions to determine their constitutionality. However, courts other than the U.S. Supreme Court rarely use this power. If a state supreme court determined that a statute was constitutional under its state constitution, the decision could be appealed to the U.S. Supreme Court, which could decide that the law did not meet the standards set by the U.S. Constitution.

Historically, the Supreme Court has used its power of judicial review sparingly and rarely struck down laws as unconstitutional. For more than half a century after *Marbury*, the Court

did not use its power as chief interpreter of the Constitution. As a general rule, the Court will defer to the lawmaking authority of the executive and legislative branches of government by interpreting laws in ways that do not conflict with the Constitution. Nonetheless, it has invalidated numerous acts of Congress.

Common Law

The **common law** is judge-made law. Most common law is found at the state level, although there is some remaining federal common law. Judges create the common law when they rely on legal custom, tradition and prior court decisions to guide their decisions in pending cases. Common law often arises in situations not covered expressly by statutes when judges base their ruling on precedent and legal **doctrines** established in similar cases. For example, under common law, judges may treat print publishers and online distributors of threatening communications differently (see Chapter 3).

The common law is not written down in one place. It consists of a vast body of legal principles created from hundreds of years of dispute resolution that reaches past the founding of this country back to England. For centuries prior to the settlement of the American colonies, English courts “discovered” the doctrines people had used throughout time to resolve disagreements. Judges then applied these “common” laws to guide court decisions. The resulting decisions, and the reasoning that supported them, was known as English common law. It became the foundation of U.S. common law. Common law principles are sometimes adopted into statute by legislators. This was the case with the “fair use” in copyright law, which were enshrined in federal copyright law in 1976 (See Chapter 11).

Eventually, common law grew beyond the problem-solving principles of the common people. Today, U.S. common law rests on the presumption that prior court rulings, or precedent, should guide future courts. The essence of precedent, *stare decisis*, is that courts should follow each other’s guidance. Once a higher court has established a principle relevant to a certain set of facts, fairness requires lower courts to try to apply the same principle to similar facts. This establishes consistency and stability in the law.

REAL WORLD LAW

PRECEDENT IS A CORNERSTONE OF THE RULE OF LAW

In a 2018 dissenting opinion, Justice Elena Kagan wrote:

The idea that today’s Court should stand by yesterday’s decisions is a foundation stone of the rule of law. It promotes the evenhanded, predictable, and consistent development of legal doctrine. It fosters respect for and reliance on judicial decisions. And it contributes to the actual and perceived integrity of the judicial process by ensuring that decisions are founded in the law rather than in the proclivities of individuals.⁵¹

Under the rule of *stare decisis*, the decision of a higher court, such as the U.S. Supreme Court, establishes a precedent that binds lower court rulings. A binding precedent of the U.S. Supreme Court constrains all lower federal courts throughout the country, and the decisions of each circuit court of appeals bind the district courts in that circuit. Similarly, lower state courts must follow the precedents of their own state appellate and supreme courts. However, courts from different and coequal jurisdictions do not establish binding precedent upon their peers. Courts in Rhode Island are not bound to follow precedents established in Wyoming, and federal district courts are not bound to apply precedents established by appellate courts in other federal circuits. In fact, different federal appellate courts sometimes hand down directly conflicting decisions. To avoid such conflicts, however, courts often look to each other's decisions for guidance.

Applying precedent is not clear cut. After all, the common law must be discovered through research in the thousands of court decisions collected into centuries of volumes, called court reporters. Sometimes, multiple lines of precedent seem to converge and suggest different outcomes.⁵² Then a court must choose.

Even when *stare decisis* is clear and its power most direct, lower courts may decide not to adhere to precedent. At the risk of the judges' credibility, courts may simply ignore precedent. Courts also may depart from precedent with good reason. Courts examining a new but similar question may decide to **modify precedent**—that is, to alter the precedent to respond to changed realities. Thus, the U.S. Supreme Court might find that contemporary attitudes and practices no longer support a 20-year-old precedent permitting government to maintain the secrecy of computer compilations of public records.⁵³

Courts also may **distinguish from precedent** by asserting that factual differences between the current case and the precedent case outweigh similarities. For example, the Supreme Court 40-plus years ago distinguished between newspapers and broadcasters in terms of any right of public access.⁵⁴ The Court said the public has a right to demand that broadcasters provide diverse content on issues of public importance because broadcasters use the public airwaves. The Court did not apply that reasoning when it later considered virtually the same question as applied to newspapers. Newspapers, the Court said, are independent members of the press with a protected right to control their content. The Supreme Court similarly has said “common-sense distinctions” differentiate advertising, which the courts call commercial speech, from other varieties of speech.⁵⁵

Finally, courts very occasionally will **overturn precedent** outright and reject the fundamental premise of an earlier decision. This is a radical step and generally occurs only to remedy past errors or to reflect a fundamental rethinking of the law. In the Supreme Court's decision in *Janus*, the Court overruled a 30-year-old Court precedent that had required public employees to pay their “fair share” of union dues even if the employees chose not to join the union.⁵⁶ The Court said an older case had been poorly reasoned, produced inconsistent outcomes and violated nonmembers' right to be free from government-compelled subsidies of private speech on matters of public concern.

Equity Law

Equity law is a second form of law made by judges when they apply general principles of ethics and fairness to determine the proper remedy for a legal harm. When a court orders someone to

stop using your trademark in addition to paying fines that cover the costs of actual damages caused, the order recognizes that continued use might force you out of business or associate you with products of lesser quality. Such a ruling represents the application of equity law to achieve a just result.

Equity law is intended to provide fair remedies for various harms that are not addressed in other forms of law or because fairness will not be achieved fully or at all through the rigid application of strict rules. No specific, black-letter laws dictate equity. Rather, judges use their conscience and discretion to decide what is fair and issue decrees to ensure that justice is achieved. Thus, restraining orders that require paparazzi to stay a certain distance away from celebrities are a form of equity law. An injunction in 1971 that temporarily prevented The New York Times and The Washington Post from publishing stories based on the Pentagon Papers was another form of equity relief. While the law of equity is related to common law, the rules of equity law are more flexible and are not governed by precedent.

Administrative Law

Constitutions and legislatures delegate authority to executives and to specialized executive branch agencies to make the decisions and create the rules that form **administrative law**. Administrative agencies, such as the Federal Election Commission or the Federal Trade Commission, create the rules, regulations, orders and decisions that execute, or carry out, laws enacted by Congress.

Administrative law may represent the largest proportion of contemporary law in the United States. An alphabet soup of state and federal administrative agencies—such as the Federal Communications Commission, which oversees interstate electronic communication—provides both legislative and judicial functions. These agencies adopt orders, rules and regulations with the force of law to implement the laws enacted by Congress and signed by the president.

The authority, or even the existence, of administrative agencies can change. Legislatures may adopt or amend laws to revise the responsibilities of administrative agencies. Thus, when Congress adopted the Telecommunications Act of 1996, it substantially revised the responsibilities of the FCC, originally authorized by the Communications Act of 1934.

Administrative agencies enforce the administrative rules they adopt. They conduct hearings in which they interpret their rules, grant relief, resolve disputes, and levy fines or penalties. Courts generally have the power to hear appeals to the decisions of administrative agencies after agency appeal procedures are exhausted. Then courts engage in regulatory construction and judicial review. Courts generally defer to the judgment of expert administrative agencies and void agency rules and actions only when the agency clearly has exceeded its authority, violated its rules and procedures, or provided no evidence to support its ruling.

In 2015, however, the U.S. Supreme Court refused to defer to administrative interpretations of the meaning of the Affordable Care Act's precise terms.⁵⁷ The Court said the “task to determine the correct reading” of the law fell to the Court itself when, as in this case, Congress did not intend to delegate the authority to “fill in the statutory gaps” to the administrative agency.⁵⁸ Carefully parsing the meaning of the key phrases in the contested section of the law and “bearing in mind . . . that the words of a statute must be read in their context and with a view to their

place in the overall statutory scheme,”⁵⁹ the Court affirmed the ruling of the Fourth Circuit Court of Appeals and found the law constitutional.⁶⁰ In *West Virginia v. EPA*, the U.S. Supreme Court in 2022 held that agencies can't take action on anything the Court considers a “major question” without clear Congressional approval, no matter how much expertise the agency has and regardless of congressional intent.⁶¹

Many saw the Court's actions in both cases as signaling a movement away from deference to administrative agency judgments. Some said the Court's shift reinforced the rule of law by counterbalancing any tendency for the new administrative agency leaders appointed by each incoming president to alter the interpretation of administrative laws.⁶²

Executive Orders

Government executives, such as the president, may issue **executive orders** (EO) to create another source of law. Presidents Barack Obama, Donald Trump and Joe Biden have used executive orders to achieve policy objectives when Congress failed to act. Their executive orders prompted frequent outcry from political opponents and protests that each was circumventing the express authority of Congress, in violation of the rule of law.

Executive Orders of Recent U.S. Presidents				
	Time Period	Total	No./Yr.	Exec. Order No.
William J. Clinton	Total	364	46	12834–13197
	Term I	200	50	12834–13033
	Term II	164	41	13034–13197
George W. Bush	Total	291	36	13198–13488
	Term I	173	43	13198–13370
	Term II	118	30	13371–13488
Barack Obama	Total	276	35	13489–13764
	Term I	147	37	13489–13635
	Term II	129	32	13636–13764
Donald J. Trump	Total	220	55	13765–13984
Joseph R. Biden (2021)	Total	90	67	13985 – 14074

Source: Washington–Biden, The American Presidency Project, presidency.proxied.lsit.ucsb.edu/data/orders.php.

The president, governors, and mayors do not have unlimited power to issue executive orders. The Supreme Court long has held that executive orders must fall within the inherent powers of the executive to have the force of law.⁶³ The Court has said executive orders must arise from the president's explicit power under Article II, Section 2 of the Constitution, his

role as commander in chief, or his responsibility to ensure that laws are properly executed. If the delegation of power to the executive is not clear, the authority to issue executive orders falls into what Justice Robert H. Jackson once called a “zone of twilight” ambiguity.⁶⁴ However, the limits to the power to issue executive orders are largely informal and primarily a matter of self-restraint and tradition.⁶⁵

Early in 2019, for example, the American Civil Liberties Union and 16 states filed separate lawsuits in federal court in California challenging President Trump’s executive order declaring a national emergency to build a wall along the southern border.⁶⁶ The ACLU argued that the executive order unconstitutionally usurped the authority of Congress to control spending. A U.S. district court and the U.S. Circuit Court of Appeals for the Ninth Circuit ruled against the Trump administration,⁶⁷ and the U.S. Supreme Court announced it would hear the case in 2020. In 2021, President Joe Biden terminated the order with his own executive order, and the Supreme Court cancelled hearing arguments in the case.⁶⁸

Former President Trump’s 2017 executive order banning Muslims from the U.S. was also challenged by protestors and courts.⁶⁹ Titled “Protecting the Nation From Foreign Terrorist Entry into the United States,” the EO was initially blocked by courts,⁷⁰ but a later version of the order was upheld by the U.S. Supreme Court.⁷¹ The EO was also revoked in January 2021 by President Biden.

Some executive orders are routine. For example, each president of the United States issues orders that determine what types of records will be open and which classified as secret, how long they will remain secret, and who has access to them. Changes in these rules not only affect the operations of the executive agencies that create the documents, they also affect the ability of citizens to oversee and review the actions of their government (see Chapter 7).

STRUCTURE OF THE JUDICIAL SYSTEM

A basic understanding of the structure of the court system in the United States is fundamental to an appreciation of the functioning of the law. Trial courts, or federal district courts, do fact-finding, apply the law and settle disputes. Courts of appeal, including federal circuit courts and supreme courts in each system, review how lower courts applied the law. Through their judgments, courts can hand down equitable remedies, reshape laws or even throw out laws as unconstitutional.

Court Jurisdiction

An independent court system operates in each state, the District of Columbia, and the federal government. The military and the U.S. territories, such as Puerto Rico, also have court systems.

Each of these court systems operates under the authority of the relevant constitution. For example, the U.S. Constitution requires the establishment of the Supreme Court of the United States and authorizes Congress to establish other courts it deems necessary to the proper functioning of the federal judiciary. **Jurisdiction** refers to a court’s authority to hear a case. Every

court has its own jurisdiction—that is, its own geographic or topical area of responsibility and authority.

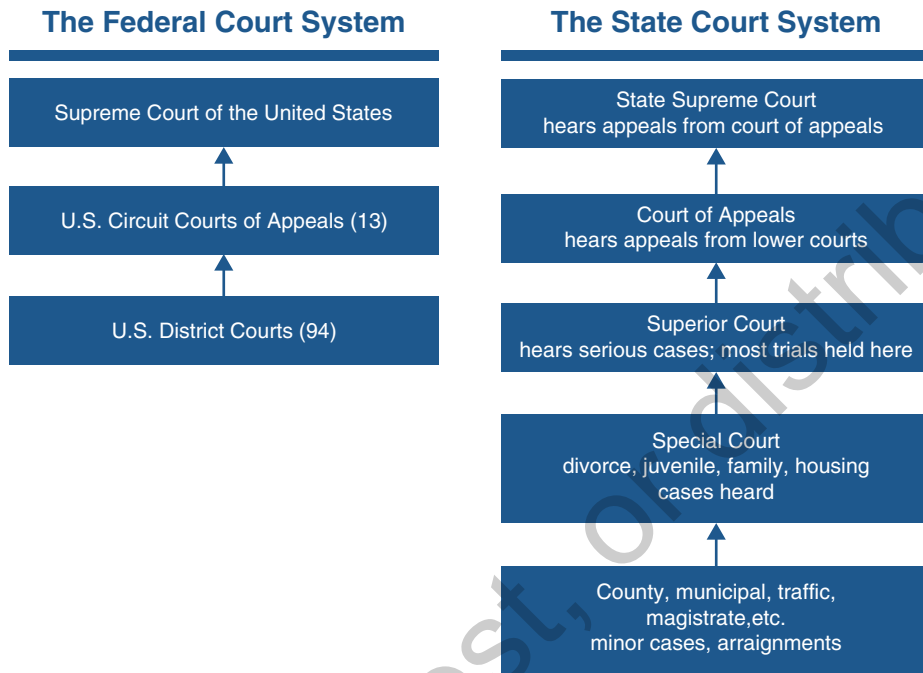
In 2017, the U.S. Supreme Court reiterated its recognition of two types of court jurisdiction: general and specific.⁷² Typically, the site or location of general jurisdiction is an individual's home or a corporation's headquarters. Given general jurisdiction, a court may hear any claim against that defendant. To be heard in a forum of specific jurisdiction, a suit must relate to the defendant's contacts with that forum. In libel, for example, the standard has been that any court in any locale where the alleged libel could be seen or heard would have jurisdiction.⁷³ A court may dismiss a lawsuit outside of its jurisdiction.

POINTS OF LAW: TRIBAL COURTS

The Indian Reorganization Act of 1934 gave Native American tribes in the United States the right to enact their own laws and establish their own formal tribal courts. Today, there are about 400 tribal justice systems in the United States.⁷⁴ Some tribes have blended judicial systems, combining elements of both Western and native systems. Others prefer traditional dispute resolution based entirely on tribal customs. In 2020, the U.S. Supreme Court ruled that about half of Oklahoma is within a Native American reservation.⁷⁵ The decision meant the state could no longer prosecute crimes on such territory—only the tribal courts or federal government could do so. In 2022, the high court narrowed that decision, ruling that Oklahoma could prosecute crimes committed against Native Americans by non-Native Americans on a reservation.⁷⁶

New technologies present new challenges to the determination of jurisdiction. Consider online libel. Given that statements published online are potentially seen anywhere, any court might claim jurisdiction (see Chapter 5). Then the plaintiff might initiate the lawsuit in any court and would likely file the suit in the court expected to render a favorable decision. In a broad ruling that could limit **forum shopping**, the practice of seeking the most favorable court to hear your case, the U.S. Supreme Court held that unless there is a substantial link between the forum of the court and the source of injury, a company may only be sued “at home.”⁷⁷ Following a detailed discussion of jurisdiction, the Court unanimously held that a national newspaper's “home” is in one of only two places: where the company is incorporated or the main location of its business.⁷⁸

As access to the internet becomes accepted as an essential public utility (in principle if not yet in law),⁷⁹ nations struggle individually and collectively to determine who has legal jurisdiction over international online disputes.⁸⁰ The U.S. Supreme Court test to establish specific jurisdiction often applies to such online disputes and requires courts to find that (1) the defendant intentionally acted inside the jurisdiction of the court, (2) the plaintiff's claim arose from that activity, and (3) it is reasonable for the court to exercise jurisdiction (See Figure 1.2.).⁸¹

FIGURE 1.2 ■ Comparing the Federal and State Court Systems

POINTS OF LAW

THREE-PART TEST FOR SPECIFIC COURT JURISDICTION⁸²

1. The defendant purposefully conducted activities in the jurisdiction of the court.
2. The plaintiff's claim arose out of the defendant's activities within that jurisdiction.
3. It is constitutionally reasonable for the court to exercise jurisdiction.

The U.S. Constitution spells out the areas of jurisdiction of the federal courts. Within their geographic regions, federal courts exercise authority over cases that relate to interstate or international controversies or that interpret and apply federal laws, treaties, or the U.S. Constitution. Thus, federal courts hear cases involving copyright laws. The federal courts also decide cases in which the federal government is a party, such as when the states bring suit against presidential directives extending protections for undocumented immigrants.⁸³ Cases involving controversies between states, between citizens of different states, or between a state and a citizen of another state also are heard in federal courts. Thus, a libel suit brought by a resident of Pennsylvania against a newspaper in California would be heard in federal court.

Trial Courts

The state, federal and specialized court systems in the United States are organized similarly; most court systems have three tiers. At the lowest level, trial courts are the courts where nearly all cases begin. Each state contains at least one of the nation's 94 trial-level federal courts, which are called district courts. Trial courts reach decisions by finding facts and applying existing law to them. They are the only courts to use juries. They do not establish precedents. Some judges view the routine media coverage of legal actions taking place in trial courts as a threat to the fairness of trials (see Chapter 8). Some judges also fear that media coverage will cast their court in disrepute and reduce public trust in the judicial system.

Courts of Appeal

Anyone who loses a case at trial may appeal the decision. However, courts of appeal generally do not make findings of fact or receive new evidence in the case. Only in rare cases do courts of appeal review case facts **de novo**, a phrase meaning “new” or “over again.” Instead, appellate courts review the legal process of the lower court. Courts of appeal examine the procedures and tests used by the lower court to determine whether **due process** was carried out—that is, whether the proper law was applied and whether the judicial process was fair and appropriate.

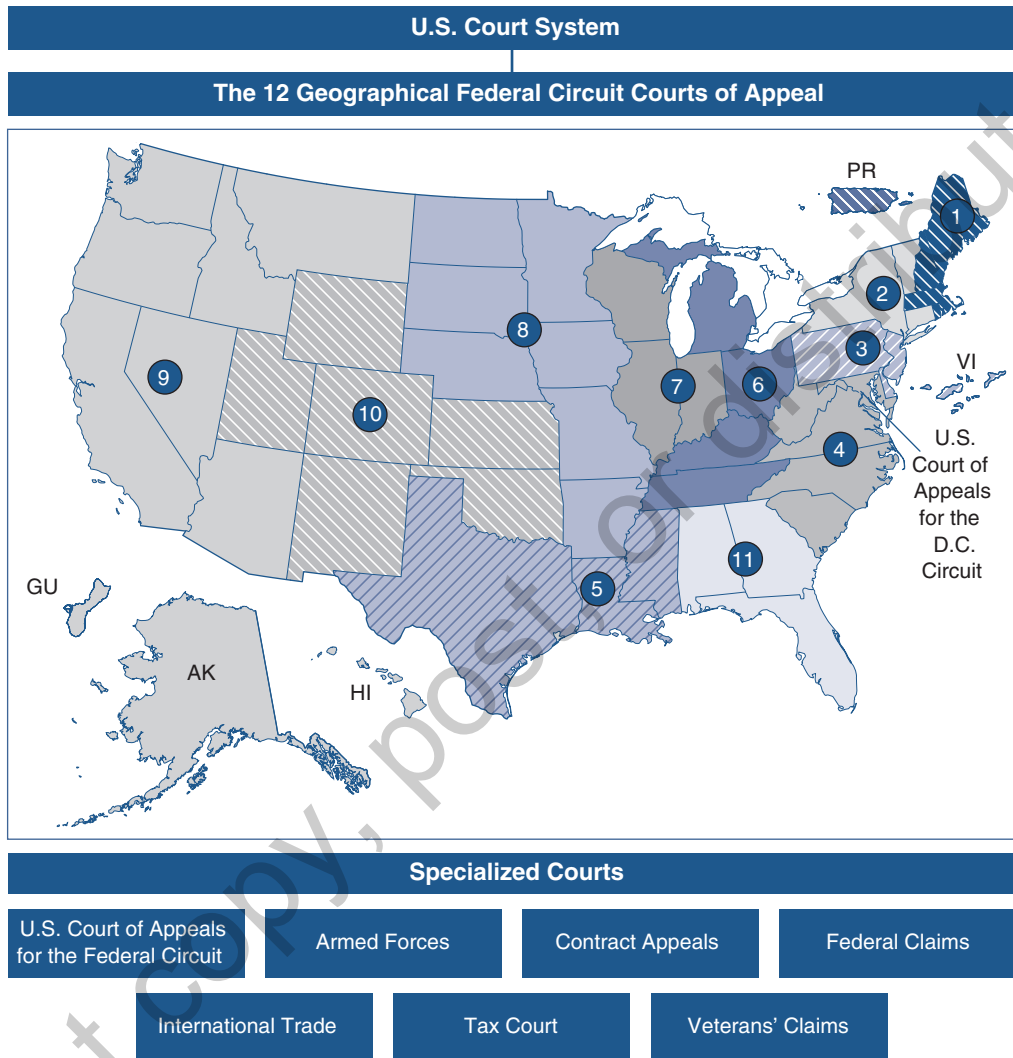
Decisions in appellate courts are based primarily on detailed written arguments, or briefs, and on short oral arguments from the attorneys representing each side of the case. Individuals and organizations that are not parties to the case, called *amicus curiae* (“friends of the court”), may receive court permission to submit a brief called an **amicus brief**.

Most court systems have two levels of appellate courts: the intermediate courts of appeal and the supreme court. In the federal court system, there are 13 intermediate-level appellate courts, called circuit courts. A panel of three judges hears all except the most important cases in the federal circuit courts of appeal. Only rarely do all the judges of the circuit court sit **en banc** to hear an appeal. *En banc* literally means “on the bench” but is used to mean “in full court.” Twelve of the federal circuits represent geographic regions (see Figure 1.3). For example, the U.S. Court of Appeals for the Ninth Circuit bears responsibility for the entire West Coast, Hawaii and Alaska, and the U.S. Court of Appeals for the D.C. Circuit covers the District of Columbia. The 13th circuit, the U.S. Court of Appeals for the Federal Circuit, handles specialized appeals. In addition, separate, specialized federal courts handle cases dealing with the armed forces, international trade or veterans' claims, among other things (See Table 1.1).

Courts of appeal may **affirm** the decision of the lower court with a majority opinion, which means they ratify or uphold the prior ruling and leave it intact. They also may **overrule** the lower court, reversing the previous decision. Any single judge or minority of the court may write a **concurring opinion** agreeing with the result reached by the court opinion but presenting different reasoning, legal principles or issues. Judges who disagree with the opinion of the court may write a **dissenting opinion**, critiquing the majority's reasoning or judgment and providing the basis for the divergent conclusion.

Majority decisions issued by courts of appeal establish precedent for lower courts within their jurisdiction. Their rulings also may be persuasive outside their jurisdiction. If only a plurality of the judges hearing a case supports the opinion of the lower court, the decision does

FIGURE 1.3 ■ U.S. Circuit Courts of Appeal



not establish binding precedent. Similarly, dissenting and concurring opinions do not have the force of law, but they often influence subsequent court reasoning.

Courts of appeal also **remand**, or send back, decisions to the lower court to establish a more detailed record of facts or to reconsider the case. A decision to remand a case may not be appealed. Courts of appeal often remand cases when they believe that the lower court did not fully explore issues in the case and needs to develop a more complete record of evidence as the basis for its decision.

A circuit court of appeals decision must be signed by at least two of the three sitting judges and is final. The losing party may ask the court to reconsider the case or may request a rehearing en banc. Such requests are rarely granted. Losing parties also may appeal the verdict of any intermediate court of appeals to the highest court in the state or to the U.S. Supreme Court.

TABLE 1.1 ■ Comparing Federal and State Courts

The federal government, and each state government, has its own court system.

The Federal Court System

Structure

- Article III of the Constitution invests the judicial power of the United States in the federal court system. Article III, Section 1 creates the U.S. Supreme Court and gives Congress authority to create lower federal courts.
- Congress has established 13 U.S. Courts of Appeals, 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.
- Parties may appeal a decision of a U.S. District Court, the U.S. Court of Claims, and/or the U.S. Court of International Trade to a U.S. Court of Appeals.
- 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.

Selection of Judges

The Constitution states that federal judges are to be nominated by the President and confirmed by the Senate.

Judges hold office during good behavior, typically, for life. Congressional impeachment proceedings may remove federal judges for misbehavior.

Types of Cases Heard

- Cases that deal with the constitutionality of a law;
- Cases involving the laws and treaties of the U.S.;
- Legal issues related to ambassadors and public ministers;
- Disputes between two or more states;
- Admiralty law;
- Bankruptcy; and
- Habeas corpus issues.

The Federal Court System

Article I Courts

Congress created several Article I, or legislative courts, that do not have full judicial power. Article I courts are:

- U.S. Court of Appeals for Veterans Claims
- U.S. Court of Appeals for the Armed Forces
- U.S. Tax Court

(Continued)

TABLE 1.1 ■ Comparing Federal and State Courts (Continued)**The State Court System****Structure**

- The Constitution and laws of each state establish the state courts. Most states have a Supreme Court, an intermediate Court of Appeals, and state trial courts, sometimes referred to as Circuit or District Courts.
- States usually have courts that handle specific legal matters, e.g., probate court (wills and estates); juvenile court; family court; etc.
- Parties dissatisfied with the decision of the trial court may take their case to the intermediate Court of Appeals.
- Parties have the option to ask the highest state court to hear the case.
- Only certain cases are eligible for review by the U.S. Supreme Court.

Selection of Judges**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.

Types of Cases Heard

- 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 interpretation of federal law or the U.S. Constitution may be appealed to the U.S. Supreme Court.

Source: United States Courts, www.uscourts.gov/about-federal-courts/court-role-and-structure; www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts.

The U.S. Supreme Court

Established in 1789, the Supreme Court of the United States functions primarily as an appellate court, although the Constitution establishes the Court's **original jurisdiction** in a few specific areas. In general, Congress has granted lower federal courts jurisdiction in these same areas, so almost no suits begin in the U.S. Supreme Court. Instead, the Court hears cases on appeal from all other federal courts, federal regulatory agencies and state supreme courts.

Cases come before the Court either on direct appeal from the lower court or through the Court's grant of a **writ of certiorari**. Certain federal laws, such as the Bipartisan Campaign Reform Act,⁸⁴ guarantee a direct right of appeal to the U.S. Supreme Court. More often, the Court grants a writ of certiorari for compelling reasons, such as when a case poses a novel or pressing legal question. The Court often grants certiorari to cases in which different U.S. circuit

courts of appeal have issued conflicting opinions. The Court may consider whether an issue is ripe for consideration, meaning that the case presents a real and present controversy rather than a hypothetical concern. In addition, the Court may reject some petitions as **moot** because the controversy is no longer “live.” Mootness may be an issue, for example, when a student who has challenged school policy graduates before the case is resolved. The Court sometimes accepts cases that appear to be moot if it believes the problem is likely to arise again.

The Court's Makeup

The chief justice of the United States and eight associate justices make up the Supreme Court. The president nominates and the Senate confirms the chief justice as well as the other eight members of the Court, who sit “during good behavior”⁸⁵ for life or until retirement. This gives the president considerable influence over the Court's political ideology. (See Table 1.2.)

Justice	Born	Nominating President	Year Appointed
 Chief Justice John G. Roberts Jr.	1955	George W. Bush	2005
 Associate Justice Clarence Thomas	1948	George H. W. Bush	1991
 Associate Justice Sonia Sotomayor	1954	Barack Obama	2009
 Associate Justice Neil M. Gorsuch	1967	Donald Trump	2017

Justice	Born	Nominating President	Year Appointed
 Associate Justice Samuel A. Alito Jr.	1950	George W. Bush	2006
 Associate Justice Elena Kagan	1960	Barack Obama	2010
 Associate Justice Brett M. Kavanaugh	1965	Donald Trump	2018
 Associate Justice Amy Coney Barrett	1972	Donald Trump	2020
 Associate Justice Ketanji Brown Jackson	1970	Joe Biden	2022

Photos source: SupremeCourt.gov.



Supreme Court of the United States justices, Fall 2021

Fred Schilling, Collection of the Supreme Court of the United States

After the Senate failed to give President Obama's Supreme Court nominee a confirmation vote after the death of Supreme Court justice Antonin Scalia, President Trump took office and nominated conservative Neil Gorsuch, who took the vacant seat in 2017. Justice Anthony Kennedy's retirement in 2018 and the death of Justice Ruth Bader Ginsburg in 2020 changed the balance of the Court. The 2018 confirmation of Brett Kavanaugh and the 2020 confirmation of Amy Coney Barrett, both nominated by President Trump, shifted the Court toward the conservative end and made Chief Justice John Roberts the swing vote. Kavanaugh's confirmation hearings were especially contentious because of testimony by Professor Christine Blasey, who accused him of sexual assault. Coney Barrett's confirmation hearings featured questions about her pro-life views, the Affordable Care Act, and her stance on climate change. Most observers argue these new justices will change the direction of American jurisprudence for decades.

In 2022, President Biden nominated Ketanji Brown Jackson, the first Black woman to be nominated for the Court, after Justice Steven Breyer announced his retirement. Brown Jackson was formerly a Supreme Court law clerk, a public defender, a federal district court judge, a federal appeals court judge, and vice chair of the U.S. Sentencing Commission. While Jackson's appointment will not change the balance of the Court, she will be joining Justices Elena Kagan and Sonia Sotomayor, the first Latino justice appointed to the Court, on the liberal side of the Court, and observers expect her dissents to receive notice.⁸⁶ Overall, the Court still leans right with Justices Alito, Thomas, Gorsuch, Kavanaugh and Coney Barrett in the conservative majority, along with Chief Justice Roberts—though Roberts has from time to time joined the liberals in some opinions.

INTERNATIONAL LAW

JUDICIAL SELECTION PROCESSES NEED TO SUPPORT RULE OF LAW

The World Justice Project's Rule of Law Index identified problematic trends in the judicial selection process in the United States over the last few years. Noting that judicial selection is an essential bulwark of the rule of law, particularly as related to judicial independence and accountability, the report highlighted significant differences in the U.S. process and that of most Western democratic nations.

While the United States allows almost anyone to become a judge, other countries require judges to meet certain standards for age, legal education and legal experience. In addition, most countries allow executives to appoint judges only from a list created by an independent body, which is not the case in the United States. This raises questions of judicial independence. Finally, very few countries allow public election of judges, while most states elect at least some judges. Elections make judges more accountable but also affect judicial outcomes, according to studies.

"Independence versus accountability is that tension that just runs throughout the judicial process. . . . But obviously the more independent you make the judges then in a certain sense the less accountable they can be."⁸⁷

Chief Justice John Roberts now is the justice closest to the center of the Court. A conservative, the chief justice tries to develop agreement across the Court by encouraging narrow rulings.

Justices Samuel Alito, Clarence Thomas, Brett Kavanaugh, Neil Gorsuch and Amy Coney Barrett create a staunch conservative bloc in the Court.⁸⁸ Conservative justices, in general, want to reduce the role of the federal government, including the Supreme Court. They tend to favor a narrow, or close, reading of the Constitution that relies more heavily on original intent than on contemporary realities. These justices have propelled the Court's rightward shift on business, campaign finance and race.⁸⁹

The demographics of the Supreme Court have important symbolic significance even if they do not directly influence the Court's rulings. Throughout history, U.S. Supreme Court justices have been overwhelmingly married, male, white and Protestant. Today, the Court is more diverse than in the past. Four female justices (one Hispanic) and two African American justices sit on the current Court, but the Court that is the final arbiter of the law in this country does not reflect the diversity of the U.S. population. Court membership overrepresents certain educational backgrounds and religious faiths. Four of the sitting justices graduated from Yale Law School and four from Harvard. While 24 percent of the U.S. population is Roman Catholic, six members of the Court (67%), including the chief justice, profess to this faith.⁹⁰ No Supreme Court justice has self-identified as other than heterosexual and cisgender.

REAL WORLD LAW

SCALIA SAID RULES, HISTORY SHOULD GUIDE COURT INTERPRETATIONS

After serving almost 30 years on the Court, Justice Antonin Scalia was one of the longest-seated justices in the Supreme Court's history when he died in 2016.⁹¹ His views shaped many areas of contemporary mass communication law as well as the rule of law.

Justice Scalia relied on originalism and clear rules to constrain the discretion of judges. Originalists argue that the Constitution's meaning should be determined by how the text was understood at the time it was adopted, "a historical criterion that is conceptually . . . separate from the preferences of the judge himself,"⁹² Justice Scalia said. He argued that the Supreme Court should "curb—even reverse—the tendency of judges to imbue authoritative texts with their own policy preferences."

Clearly delineated and consistently applied rules are necessary, he said, to "provide greater certainty in the law and hence greater predictability and greater respect for the rule of law."⁹³ Concrete rules are preferable to multipart tests or balancing, he said, because "when . . . I adopt a general rule . . . I not only constrain lower courts, I constrain myself as well."⁹⁴ The predictability of clear rules helps "enhance the legitimacy of decisions . . . [and] embolden the decision maker to resist the will of a hostile majority," one observer said.⁹⁵

Granting Review. Petitioners may ask the Supreme Court for a writ of certiorari if the court of appeals or the highest state court denies them a hearing or issues a verdict against them. Writs are granted at the discretion of the Court. All seated justices consider a writ, which is granted only if at least four justices vote to hear the case. This is called the rule of four.

Neither the decision to grant nor the decision to deny a writ of certiorari indicates anything about the Court's opinion regarding the merits of the lower court's ruling. Denial of certiorari generally means that the justices do not think the issue is sufficiently important or timely to decide. In recent years, an average of 8,200 petitions have been filed with the Court, which grants fewer than 1 percent of them.⁹⁶ Petitions filed are accompanied by the required fee of \$300. The vast majority of petitions are filed without the fee—often by prisoners who cannot pay the required filing fee.

Reaching Decisions. Once the Court agrees to hear a case, the parties file written briefs outlining the facts and legal issues in the case and summarizing their legal arguments. The justices review the briefs prior to oral argument in the case, which generally lasts one hour. The justices may sit silently during oral argument, or they may pepper the attorneys with questions.

Following oral argument, the justices meet in a private, closed conference to take an initial vote on the outcome. Discussion begins with the chief justice and proceeds around the table in order of descending seniority of the associate justices. Then voting proceeds from the most junior member of the Court and ends with the chief justice. The chief justice or the most senior justice in the majority determines who will draft the majority opinion.



This 1885 lithograph shows "Our Overworked Supreme Court."

"Our overworked Supreme Court" by Joseph Ferdinand Keppler. Published by Keppler & Schwarzmann, December 9, 1885, via SupremeCourt.gov

A majority of the justices must agree on a point of law for the Court to establish binding precedent. Draft opinions are circulated among the justices, and negotiations may attempt to shift votes. It may take months for the Court to achieve a final decision, which is then announced on decision day.

Two other options exist for the Supreme Court. It may issue a **per curiam opinion**, which is an unsigned opinion by the Court as a whole. Although a single justice may draft the opinion, that authorship is not made public. Per curiam opinions often do not include the same thorough discussion of the issues found in signed opinions. The Supreme Court also may resolve a case by issuing a **memorandum order**. A memorandum order simply announces the vote of the Court without providing an opinion. This quick and easy method to dispense with a case has become more common with the Court's growing tendency to issue fewer signed opinions. More recently, the Court has come under criticism for increasing use of the **shadow docket**, a nickname for actions by the Court that do not go through the full opinion process. These cases comprise emergency orders and summary decisions that do not include information about how each justice voted or why a majority came to a certain conclusion.⁹⁷

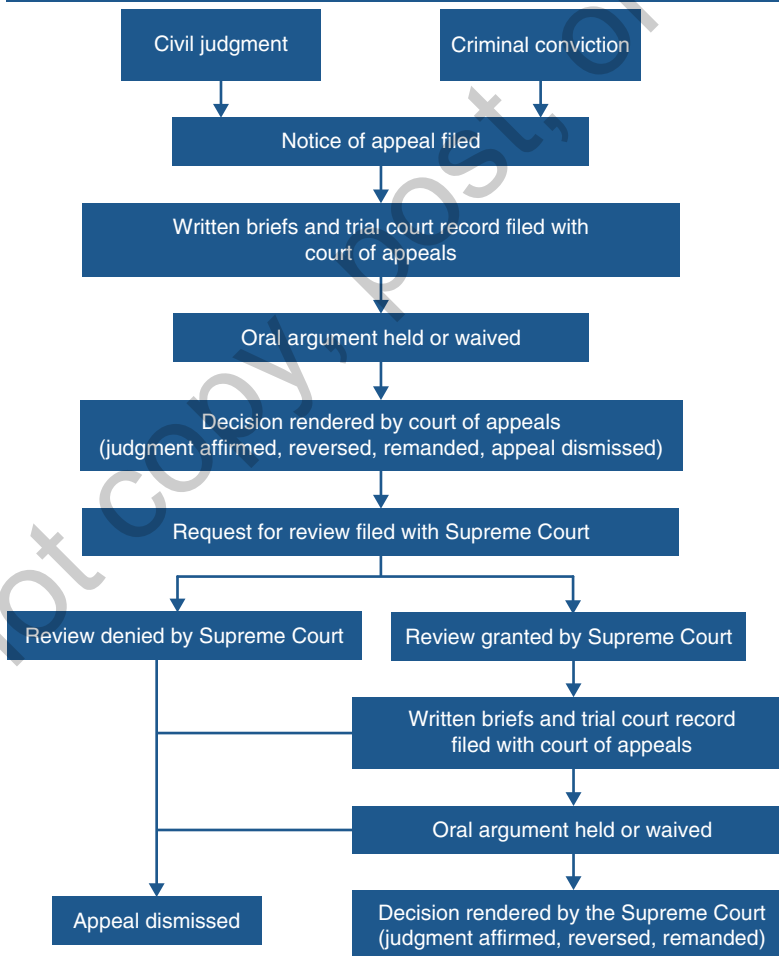
The ideological leanings of the individual justices, and of the Court as a whole, come into play in the choice of cases granted review and the ultimate decisions of the Court.⁹⁸ The U.S. Supreme Court relies on a wide range of sources to guide its interpretation of the Constitution. **Originalists** and **textualists** seek the meaning of the Constitution primarily in its explicit text, the historical context in which the document developed and the recorded history of its deliberation and original meaning. Some justices look beyond the text to discover how best to apply the Constitution today. Their interpretation relies more expressly on deep-seated personal and societal values, ethical and legal concepts, and the evolving interests of a shifting society. The Court's reasoning at times also builds on international standards, treaties or conventions, such as the Universal Declaration of Human Rights, or the decisions of courts outside the United States as well as state and other federal courts. On occasion, such as when the Court discovered a right to privacy embedded in the First Amendment, the justices refer to the views and insights of legal scholars.⁹⁹

PROCESSES OF THE LAW

Although each court or case follows a somewhat idiosyncratic path, similar patterns of judicial process emerge. In a criminal matter, the case starts when a government agency investigates a possible crime. After gathering evidence, the government arrests someone for a crime, such as distributing false and misleading advertising through the internet. The standard of evidence needed for an arrest or to issue a search warrant is known as **probable cause**, which is more than mere suspicion.

The case then goes before a **grand jury** or a judge. Unlike trial juries (also called petit juries), grand juries do not determine guilt. Grand juries hear the state's evidence and determine whether that evidence establishes probable cause to believe that a crime has been committed. A grand jury may be convened on the county, state or federal level. If the case proceeds without a grand jury, the judge makes a probable cause determination at a preliminary hearing. If the state fails to establish probable cause, the case may not proceed. If probable cause is found, the person is indicted (see Figure 1.4).

FIGURE 1.4 ■ The Process of an Appeal



Then the case moves to a court arraignment, where the defendant is formally charged and pleads guilty or not guilty. A plea bargain may be arranged in which the defendant pleads guilty to reduced charges or an agreed-upon sentence. Plea bargains account for almost 95 percent of all felony convictions in the United States.¹⁰⁰ If a not-guilty plea is entered, the case usually proceeds to trial. The judge may set bail.

Proof beyond a reasonable doubt is required to establish guilt in a criminal trial. A guilty verdict prompts a sentencing hearing. A criminal sentence may include jail or prison time and a fine or fines.

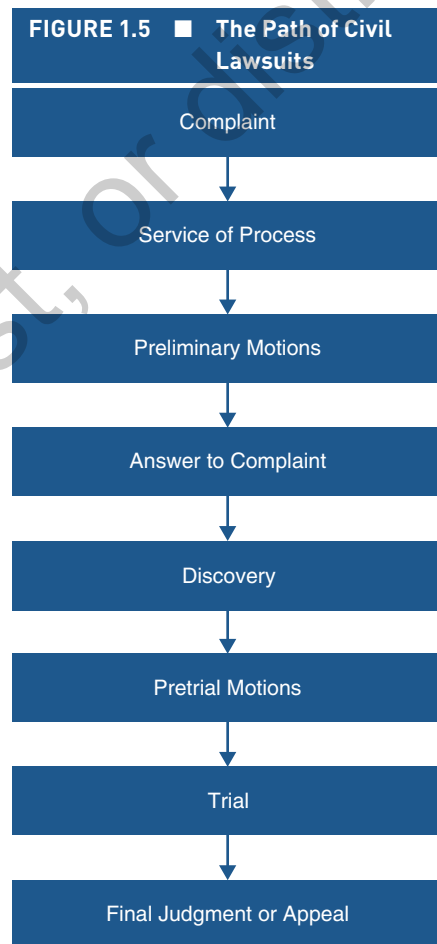
Civil Suits

Civil cases generally involve two private individuals or organizations asking the courts to settle a conflict. The person who files a civil complaint or sues is the **plaintiff**. The person responding to the suit is the **defendant**. The civil injury one person or organization inflicts on another is called a tort. **Tort** law provides the means for the injured party to establish fault and receive compensation.

The majority of communication and media lawsuits are civil suits in which the plaintiff must prove their case by the preponderance of evidence. This standard of proof is lower than in criminal cases.

Civil suits begin when the plaintiff files a pleading with the clerk of court. To receive a damage award, a plaintiff generally must show that the harm occurred, that the defendant caused the harm, and that the defendant was at fault, meaning the defendant acted either negligently or with malicious intent. Under a **strict liability** standard, the plaintiff does not need to demonstrate fault on the part of the defendant in order to win the suit. Strict liability applies in cases involving inherently dangerous products or activities. Under strict liability, the individual who produced the product or took the action is liable for all resulting harms.

At a court hearing, the defendant may answer the complaint by filing a countersuit, by denying the charge, by filing a **motion to dismiss** or by filing a motion for **summary judgment** (see next page). A motion to dismiss, or **demurrer**, asks a court to reject a complaint because



it is legally insufficient. For example, a defendant may admit that it distributed a story but argue that the story did not cause any legally actionable harm to the plaintiff. If the court grants the motion to dismiss, the plaintiff may appeal.

Before a case goes to trial, the disputing parties may agree to an out-of-court settlement. When this occurs, there is no public record of the outcome of the case. Out-of-court resolutions often prohibit the parties from discussing the terms of the settlement. In the 2019 settlement of the lawsuit former San Francisco 49ers quarterback Colin Kaepernick brought against the NFL, for example, a confidentiality agreement prevented the disclosure of any settlement details.¹⁰¹

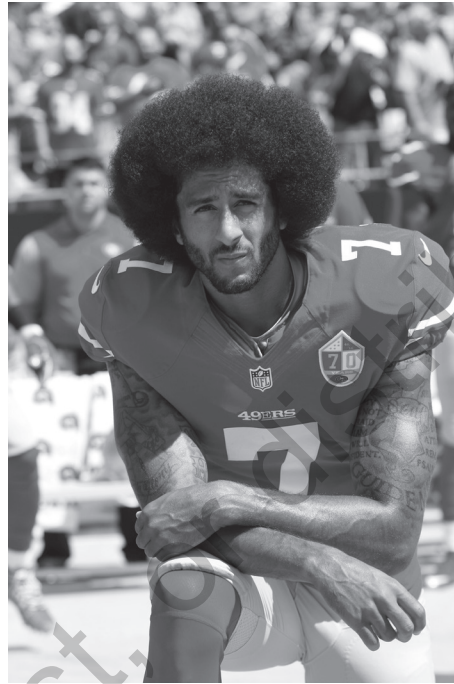
Sometimes a judge will settle a civil case through a court conference. Civil suits are settled by the parties before trial almost 97 percent of the time.¹⁰²

If the two sides do not settle, they begin to gather evidence through a process called **discovery**. In trying to build a case, one or both parties may issue a **subpoena**, which is a legal command for someone, sometimes a media professional, to appear and testify in court or turn over evidence, such as outtakes or notes. Citizens are legally obligated to comply with subpoenas, and the judge may punish noncompliance with a contempt of court citation, fines or jail.

If the parties do not reach a settlement, the case may proceed to a jury trial, which is required if either party requests it. To form a jury, the court summons individuals from a local pool, called the **venire**, that is usually based on voters' rolls. The locality where the court hears the suit is called the **venue**. The lawyers and judge select jurors through a process of questioning called **voir dire**, which literally means "to speak the truth."

While the theoretical goal is to seat an impartial jury for the trial, attorneys on both sides hope to gain advantage through the juror selection process. Attorneys may challenge potential jurors "for cause," such as when a prospective juror knows a party in the suit. They also may eliminate a limited number of potential jurors through **peremptory challenges**, in which they need not show a reason for the rejection. Expert consulting on jury selection, witness preparation, media interactions and the like help attorneys shape the jury and public messaging about the trial.

After evidence is presented at trial, the judge instructs the jury on how to apply the law to the case. Then the jury deliberates. If the jury cannot reach a verdict, the judge may order a new



Colin Kaepernick of the San Francisco 49ers takes a knee during the national anthem in Charlotte, N.C., in 2016. He settled his collusion lawsuit against the NFL in 2019.

Michael Zagaris/San Francisco 49ers/Getty Images

trial with a new jury. When a jury reaches a verdict, the judge generally enters it as the judgment of the court. However, the judge may overturn the verdict if it is contrary to the law. A successful plaintiff usually will be awarded damages.

Either party may appeal the judgment of the court. For example, if a party believes the jury was not properly instructed on the law, they may appeal on the basis of violation of due process. It can take years and cost hundreds of thousands of dollars to appeal a case. The person who challenges the decision of the court is called the petitioner or **appellant**. The respondent to the appeal, or the **appellee**, wants the verdict to be affirmed.

Summary Judgment

When parties ask a court to dismiss a case, they file a motion for summary judgment asking the judge to decide the case on the basis of pretrial submissions when neither party disputes the underlying facts.¹⁰³ A summary judgment results in a legal determination by a court *without* a full trial and avoids the cost of trial and the risk of loss to the moving party.

A court's summary judgment may be issued based on the merits of the case as a whole or on specific issues critical to the case. In a libel case, this may occur when a plaintiff is clearly unable to meet one or more elements of the burden of proof, such as the falsity of the published material (see Chapter 4). If the judge determines evidence supports an uncontested conclusion that one party should win the case, the judge hands down a summary judgment in that party's favor.

Summary judgment may be granted at several points in litigation, but usually prior to trial. The U.S. Supreme Court has said that courts considering motions for summary judgment “must view the facts and inferences to be drawn from them in the light most favorable to the opposing party.”¹⁰⁴ In libel cases, this means that courts must take into account the burden the plaintiff is required to meet at trial. The Court created this obstacle to summary judgment because the nonmoving party loses the opportunity to present their case when a judge grants summary judgment to the opposing side.¹⁰⁵ Media defendants sometimes seek summary judgments to protect themselves from the high costs of frivolous lawsuits intended to harass, intimidate, or affect content.¹⁰⁶

For decades, courts would dismiss a case only if “no set of facts” could support the plaintiff's claim.¹⁰⁷ But the U.S. Supreme Court changed this standard when it decided two cases, *Bell Atlantic v. Twombly* in 2007¹⁰⁸ and *Ashcroft v. Iqbal* in 2009.¹⁰⁹ What is known as the *Twombly/Iqbal* test says a court will dismiss a case if the plaintiff cannot state a plausible claim. That requires a court to determine “exactly where plausibility falls in that gray area between possible and probable.”¹¹⁰ It is more difficult for plaintiffs to present plausible facts to support their claim than it is simply to show that no set of facts could prove the claim, which means that courts applying the *Twombly/Iqbal* test dismiss a case more readily. Courts continue to disagree what “plausible” means in this context.

Finding And Reading the Case Law

This textbook provides an introduction and overview to key areas of the law of journalism and mass communication. Many students will wish, or their professors will require them, to

supplement this text with research in primary legal sources. Primary sources are the actual documents that make up the law (e.g., statutes, case decisions, administrative rules and committee reports). Legal research often begins in secondary sources that analyze, interpret and discuss the primary documents. Perhaps the most useful secondary sources for beginning researchers in communication law are “American Jurisprudence” (2nd, ed.), “Corpus Juris Secundum” and “Media Law Reporter.” The first two are legal encyclopedias that summarize legal subjects and reference relevant cases and legal articles. “Media Law Reporter” provides both topical summaries and excerpts of key media law cases organized by subject. However, “Media Law Reporter” is not comprehensive. It contains only the cases selected by the editors to highlight prominent issues in media law. Law review articles provide invaluable scholarship and references to contemporary legal topics. However, primary source research in administrative, legislative and court documents is necessary to thoroughly research a legal topic.



The main reading room in the U.S. Supreme Court Library.

SupremeCourt.gov

This text cannot provide a detailed explanation of how to navigate these complex and diverse legal materials. However, access to primary legal materials is available online and in databases such as Westlaw and Nexis Universe.

The notes at the end of this book contain citations to many of the important cases in the law of journalism and mass communication. These legal citations provide the names of the parties in the case, the number of the volume in which the case is reported, the abbreviated name of the official legal reporter (or book) in which the case appears, the page of the reporter on which the case begins, and the year in which the case was decided. For example, a citation might look like this: “*FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 534 (2007) (Souter, J., dissenting).” This citation shows that the first party, the Federal Election Commission, filed an appeal from a decision in favor of the second party, Wisconsin Right to Life, Inc. The decision in this case

striking down a ban on issue advertising prior to elections or primaries can be found in the U.S. Reports collection, which contains U.S. Supreme Court opinions. The case appears in volume 551 (the number *before* the name of the reporter), beginning on page 449 (the number *after* the name of the reporter). The case was decided in 2007 (the number in parentheses). In addition, the page number following the comma tells you precisely what page of the decision is referenced, and the parentheses at the end indicate that the reference comes from a dissenting opinion by Justice David Souter.

This chapter shows that the law of journalism and mass communication contains many terms and concepts that may be unfamiliar to the general reader. Key definitions at the end of the chapter and in the glossary at the back of the book should help you navigate opinions for lawyers trained in legal terminology and doctrines. At first, it may be difficult to grasp the meaning and importance of a case. With practice, however, anyone can learn the language and read case law with relative ease.

The following steps will help you read the law more quickly and with better comprehension. You will understand the law far better and more easily if you give yourself sufficient time to use these three steps:

1. **Preread the case.** Prereading identifies the *structure* of the decision, the various *rules or doctrines* that underlie the court's reasoning, and the *outcome* of the case. These three elements highlight the most important elements of the court's reasoning. To preread, quickly skim
 - a. The topic sentence of each paragraph to get the gist of the opinion and identify its most important sections
 - b. The first few paragraphs of the opinion, which should establish the parties, the issues and the history of the case
 - c. The last few paragraphs of the opinion to understand the **holding** (which is the legal principle taken from the decision of the court) or to get a summary of the outcome of the case
2. **Skim the entire case.** Scan the entire case and mark the start of key sections of the case for more careful reading.
3. **Read carefully the sections you have identified as important.** Underline or highlight as you go. You may want to take note of the following:
 - a. **The issue.** Knowing the issue in the case helps you know which elements of the history and facts are significant. In this text, the chapter titles generally signal the issue on which the case excerpt will focus. The case itself also often includes language that identifies the issue. Such language includes, "The question before the Court is whether . . ." and "The issue in this case is . . ."
 - b. **The facts.** Identify which facts are central to the issue by asking yourself whether the dispute in the case is about a question of fact (e.g., what happened) or a question of law (e.g., which test, doctrine or category of speech is relevant). A libel decision that turns on the identity of the individual whose reputation was

harmed would represent a question of fact, making related facts central to the holding.¹¹¹

- c. **The case history.** The circumstances surrounding a decision often are pivotal to the issue before the court. Sometimes the relevant history is one of shifting legal doctrine, as when the court gradually affords commercial speech greater constitutional protection.¹¹² Sometimes the important context is factual, as when the court protects defamatory comments situated within a generally accurate portrayal of the violent oppression of Blacks during the civil rights movement.¹¹³
- d. **The common law rule.** The rule is the heart of the decision; it is the common law developed in this case. It relates to the holding but is the more general rule applied here and applicable to other cases. To identify the rule, ask whether the court has created a new test, engaged in balancing, or applied an established doctrine in a new way. What are the elements of the rule, and what are its exceptions?
- e. **The analysis.** Here the court applies the rule to the facts. In libel law, for example, public officials must prove actual malice to win their suit. How does the court apply this element of the test?

Careful reading of the law is the first stage in conducting legal research and positions you well to write case briefs, which summarize the key elements of a court decision.

Briefing Cases

Case briefs simplify and clarify a court's opinions by selecting the five most important elements of the decision. Briefs focus on key elements and set aside content that does not directly inform the court's decision.

The five components of a case brief are often referred to as FIRAC. They are Facts, Issue, Rule of Law, Analysis and Conclusion (or holding).

1. **The Facts.** The facts summary should include all the information needed to understand the issue and the decision of the court. The facts statement consists of a brief but inclusive discussion of what happened in the legal dispute before it reached this court. It should include who the parties are, what happened in the trial court, and the basis for appeal. What happened between the parties that gave rise to the case? Who initiated the lawsuit? What was the substance of the complaint, and what type of legal action was brought? What was the defense? What did other courts reviewing the case decide? What legal errors provide the basis for the appeal?
2. **The Issue.** Here, one sentence summarizes the specific question decided by the court in this case. The issue should be phrased as a single question that can be answered "yes" or "no."
3. **The Rule of Law.** The rule of law states, preferably in one sentence, the precedent established by this decision that will bind lower courts.

4. **The Analysis.** This section, also called the *rationale*, details how and why the court reached its decision. In this section, it is important to discuss the details of the court's reasoning and how it creates new law. Consider whether it establishes a new test, clarifies existing legal distinctions, defines a new category, or highlights changing realities that affect the law. A thorough analysis must describe the reasoning for all the opinions in the decision and highlight the specific points on which concurring and dissenting opinions diverge from the opinion of the court.
5. **The Conclusion.** This is a simple declarative statement of the holding reached by the present court. What did the court decide, and did it affirm, remand or reverse? Provide the vote of the court if it is an appellate court.

Analyzing *Marbury v. Madison*

The following case brief previews the first case excerpted at the end of this chapter.

FACTS: William Marbury was one of President John Adams' 42 "midnight appointments" on the eve of his departure from the White House. The necessary paperwork and procedures to secure his and several other appointments were completed, but Secretary of State John Marshall—himself a midnight appointee—failed to deliver Marbury's commission. Upon assuming the presidency, Thomas Jefferson ordered his secretary of state—James Madison—not to deliver the commission. Under authority of the Judiciary Act of 1789, Marbury sued to ask the Supreme Court to order Madison, through a writ of mandamus, to deliver the commission. A writ of mandamus is a court order requiring an individual or organization either to perform or to stop a particular action.

ISSUE: Does the Supreme Court have the power to review acts of Congress and declare them void if they violate the Constitution?

RULE of LAW: Under Article VI, Section 2 of the U.S. Constitution, the Supreme Court is implicitly given the power to review acts of Congress and to strike them down as void if they are "repugnant" to the Constitution.

ANALYSIS: A commission signed by the president and sealed by the secretary of state is complete and legally binding. Denial of Marbury's commission violates the law, creating a governmental obligation to remedy the violation. A writ of mandamus is such a remedy. The Constitution is the "supreme law of the land" (Art. VI). As such, it is "superior" and "fundamental and paramount." It establishes "certain limits" on the power of the government it creates, including the power of Congress. The Constitution also establishes that "[it] is emphatically the province and duty of the judicial department to say what the law is." The Supreme Court, therefore, must determine the law that applies in a specific case and decide the case according to the law. If the Court finds that "ordinary" statutory law conflicts with the dictates of the Constitution, the "fundamental" constitutional law must govern. Accordingly, "a legislative act contrary to the Constitution is not law," and the Court must strike it down to give the Constitution its due weight.

Under Article III of the Constitution, Congress has the power to regulate the appellate jurisdiction, but not the original jurisdiction, of the Supreme Court. The Court's original

jurisdiction is defined completely and exclusively by Article III and cannot be altered except by amendment of the Constitution. Through the Judiciary Act of 1789, Congress *added* to the original jurisdiction of the Court. Being outside the power given to Congress by the Constitution, this act is illegitimate. Because the power of mandamus was not granted to the Court by the Constitution either, the Court does not have the power to order mandamus on behalf of Marbury.

The Court held the provision of the Judiciary Act unconstitutional and declared the mandamus void.

CONCLUSION: Marshall, C.J. 6–0. Yes. Relying heavily on the inherent “logical reasoning” of the Constitution, rather than on any explicit text, the Court dismissed the case for lack of jurisdiction but found that Congress’ grant of original power of mandamus to the Court violated the separation of power established in Article III of the Constitution.

CHAPTER GLOSSARY

administrative law	holding
affirm	judicial review
amicus brief	jurisdiction
appellant	memorandum order
appellee	modify precedent
black-letter law	moot
common law	motion to dismiss
concurring opinion	original jurisdiction
constitutional law	originalists
construction	overbroad laws
defendant	overrule
deference	overturn precedent
demurrer	per curiam opinion
de novo	peremptory challenge
discovery	plaintiff
discretion	political questions
dissenting opinion	precedent
distinguish from precedent	probable cause
doctrines	remand
due process	rule of law
en banc	shadow docket
equity law	stare decisis
executive orders	statutory law
facial meaning	strict construction
federalism	strict liability
forum shopping	subpoena
grand jury	summary judgment

Supremacy Clause
 textualists
 tort
 vague laws

venire
 venue
 voir dire
 writ of certiorari

CASES FOR STUDY

Thinking About It

The first case excerpt is from *Marbury v. Madison*, the decision in which the Supreme Court established its own power of judicial review. A central question resolved by the Supreme Court in *Marbury v. Madison* was whether, under the Constitution, the Court had authority to void duly enacted laws that it deemed to violate the U.S. Constitution.

The second case excerpt is from *U.S. v. Alvarez*, a case in which the Supreme Court struck down a federal law that made it a crime to lie about receiving a Congressional medal of honor. The Court deemed the law to be unconstitutional under the First Amendment because it failed a legal test known as strict or “exacting scrutiny,” which requires the government to show a compelling interest in the regulation and that the regulation be least restrictive. This test is covered in more detail in Chapter 2. The Court ruled that while the government had a compelling interest in protecting the military’s honor with the regulation, the law was overbroad and not the least restrictive alternative. The Court said the government could likely protect the integrity of the military awards system by creating a database of medal winners accessible and searchable on the internet. Furthermore, the Court said that while some forms of lying are not protected by the First Amendment (for instance, perjury or fraud), most lying is handled by “counterspeech,” the notion that more speech is the remedy for speech that is false. The counterspeech doctrine is also covered in more detail in Chapter 2. The case is a good example of the court’s reliance on an open marketplace of ideas to counter falsehoods. It also demonstrates how courts deal with a government regulation on speech that is overbroad.

MARBURY V. MADISON

SUPREME COURT OF THE UNITED STATES 5 U.S. 137 (1803)

CHIEF JUSTICE JOHN MARSHALL delivered the Court’s opinion:

. . . The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that “the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and

those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction.”

It has been insisted at the bar, that as the original grant of jurisdiction to the supreme and inferior courts is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it to the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is . . . entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance. . . .

It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it. . . .

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction, the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true; yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that case. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to enquire whether a jurisdiction, so conferred, can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. 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 alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void.

This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution, would of itself be sufficient, in America where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained. . . .

[I]t is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on the subject. It is in these words, "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the constitution, and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

U.S. V ALVAREZ (2012)

JUSTICE KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE GINSBURG, and JUSTICE SOTOMAYOR join:

Lying was his habit. Xavier Alvarez, the respondent here, lied when he said that he played hockey for the Detroit Red Wings and that he once married a starlet from Mexico. But when he lied in announcing he held the Congressional Medal of Honor, respondent ventured onto new ground; for that lie violates a federal criminal statute, the Stolen Valor Act of 2005.

In 2007, respondent attended his first public meeting as a board member of the Three Valley Water District Board. The board is a governmental entity with headquarters in Claremont, California. He introduced himself as follows: "I'm a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy." None of this was true. For all the record shows, respondent's statements were but a pathetic attempt to gain respect that eluded him. The statements do not seem to have been made to secure employment or financial benefits or admission to privileges reserved for those who had earned the Medal.

Respondent was indicted under the Stolen Valor Act for lying about the Congressional Medal of Honor at the meeting. The United States District Court for the Central District of California rejected his claim that the statute is invalid under the First Amendment. Respondent pleaded guilty to one count, reserving the right to appeal on his First Amendment claim. The United States Court of Appeals for the Ninth Circuit, in a decision by a divided panel, found the Act invalid under the First Amendment and reversed the conviction. This Court granted certiorari. 565 U. S. (2011).

It is right and proper that Congress, over a century ago, established an award so the Nation can hold in its highest respect and esteem those who, in the course of carrying out the "supreme and noble duty of contributing to the defense of the rights and honor of the nation," have acted with extraordinary honor. And it should be uncontested that this is a legitimate Government objective, indeed a most valued national aspiration and purpose. This does not end the inquiry, however. Fundamental constitutional principles require that laws enacted to honor the brave must be consistent with the precepts of the Constitution for which they fought.

The Government contends the criminal prohibition is a proper means to further its purpose in creating and awarding the Medal. When content-based speech regulation is in question, however, exacting scrutiny is required. Statutes suppressing or restricting speech must be judged by the sometimes inconvenient principles of the First Amendment. By this measure, the statutory provisions under which respondent was convicted must be held invalid, and his conviction must be set aside.

Respondent's claim to hold the Congressional Medal of Honor was false. There is no room to argue about interpretation or shades of meaning. On this premise, respondent violated §704(b); and, because the lie concerned the Congressional Medal of Honor, he was subject to an enhanced penalty under subsection (c). Those statutory provisions are as follows:

"(b) FALSE CLAIMS ABOUT RECEIPT OF MILITARY

DECORATIONS OR MEDALS.--Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States

. . . shall be fined under this title, imprisoned not more than six months, or both.

“(c) ENHANCED PENALTY FOR OFFENSES INVOLVING CONGRESSIONAL MEDAL OF HONOR.--

“(1) IN GENERAL.--If a decoration or medal involved in an offense under subsection (a) or (b) is a Congressional Medal of Honor, in lieu of the punishment provided in that subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both.”

Respondent challenges the statute as a content-based suppression of pure speech, speech not falling within any of the few categories of expression where content-based regulation is permissible. The Government defends the statute as necessary to preserve the integrity and purpose of the Medal, an integrity and purpose it contends are compromised and frustrated by the false statements the statute prohibits. It argues that false statements “have no First Amendment value in themselves,” and thus “are protected only to the extent needed to avoid chilling fully protected speech.” Although the statute covers respondent’s speech, the Government argues that it leaves breathing room for protected speech, for example speech which might criticize the idea of the Medal or the importance of the military. The Government’s arguments cannot suffice to save the statute. . . .

III

The probable, and adverse, effect of the Act on freedom of expression illustrates, in a fundamental way, the reasons for the Law’s distrust of content-based speech prohibitions.

The Act by its plain terms applies to a false statement made at any time, in any place, to any person. It can be assumed that it would not apply to, say, a theatrical performance. Still, the sweeping, quite unprecedented reach of the statute puts it in conflict with the First Amendment. Here the lie was made in a public meeting, but the statute would apply with equal force to personal, whispered conversations within a home. The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain.

Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth [from George Orwell’s novel, “1984”]. Were this law to be sustained, there could be an endless list of subjects the National Government or the States could single out. Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment. But the Stolen Valor Act is not so limited in its reach. Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court’s cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom. . . .

IV

The previous discussion suffices to show that the Act conflicts with free speech principles. But even when examined within its own narrow sphere of operation, the Act cannot survive. In assessing content-based restrictions on protected speech, the Court has not adopted a freewheeling approach, but rather has applied the “most exacting scrutiny.” Although the objectives the Government seeks to further by the statute are not without significance, the Court must, and now does, find the Act does not satisfy exacting scrutiny.

The Government is correct when it states military medals “serve the important public function of recognizing and expressing gratitude for acts of heroism and sacrifice in military service,” and also “foste[r] morale, mission accomplishment and esprit de corps’ among service members.” General George Washington observed that an award for valor would “cherish a virtuous ambition in . . . soldiers, as well as foster and encourage every species of military merit.” Time has not diminished this idea. In periods of war and peace alike public recognition of valor and noble sacrifice by men and women in uniform reinforces the pride and national resolve that the military relies upon to fulfill its mission. . . . The Government’s interest in protecting the integrity of the Medal of Honor is beyond question. But to recite the Government’s compelling interests is not to end the matter. The First Amendment requires that the Government’s chosen restriction on the speech at issue be “actually necessary” to achieve its interest. There must be a direct causal link between the restriction imposed and the injury to be prevented.

The link between the Government’s interest in protecting the integrity of the military honors system and the Act’s restriction on the false claims of liar’s like respondent has not been shown. Although appearing to concede that “an isolated misrepresentation by itself would not tarnish the meaning of military honors,” the Government asserts it is “common sense that false representations have the tendency to dilute the value and meaning of military awards.” It must be acknowledged that when a pretender claims the Medal to be his own, the lie might harm the Government by demeaning the high purpose of the award, diminishing the honor it confirms, and creating the appearance that the Medal is awarded more often than is true. Furthermore, the lie may offend the true holders of the Medal. From one perspective it insults their bravery and high principles when falsehood puts them in the unworthy company of a pretender.

Yet these interests do not satisfy the Government’s heavy burden when it seeks to regulate protected speech. The Government points to no evidence to support its claim that the public’s general perception of military awards is diluted by false claims such as those made by Alvarez. . . . The lack of a causal link between the Government’s stated interest and the Act is not the only way in which the Act is not actually necessary to achieve the Government’s stated interest. The Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest. The facts of this case indicate that the dynamics of free speech, of counterspeech, of refutation, can overcome the lie. Respondent lied at a public meeting. . . . Once the lie was made public, he was ridiculed online, his actions were reported in the press, and a fellow board member called for his resignation. There is good reason to believe that a similar fate would befall other false claimants. Indeed, the outrage and contempt expressed for respondent’s lies can serve to reawaken and reinforce the public’s respect for the Medal, its recipients, and its high purpose. The acclaim that recipients of the Congressional Medal of Honor receive also casts doubt on the proposition that the public will be misled by the claims of charlatans or become cynical of those whose heroic deeds earned them the Medal by right.

The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth. The theory of our Constitution is “that the best test of truth is the power of the thought to get itself accepted in the competition of the market.” The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.

Expressing its concern that counterspeech is insufficient, the Government responds that because "some military records have been lost . . . some claims [are] unverifiable," This proves little, however; for without verifiable records, successful criminal prosecution under the Act would be more difficult in any event. So, in cases where public refutation will not serve the Government's interest, the Act will not either. In addition, the Government claims that "many [false claims] will remain unchallenged." The Government provides no support for the contention. And in any event, in order to show that public refutation is not an adequate alternative, the Government must demonstrate that unchallenged claims undermine the public's perception of the military and the integrity of its awards system. This showing has not been made.

It is a fair assumption that any true holders of the Medal who had heard of Alvarez's false claims would have been fully vindicated by the community's expression of outrage, showing as it did the Nation's high regard for the Medal. The same can be said for the Government's interest. The American people do not need the assistance of a government prosecution to express their high regard for the special place that military heroes hold in our tradition. Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication.

In addition, when the Government seeks to regulate protected speech, the restriction must be the "least restrictive means among available, effective alternatives." There is, however, at least one less speech-restrictive means by which the Government could likely protect the integrity of the military awards system. A Government-created database could list Congressional Medal of Honor winners. Were a database accessible through the Internet, it would be easy to verify and expose false claims. It appears some private individuals have already created databases similar to this, and at least one database of past winners is online and fully searchable. The Solicitor General responds that although Congress and the Department of Defense investigated the feasibility of establishing a database in 2008, the Government "concluded that such a database would be impracticable and insufficiently comprehensive." Without more explanation, it is difficult to assess the Government's claim, especially when at least one database of Congressional Medal of Honor winners already exists.

The Government may have responses to some of these criticisms, but there has been no clear showing of the necessity of the statute, the necessity required by exacting scrutiny.

* * *

The Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace. Though few might find respondent's statements anything but contemptible, his right to make those statements is protected by the Constitution's guarantee of freedom of speech and expression. The Stolen Valor Act infringes upon speech protected by the First Amendment.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

DISSENT

JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Only the bravest of the brave are awarded the Congressional Medal of Honor, but the Court today holds that every American has a constitutional right to claim to have received this singular award. The Court strikes down the Stolen Valor Act of 2005, which was enacted to stem an epidemic of false claims about military decorations. These lies, Congress reasonably concluded, were undermining our country's system of military honors and inflicting real harm on actual medal recipients and their families.

Building on earlier efforts to protect the military awards system, Congress responded to this problem by crafting a narrow statute that presents no threat to the freedom of speech. The statute reaches only knowingly false statements about hard facts directly within a speaker's personal knowledge. These lies have no value in and of themselves, and proscribing them does not chill any valuable speech.

By holding that the First Amendment nevertheless shields these lies, the Court breaks sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest. I would adhere to that principle and would thus uphold the constitutionality of this valuable law.

...

Congress passed the Stolen Valor Act in response to a proliferation of false claims concerning the receipt of military awards. For example, in a single year, *more than 600* Virginia residents falsely claimed to have won the Medal of Honor. An investigation of the 333 people listed in the online edition of *Who's Who* as having received a top military award revealed that fully a third of the claims could not be substantiated. When the Library of Congress compiled oral histories for its Veterans History Project, 24 of the 49 individuals who identified themselves as Medal of Honor recipients had not actually received that award. The same was true of 32 individuals who claimed to have been awarded the Distinguished Service Cross and 14 who claimed to have won the Navy Cross. Notorious cases brought to Congress' attention included the case of a judge who falsely claimed to have been awarded *two* Medals of Honor and displayed counterfeit medals in his courtroom; a television network's military consultant who falsely claimed that he had received the Silver Star; and a former judge advocate in the Marine Corps who lied about receiving the Bronze Star and a Purple Heart.

...

As Congress recognized, the lies proscribed by the Stolen Valor Act inflict substantial harm. In many instances, the harm is tangible in nature: Individuals often falsely represent themselves as award recipients in order to obtain financial or other material rewards, such as lucrative contracts and government benefits. An investigation of false claims in a single region of the United States, for example, revealed that 12 men had defrauded the Department of Veterans Affairs out of more than \$1.4 million in veteran's benefits. In other cases, the harm is less tangible, but nonetheless significant. The lies proscribed by the Stolen Valor Act tend to debase the distinctive honor of military awards. And legitimate award recipients and their families have expressed the harm they endure when an imposter takes credit for heroic actions that he never performed. One Medal of Honor recipient described the feeling as a "slap in the face of veterans who have paid the price and earned their medals."

...

Because a sufficiently comprehensive database is not practicable, lies about military awards cannot be remedied by what the plurality calls "counterspeech." Without the requisite database, many efforts to refute false claims may be thwarted, and some legitimate award recipients may be erroneously attacked. In addition, a steady stream of stories in the media about the exposure of imposters would tend to increase skepticism among members of the public about the entire awards system. This would only exacerbate the harm that the Stolen Valor Act is meant to prevent.

...

Allowing the state to proscribe false statements in these areas also opens the door for the state to use its power for political ends. Statements about history illustrate this point. If some false statements about historical events may be banned, how certain must it be that a statement is false before the ban may be upheld? And who should make that calculation?

While our cases prohibiting viewpoint discrimination would fetter the state's power to some degree, the potential for abuse of power in these areas is simply too great.

In stark contrast to hypothetical laws prohibiting false statements about history, science, and similar matters, the Stolen Valor Act presents no risk at all that valuable speech will be suppressed. The speech punished by the Act is not only verifiably false and entirely lacking in intrinsic value, but it also fails to serve any instrumental purpose that the First Amendment might protect. Tellingly, when asked at oral argument what truthful speech the Stolen Valor Act might chill, even respondent's counsel conceded that the answer is none.

* * *

The Stolen Valor Act is a narrow law enacted to address an important problem, and it presents no threat to freedom of expression. I would sustain the constitutionality of the Act, and I therefore respectfully dissent.

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