CHAPTER V

THE JUDICIAL SYSTEM

To speak of "the judicial system" of the United States is misleading, because there are in reality 51 different judicial systems in the country: the federal court system and the court system in each state. As to questions of state law, each of the state systems is a separate closed system. In other words, each state system has its own court of last resort that has the last word on what state law is. Only on issues of federal law, arising originally either in federal or state court, can it be said that there is the semblance of a single national judicial system with one court, the United States Supreme Court, serving as the court of last resort.[1]

PART I: An Overview of Court Systems and Judges

A. Trial Courts and Appellate Courts: Their Basic Characteristics and Interrelationship

All the court systems in the United States, state and federal, have two basic types of courts: trial courts and appellate courts. The two have different functions and characteristics.

1. Trial Courts

Functions and Characteristics Judges who staff trial courts "sit" alone without any other judges. They conduct trials either with or without a jury, depending on the type of case and the wishes of the parties. The overall job of trial courts is to reach a decision in the first instance on all disputes filed in a given judicial system. This involves hearing the evidence and arguments presented by the parties, determining the facts in the case and applying the law to those facts. In the process, the trier of fact, whether judge or jury, must resolve conflicts in the testimony and make judgments about the credibility of witnesses and the believability and weight to be given all the evidence. This is an important function because, as discussed below, the facts of a case cannot be relitigated on appeal.[2]

Trials constitute only part of the activity of a trial judge. Pretrial motions must be heard and decided. A great deal of a trial court's time is spent on this activity, which the judge performs alone without the assistance of a jury. In most courts one or two days a week are set aside as "motion days." In addition, trial judges preside over pre-trial conferences in civil cases slated for trial. In those conferences the judge will attempt to persuade the parties to settle the case or, if they cannot settle it, to narrow the factual and legal issues for trial.[3] In criminal cases, a great deal of time is spent on arraignments of criminal defendants (a hearing at which formal charges are presented and bail set) and preliminary hearings (where the prosecution must present enough evidence to warrant binding the defendant over for trial).[4] Judges of trial courts also need time to do legal research and to write the required judicial opinions deciding

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1 *See* Chapter I, p. 22, and the diagram of the federal and state court systems in set out in the Appendix, p. A32. For a short introduction to U.S. courts written especially for a foreign audience, *see* DANIEL J. MEADOR, AMERICAN COURTS, 2D ED. (West 2003) and DANIEL J. MEADOR & JORDANA S. BERNSTEIN, APPELLATE COURT IN THE UNITED STATES, 2D ED. (West 2006). *See also* HENRY J. ABRAHAM, THE JUDICIAL PROCESS, 7TH ED. (Oxford U. Press, N.Y. 1998).

2 *See generally* Chapter III, pp. 91-109 for jury trial procedure.

3 *See* Chapter VII, pp. 226-239.

4 *See* Chapter VIII, pp. 270-273.

motions or trials they have already heard. There are also administrative tasks, such as conferences with colleagues on mutual problems, personnel matters, the operation of the clerk of the court's office, and the like.

Trial Judges and Courtrooms Trial judges wear robes, but not wigs as are the case in England. The "bench," *i.e.*, the dais where the judge sits when presiding at a hearing, is raised. The judge's secretary or clerk and the court reporter sit in front or to the side of the judge's bench. A jury box, an area with 12 or 14 seats that is enclosed by a one-meter high partial wall, is located to one side. Further out in front of both the judge's bench and the jury box are the counsel tables and chairs, where the lawyers sit while handling a matter before the judge. Nearby is a lectern which the lawyers may use when arguing or conducting witness examinations. Behind counsel tables is a "bar" about a meter high between the area where the lawyers, judge and jury sit, and the rest of the courtroom where the general public sits. There are also places in the courtroom for the court reporter and the judge's clerk and judge's law clerk, if there is one.[5]

As a show of respect to the judge, all persons present in the courtroom are required to stand when the judge enters and is seated "on the bench." The judge has contempt power to punish summarily any disruption in the courtroom or other display of disrespect to the court. When court is in session, lawyers generally must address the judge from the lectern or counsel table unless they are invited or obtain permission to "approach the bench." This is done usually at trial when matters must be discussed which the jury is prohibited from hearing.

Each judge has a court reporter who takes down verbatim (either in shorthand or by means of a machine) everything that takes place in court at a trial or hearing. In the event of an appeal, this record must be typed up in a transcript that must be filed with the appellate court to apprize it of exactly what happened in the trial court.

Virtually all trial court hearings are open to the public and are in general required to be by state law and as a constitutional matter.[6] However, many trial judges conduct pre-trial conferences "in chambers," meaning the judge's office, usually located behind the courtroom. Also, some matters that are required or permitted to be inquired into confidentially may be heard "*in camera*," *i.e.*, in chambers.

Since trial courts handle all cases filed in a given judicial system, the atmosphere in a trial court in a large city on motion day or the day set for preliminary hearings in criminal cases can be chaotic, with parties, lawyers, policemen and complaining witnesses moving in and out of the courtroom or up to the lectern or bench for conferences with the judge as their cases are called. In the halls, lawyers confer with their clients, worried litigants pace and family members of the litigants gather in groups. In addition, an air of tension is present in view of the fact that disputes are the business of the day and that delay is inevitable as the court tries to handle everything that has been scheduled.

Trial courts, being at the bottom of the judicial system pyramid, are the most numerous courts in a state or in the federal system. The number of judges staffing trial

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5 A diagram of a trial courtroom is set out in the Appendix to this book on p. A33. The bar between the area where the judge and lawyers the area where the public sits gives us the expression that a lawyer, when admitted to practice, is "called to the bar" (English version) or "admitted to the bar" (American version). Lawyers and judges are so identified with their physical place in the courtroom that it is common to refer to judges collectively as "the bench" and to lawyers collectively as "the bar."

6 *See* Chapter IX, p. 377.

courts of general jurisdiction varies from a high of 1,498 in California to a low of 16 in Maine.[7]

2. Appellate Courts

Intermediate Appellate Courts and Supreme Courts Above the trial courts of a judicial system, there are usually two layers of appellate courts: an intermediate court of appeals and a supreme court. The intermediate appellate court is usually called the "Court of Appeals" and the court of final resort is called the "Supreme Court."[8] Judges of supreme courts are usually called "justices," while judges of intermediate courts of appeal and trial courts are called "judges." Appellate courts have no jury or other non-lawyer members. When meeting to hear and decide cases, intermediate appellate courts have three judges while supreme courts usually number five, seven, or nine justices.

This two-tiered structure prevails in the federal system and all but twelve of the states. For most types of cases, there is an appeal as of right from the trial court to the court of appeals, while further appeal to the supreme court is discretionary with that court. However, some categories of cases may qualify for review as of right in a state supreme court, such as cases where the death penalty has been imposed. Where two levels of appellate courts exist, the intermediate court of appeals has the task of assuring that trial court errors are corrected. The supreme court in such a system has the broader task of overseeing the development of the law. Thus, it will generally decide only cases in which the law needs to be clarified or some question of overriding public significance is presented. A system of granting discretionary review is established to select such cases. To have a case heard in the supreme court of a system, a party must be "granted leave to appeal" or must obtain a writ of "certiorari," the procedure established at common law for a higher court to review the decision of a lower court.[9] Thus, in the ordinary case in most jurisdictions, litigants must be satisfied with only one appeal. However, the courts of final resort of some states with two-level appellate systems, among them New York, retain relatively large categories of obligatory appellate jurisdiction.

Resolving Conflicts Within the Court of Appeals The "panel" of three judges of intermediate courts of appeal that decides appeals constitutes less than all the judges of that court. This can result in disagreement among different panels of the appellate court. There are many mechanisms for resolving such disagreements. One method, used by the federal courts of appeal and many states, is to convene a court of all of the judges of that court for an *en banc* hearing to resolve the conflict.[10] States handle panel conflicts variously. In some, the first panel to decide an issue binds the entire court until and unless it is reversed by the state supreme court. Another method is to make the first panel's decision binding, but to allow the second panel considering the same

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7 These figures do not include trial courts of limited jurisdiction. This and other information regarding state courts in this chapter are taken from THE BOOK OF THE STATES (Council of State Governments, Lexington, Kentucky 2005).

8 In some states, among them New York, the court of final resort is called the Court of Appeals and in Massachusetts it is called the Supreme Judicial Court. In Texas and Oklahoma, there are separate supreme courts for criminal and civil appeals.

9 Certiorari practice in the United States Supreme Court is similar and is discussed *infra* p. 182.

10 If the U.S. Court of Appeals of the Ninth Circuit were to meet *en banc*, there would be 28 judges — a rather large court. Legislation enacted in 1978 permits circuits with more than 15 active judges (currently only 3) to conduct limited *en banc* hearings with fewer than all judges. However, only the 9th Circuit has opted to do so, since 1980 using 11 judges and since January 2006 — and after some criticism of the practice — 15 judges. *See* Ct. App. 9th Cir. Rule 35-3 (2006). The practice remains controversial.

issue to indicate that it is following the first panel's decision only because it is required to do so. All the Court of Appeals judges are then polled on whether the issue of potential conflict warrants the convening of a special panel to resolve the potential conflict. Then a special panel of 7 judges drawn by lot from of all but the judges involved in the two potentially conflicting decisions rehears and decides the issue.[11]

No such conflict problems attend supreme courts. All judges participate in each case heard unless ill or disqualified. Thus, supreme courts normally sit *en banc*.[12]

3. The Scope of Appellate Review

The scope of appellate review of trial court judgments depends on two factors: whether the issue reviewed is one of fact or one of law and, if one of fact, whether the fact finder was a judge or a jury.[13] An appellate court can review issues of law *de novo* and will reverse for any non-harmless error, but it is much more limited in its review of the factual basis for a trial court judgment.

Fact Review in General One reason for limited review of facts is one of the tenets of the adversary system discussed in Chapter III: a belief in the superiority of immediate oral evidence over mediate written evidence.[14] Though a verbatim transcript of the entire trial is available to the appellate court, this "cold paper record" of the trial is no substitute for the vantage point of the fact finder on the trial level, who actually saw and heard the witnesses and is therefor in a far superior position to find the facts accurately. Indeed, much of the presumed benefit of the trial-level adversary presentation of the facts would be lost if an appellate court could simply substitute its view of the evidence for that of the trial court.

Standards for Bench Trials and Jury Trials When a trial judge sits as the fact-finder in a bench trial, the judge's findings of fact will be reversed only if they are "clearly erroneous."[15] Review of jury verdicts is even more limited. If the judgment reviewed is based on a jury verdict, a second reason for great deference to trial level findings emerges. The right to trial by jury would not mean very much if either trial or appellate judges could simply reverse jury findings whenever they disagreed with them. The standard for appellate review of jury verdicts is identical to the standard employed by a trial judge in reviewing a jury verdict: the verdict of the jury can be reversed only if there is a complete absence of any substantial credible evidence to support it. Simple disagreement with the verdict is not sufficient. In determining the sufficiency of the evidence, the appellate court must be careful not to substitute its view for that of the jury. This would be a violation of the fundamental right to a trial by jury.[16]

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11 Michigan Court Rule 7.215(J). Further appeal to the state supreme court is also possible.

12 If one judge cannot hear a particular case for some reason, this can result in an even number on the court and a tie vote. In such a case, the judgment below is affirmed.

13 *See generally* JACK H. FRIEDENTHAL, MARY KAY KANE AND ARTHUR MILLER, HORNBOOK ON CIVIL PROCEDURE, 4TH ED. §13.4 (West 2005).

14 *See* pp. 83-84.

15 *See* Federal Rule of Civil Procedure 52(a). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). *See also Anderson v. Bessemer City*, 470 U.S. 564 (1985) (finding of intentional discrimination); *Hunt v. Cromartie*, 532 U.S. 234 (2001) (finding that race, rather than politics, drove the state legislature's legislative redistricting decision). Some states use a standard of "against the manifest weight of the evidence." *Eychaner v. Gross*, 779 N.E.2d 1115 (Ill. 2002).

16 An attempt at explaining the precise difference between the standard of review for judge and jury factual findings is set out in *Hersch v. United States*, 719 F.2d 873 (6th Cir. 1983). The standard for trial judge review of jury verdicts is set out in Chapter III, p. 107 and note 98.

It follows from what has been said that an appellate court generally may not receive new evidence on the factual issues in the case.[17] Even if the appellate court determines that more evidence is necessary on a point, it will direct the trial court to take such evidence and make a decision in the first instance.

Review of Decisions Committed to Trial Court Discretion There are numerous decisions that trial courts make that are committed to their discretion. Most often, there are guidelines for the court to follow, but reasonable judges could differ as to their application to a given set of facts. In such cases, a trial court's decision will be reversed on appeal only if the appellate court finds an "abuse of discretion." This question is essentially one of whether the trial judge's decision was among the rational choices a reasonable judge could make under the circumstances. It is not what the appellate court would have done had it been the trial judge. An example of such decisions is whether to issue a preliminary injunction, an order preserving the *status quo* until the merits of a case can be heard.[18]

Civil vs. Criminal Cases The same narrow scope of appellate review of fact issues applies to criminal appeals except to the extent that the standard of proof affects the question. Thus, a civil judgment of a jury will be reversed only if the evidence was legally insufficient for the jury to find as it did *by a preponderance* of the evidence. In a criminal case, a jury verdict finding the defendant guilty will be reversed on factual grounds only if the record discloses that there was legally insufficient evidence *beyond a reasonable doubt* to support it.[19]

4. Appellate Court Procedure

The issues of law raised on appeal are argued principally through the exchange of written briefs between the parties.[20] Some limited oral argument before the court is permitted. The maximum time for oral argument permitted each side is usually 15 or 30 minutes. Because most of the arguments of a party will be presented well in the written briefs, oral argument generally serves as a time for the attorney to touch on recent developments in the law affecting the case, to highlight the main arguments in their favor and, most important, to respond to questions from the bench.[21]

The fact that only issues of law are involved and that they are addressed primarily in written briefs gives the appellate court a much more quiet and erudite atmosphere than prevails in most trial courts. Only the lawyers and their assistants generally attend court sessions. Clients rarely do, in part because the appellate court is often many miles from where they live and in part because they would not understand much of the argument, which would be confined to the legal issues.

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17 For a discussion of the history leading to this almost invariable rule, *see* Robert W. Millar, *New Allegations and Proof on Appeal in Anglo-American Civil Procedure*, 47 NW. L. REV. 427 (1952).

18 *See, e.g., William Inglis & Sons Baking Co. v. ITT Continental BakingCo.*, 526 F.2d 86 (9th Cir. 1976) ("the question is not whether or not [the appeals court] would make or would not have made the order. It was to the discretion of the trial court, not to that of the appellate court, that the law entrusted the granting or refusing of these injunctions"). Of course, if the wrong legal test is applied, that is a separate ground for reversal.

19 There can be no appellate review of a verdict of acquittal. *See* Chapter VIII, p. 311.

20 *See* Chapter II, pp. 78-78 (nature of the argumentation style and composition of briefs).

21 Two classic works on the proper purpose and appropriate techniques of oral argument are John W. Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895 (1940), and Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A.J. 801 (1951). Davis was a well-known, and well-connected lawyer who argued many cases in the United States Supreme Court, among them the defense (and losing) side in *Brown v. Board of Education*, 347 U.S. 483 (1954), the school desegregation case. Jackson was a Justice of the Supreme Court.

Appellate Court Action An appellate court decides a case by issuing an order or judgment indicating who wins and, usually, an opinion of the court setting out the reasons for the decision. As described in Chapter II, there may also be concurring opinions from judges who agree with the result, but differ in the reasoning behind it, and dissenting opinions from judges who disagree with the result and the reasoning of the majority.[22] There are various actions that an appellate court can take. It can affirm the judgment of the trial court, meaning that it approves of it. It can reverse that judgment and direct entry of judgment for the opposing side. Or if the implications of the appellate court's opinion depend on development of further facts or the appellate court wishes the trial court to take further action consistent with the opinion, the appellate court will "vacate" the trial court's judgment and "remand" the case to the trial court for "further proceedings consistent with" its opinion.

5. Trial Court Actions that are Reviewable

The Final Judgment Rule A final trial court judgment deciding the case on the merits or dismissing it is usually the only kind of judgment or order that can be appealed. The policy behind this final judgment rule is the notion that one appeal at the end of the case is more efficient. One "big" appeal takes less time than multiple appeals and many errors that take place could well be rendered moot if the party complaining of those errors ultimately wins the case or if the case is settled.

Interlocutory Appeals Appeals of non-final orders, called "interlocutory appeals," are often allowed, but they are discretionary. Usually both the trial court and the appellate court must agree that the issue raised by the interlocutory order is a close one and that it would be efficient to address the issue without waiting for a final judgment.[23] For example, if the trial judge denies a motion to dismiss a case for lack of jurisdiction finding that it has jurisdiction, permission to take an interlocutory appeal will often be granted if the issue is a close one, since an appellate finding of lack of jurisdiction at that point could avoid an unnecessary trial. There are a few other exceptions to the final judgment requirement, primarily based on overriding need to have the issue addressed at an early stage of the litigation.[24]

Mandamus A limited path around the final judgment rule is pursuit of an action for a "writ of mandamus" (an order requiring certain trial court action) or "writ of prohibition" (an order prohibiting certain trial court action).[25] In some state courts these ancient writs are consolidated under the modern label, "writ of superintending control." These forms of action avoid the final judgment rule because they are considered to be an *original* action filed against the trial judge (often by name) rather than an appeal. The limited nature of mandamus review must be emphasized, however. It is considered to be an "extraordinary writ" and is available generally only to redress clearly illegal action by the trial judge of a particularly serious sort, most often concerning an improper exercise or abdication of jurisdiction. In the federal system, at least, the

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22 *See* p. 64.

23 For example, 28 U.S.C.A. §1292, applicable in federal court, allows an interlocutory appeal from a non-final order if the trial judge certifies that it presents "a controlling question of law as to which there is substantial ground for difference of opinion and that immediate appeal . . . may materially advance the ultimate termination of the litigation," and the appeals court agrees as well.

24 For example, in the federal system an immediate appeal as of right is provided from interlocutory orders granting or denying injunctive relief. 28 U.S.C.A. §1292(a)(1). In addition, some non-final orders that have a "practical finality" about them may be appealed under the "collateral order: doctrine. *See Cohen v. Beneficial Industrial Loan Co.*, 337 U.S.541 (1949) (order declining to require a bond in stockholder derivative action in which plaintiffs own few shares of stock).

25 *See* 28 U.S.C.A. §1651 (federal statute authorizing writs).

occasions for mandamus are narrow and it is said that "mandamus will not lie" for any error that could be remedied adequately by appeal.[26] However, many state systems regularly allow such writs as a supplement to interlocutory appeal.[27]

B. State and Federal Court Structure and Characteristics

1. State Court Structure

Trial Courts of General Jurisdiction The basic component of the state court systems of all states is the trial court of general jurisdiction. This court has jurisdiction over major civil disputes and all serious criminal offenses, called "felonies."[28] These courts are called by various names. The most common names for this court are the "Superior Court" or the "Circuit Court," though in some states they are called the "District Court." Strangely enough, in New York these trial courts are called the "Supreme Court" (while the highest court in New York is called the "Court of Appeals"). In general the territorial subdivisions over which these state trial courts preside correspond with the county lines of a state.

In most states, there is a layer of trial courts below the circuit or superior court level which exercise limited general jurisdiction. Typically they have jurisdiction over all types of civil cases up to a certain amount of money in controversy and over all criminal prosecutions of less serious criminal matters, called "misdemeanors."[29] For example, in California the Superior Court handles all felonies and civil cases with more than $25,000 in controversy, while the Municipal and Justice Courts handle criminal misdemeanors and civil disputes of $25,000 or less. Sometimes these lower level courts are the descendants of "Justice of the Peace" or other small claims courts. Those less formal courts were gradually "upgraded" and given greater jurisdiction to relieve the increased workload of the superior or circuit court. Appeals from judgments of these lower courts often go to the circuit or superior court rather than to the regular appeals court. In such cases, the circuit or superior court acts as a single-judge appellate court rather than a trial court.

Trial Courts with Specialized Jurisdiction States have other trial courts with specialized jurisdiction to decide only disputes of a particular type. Among them are probate or surrogate's courts (for overseeing distribution of decedents' estates, for juvenile matters, or for mental commitments and guardianships over adults unable to handle their affairs), juvenile courts (if juvenile matters are not handled by the probate court), and courts of claims (to handle money claims against the state). In some states, some courts with specialized subject-matter jurisdiction are considered the equal of the superior or circuit courts of general jurisdiction. In other states, specialized courts are considered inferior to the circuit or superior court and the latter are sometimes assigned the task of deciding appeals from the former. This is an instance when a trial court exercises appellate court functions and when an appeal can be decided by a single judge.

Small Claims and Other Informal Courts Most states have established small claims divisions either in the courts of general jurisdiction or in the courts just below them. Disputes are limited to those involving less than a specified amount in controversy, such as $300, $500 or $1,000. Sometimes these courts are called "Justice of the Peace"

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26 *See Kerr v. United States District Court*, 426 U.S. 394 (1976) (disapproving mandamus as means of reviewing discovery order, even though irreparable injury was alleged).

27 For a discussion of all these and other devices, *see* FRIEDENTHAL, *supra* note 13, §§13.1-13.3.

28 A felony is generally defined as an offense punishable by more than one year in prison.

29 Misdemeanors are usually crimes punishable by less than a year in jail. *See* Chapter VIII, p. 266.

courts, because that is the name of the official who presides over the proceedings. Sometimes these "justices" are not lawyers and have no particular legal training.[30] Procedure in small claims courts is very informal and there is generally no appeal from a judgment. Sometimes lawyers are prohibited from representing parties in such courts. However, in most jurisdictions, if parties to cases in small claims court wish to utilize a lawyer or to avail themselves of the greater rights afforded by a regular court, they may do so by simply asking that the case be "removed" from small claims court to the regular trial court. In others, there is no right of removal, but the losing party has a right to a "trial *de novo*" in a higher court. A trial *de novo* is a completely new trial that ignores the earlier result in the small claims court.

Appellate Courts The structure of state appellate courts conforms generally to that described above in the general description of appellate courts.[31] However, it bears repeating that the state appellate court of last resort of a state is the final arbiter of the meaning and application of *state* law. While the United States Supreme Court has power to review state court judgments, it may do so only on issues of *federal* law.

2. The Federal Court System

As discussed in Chapter I, federal courts have jurisdiction over federal law claims and state law claims that involve parties from different states. Such claims can arise anywhere, so the federal court system court system covers the entire country. However, the federal court system is much smaller than the aggregate of all the state systems. In 2005, there were 278,500 cases filed in federal courts nationwide.[32] This compares to over 100 million cases that were filed in state courts.[33] There were 29,400 state judges, as compared to a little over 800 — about the same number of judges as in the California state judicial system. But the numbers of cases handled by California courts totaled almost a million while the federal courts handled about a quarter that many.

District Courts The basic trial court in the federal system is the United States District Court, located in 94 districts.[34] Districts vary in size. In the more populous states, there will be three or even four districts. In the less populous states, the entire state is one district. New York has southern, northern, eastern and western districts, while the state of Montana is all one district. All district courts have at least two judges (North Dakota and Vermont have only two) and one district (the southern district of New York) has 28. Where necessary to provide better access for litigants and witnesses, judges of the district court "sit" (*i.e.*, hold court sessions) in various places in the state. Also handling cases in these districts are "magistrate judges," whose work is discussed later.[35]

Although federal law claims are not as numerous as state claims, when issues of federal law arise, they are often very important. Either the federal Constitution is involved or the case involves a problem of sufficient importance that Congress has decided to regulate it by way of a federal statute. The importance of many of the cases

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30 *See infra* p. 175 and note 49.

31 *See supra* pp. 167-171.

32 This and other statistics come from the Federal Judiciary website set out in Appendix B.

33 Examining the Work of State Courts, 2004, Nat'l Center for State Courts website in Appendix B.

34 28 U.S.C.A. §§81-131. These districts are in the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the territories of Guam, the U.S. Virgin Islands, and the Northern Mariana Islands. For more information on the federal court system, *see* CHARLES A. WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS, 6TH ED. §§1-6 (West 2002).

35 *See infra* p. 183 and note 80, where federal magistrate judges are discussed.

that federal judges handle, plus the facts that there are relatively few federal judges and that they are appointed by the President for life, all combine to give federal district judges a certain prestige that does not attach to state trial court judges.

Federal Courts with Specialized Jurisdiction There are several federal courts with specialized jurisdiction. They are the United States Claims Court, which handles exclusively claims against the federal government; the Tax Court, which handles suits involving federal taxes; the Court of International Trade, which handles civil matters related to tariff and trade agreements; and the system of bankruptcy courts housed with the federal district courts. In addition, there are the District of Columbia Superior Court and the District of Columbia Court of Appeals, which act like "state" courts for Washington, D.C. where local law is federal law. There is also a Foreign Intelligence Surveillance Court, which determines applications by the Attorney General for permission to implement domestic wiretaps in the interest of national security and which uses judges from the regular federal courts. Two specialized courts deal with military and veterans matters: the Court of Military Appeals reviews court-martial convictions for military offenses and the Court of Veterans Appeals reviews decisions of the Department of Veterans Affairs on claims for veterans benefits.

The judges of all these specialized courts, except the Court of International Trade and Foreign Intelligence Surveillance Court, are called "Article I judges" and their courts "Article I courts." Unlike "Article III" district judges, they are not appointed for life, but for specific terms. The differences between the two types of judges and the effect these differences have on their powers are considered in the chapter on administrative law, since similar issues arise with administrative agency adjudicators.[36]

The volume of cases these specialized courts handle is insignificant in comparison to district courts. Congress has generally resisted pressures to create more federal courts with specialized jurisdiction, preferring that most federal judicial business be handled by "generalist" Article III judges who handle all kinds of cases.

Federal Courts of Appeals Above the federal district level are the 13 federal courts of appeal. There is a right to appeal all final judgments of district courts to the circuit courts of appeals of the appropriate circuit. In addition, the circuit courts have jurisdiction to hear appeals from decisions of certain administrative agencies, such as the National Labor Relations Board and the Department of Health and Human Services.[37]

Eleven of these 13 circuits cover several states. For example, the Sixth Circuit covers Ohio, Kentucky, Tennessee and Michigan. The District of Columbia Circuit covers that federal territory. The Federal Circuit is not organized on a geographical basis at all. It has been assigned the task of handling appeals that involve patents and certain damages suits against the United States government from any of the 94 district courts, as well as appeals from the Claims Court and the Court of International Trade. The smallest number of court of appeals judges is in the First Circuit, which has 6, and the largest is in the Ninth Circuit, which has 28.

The federal circuit courts of appeal have the right to disagree with one another and decisions from one circuit only have persuasive precedential effect in another circuit.

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36 Chapter VI, pp. 217-219. *See also infra* p. 183 and note 80, where federal magistrate judges, also Article I judges, are discussed.

37 The federal courts of appeals are sometimes called "circuit" courts of appeal because the judges at one point had to "ride circuit," *i.e.*, to travel through the states under their jurisdiction along a regular route, usually on horseback, and hold court in various places along that route.

The result is that there can be and often is a different rule on a point of federal law in New York (a state in the Second Circuit) and in California (a state in the Ninth Circuit). Just such a "split in the circuits" forms one basis for the Supreme Court to exercise its power to review decisions of the circuit courts of appeal, as discussed below.

3. The United States Supreme Court

Nature and Dual Function The Supreme Court of the United States is part of the federal court system, but has a hybrid function. As one might expect, it exercises appellate jurisdiction over cases appealed from the United States Courts of Appeals, but it also exercises appellate jurisdiction over state courts as to *federal issues*.[38]

The Supreme Court is the only court that is specifically created by the Constitution. However, its composition and jurisdiction are determined by Congress. Currently and since 1868, the Court has consisted of a total of 9 judges: 8 associate justices and one "Chief Justice of the United States." It has had as few as 5 and as many as 10 justices. The Court is located in Washington, D.C. and hears every case *en banc*, meaning that all 9 justices sit together and make final decisions in all cases.

Certiorari and Appeals There are two routes to review in the U.S. Supreme Court: an appeal as a matter of right and the discretionary grant of a writ of certiorari. Very few cases fall into the category of appeals as of right, so as a practical matter certiorari is the only way to gain Supreme Court review.[39] Certiorari means to "bring up the record," an essential first step for review of a case by an appellate court. By exercising its appellate certiorari jurisdiction over cases involving issues of federal law coming from the lower federal courts and the highest courts of the states, the Court maintains the supremacy and consistency of federal law.

Certiorari Procedure In a private conference held each week certiorari grants are decided according to the "Rule of Four," meaning that it takes a vote of four Justices to grant certiorari. As is the case with the state supreme courts exercising discretionary jurisdiction, the Supreme Court does not view its role as one of correcting error, but as one of serving the broader interests of the law and the legal system. Thus, its rules provide that certiorari will be granted only when a federal appeals court or a state supreme court has decided a federal law question in conflict with another federal appeals court or state supreme court, or where "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."[40] Of the 7,496 petitions for certiorari the Court received in 2004, only 87 cases were argued and 85 of them were decided in 74 signed opinions — about 1%.[41]

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38 *See* 28 U.S.C.A. §§1254, 1257 and *supra* note 1. For a readable and more detailed description of the Supreme Court and how it operates, *see* ABRAHAM, *supra* note 1, 170-244. For even greater detail on how the Court selects and decides case, *see* SUSAN LOW BLOCH & THOMAS G. KRATTENMAKER, SUPREME COURT POLITICS (West 1994). *See also* DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS, 7TH ED. (W.W. Norton, New York 2005).

39 28 U.S.C.A. §§1251-1259. Appeals as of right directly to the Supreme Court are allowed only from special three-judge district court decisions. *See* 28 U.S.C.A. §1253 and §2284. The court is made up of two district judges and one circuit court of appeals judge and is authorized only when reapportionment of legislative districts is ordered and occasionally when Congress desires speedy resolution of a constitutional issue. *See, e.g., United States v. Eichman*, 496 U.S. 310 (1990) (constitutionality federal statute making illegal burning of the U.S. flag), discussed in Chapter IX, p. 370.

40 Supreme Court Rule 10.

41 2005 Year-End Report on the Federal Judiciary, www.supremecourtus.gov/publicinfo/ year-end/2005year-endreport.pdf. This represents a sharp downward trend, both in percentage and absolute terms. As recently as the 1996 term, the Court decided 158 cases out of 6,695. And 30 years ago, when the

Original Jurisdiction The Constitution provides that the Supreme Court has original jurisdiction "[i]n all Cases affecting Ambassadors, and other [foreign] public ministers and consuls, and in cases in which a State shall be a party."[42] These cases form a negligible part of its business, usually less than one-tenth of the number in which certiorari is granted. By far the greatest number of original jurisdiction cases are disputes between states, although there is an occasional suit by a state against the federal government.[43] Most suits by states against another state are territorial disputes, usually arising as a result of a river changing its course.[44] A notable non-territorial dispute was the seemingly interminable litigation between Texas, California and Utah over which state had the right to tax the estate of multi-billionaire Howard Hughes.[45]

As the court of first instance in these cases, the Supreme Court acts as a trial court. Since a trial before the Supreme Court would be unwieldy, the Court appoints a "special master," usually a retired federal judge, to hear proofs and make a recommended decision in such disputes.[46]

C. Judges and Methods of Judicial Selection

1. Characteristics of Judges

Experience as Members of the Bar Federal and state judges are members of the bar. Thus, they have gone through the same legal education and procedures for acceptance into the bar described in Chapter IV.[47] At one point in United States history, judges were neither members of the bar nor even trained in law. From colonial times until well into the nineteenth century, "lay judges" were not uncommon in the United States.[48] Things are different today, although there are still a few non-lawyer judges in some rural areas in some states.[49]

Judges in the United States almost always come to the bench following several years of law practice, whether as private lawyers, prosecutors, or public defenders. Because of this, new judges in the United States tend to be older than their counterparts

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Court had only 5,000 petitions, it decided between 150 and 180 cases a year. For description and analysis of the Court's certiorari practices, *see* BLOCH & KRATTENMAKER, *supra* note 38, at 325-380.

42 Art. III §2.

43 *South Carolina v. Baker*, 485 U.S. 505 (1988) (suit against the Secretary of the Treasury challenging the constitutionality of a federal law that prohibited states from issuing unregistered bearer bonds).

44 *See, e.g., Arkansas v. Tennessee*, 310 U.S. 563 (1940) (holding Arkansas had through acquiescence given up its legal claim to land cut away from Arkansas and attached to Tennessee island by Mississippi River due to avulsion in the early 1800s given Tennessee's unchallenged exercise of governmental authority over land for years).

45 *See California v. Texas*, 437 U.S. 601 (1978) and *California v. Texas*, 457 U.S. 164 (1982). The litigation finally ended in 1991. A recent case of note was litigation between New Jersey and New York over their claims to filled portions of Ellis Island, the famous entry point for many waves of immigrants to the United States. *New Jersey v. New York*, 523 U.S. 767 (1998).

46 *See Kansas v. Colorado*, 533 U.S. 1 (2001), where objections to the special master's report are considered in a case involving upstream overuse of water from an interstate river.

47 *See* pp. 127-140. A few state judges of courts of limited jurisdiction may be non-lawyers.

48 Of the eleven judges of the Massachusetts Superior Court from 1760 to 1774, nine had never practiced law and six had never studied it. New York included the governor and legislators on its highest court until well into the nineteenth century. *See* LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW, 2D ED. 125 (Touchstone Books, New York 1985). Use of lay judges was consistent with English practice of having trial courts run by layperson squires and having a legislative body, the House of Lords, as the court of last resort in the system.

49 The Supreme Court has held that it does not violate the due process clause of the Constitution for a defendant to be tried before a non-lawyer judge in a petty criminal case, at least where there is a right to *de novo* re-trial in a higher court with a lawyer-judge. *North v. Russell*, 427 U.S. 328 (1976). In reaction to erratic and legally questionable behavior of some lay judges, several states have enacted laws requiring that all judges in the state be lawyers. *See generally* ABRAHAM, *supra* note 1, at 21, 138-140.

in civil law countries, most of whom start out on the judicial ladder shortly after finishing their legal education.[50] Part of the Anglo-American tradition of preferring older judges has to do with the need for the judge to have gained adequate knowledge of the law and the complexities of court procedure, particularly how to handle the relatively complicated adversary trial process, a task for which law school does not prepare them particularly well. But it is more than that. Experience, not just as a lawyer, but in life, is deemed essential for the exercise of mature judgment, which many view as the hallmark of a good judge in the United States. This is particularly so in a common law system where judges have lawmaking powers.

Career Paths of Judges Career paths of judges in the United States differ from the career paths of judges in civil law countries and of judges in England.[51] Judges in the United States usually do not start at the bottom of the judicial ladder and work their way up to positions on higher courts and more responsibility. A judge in the United States who starts out at the trial level is likely to remain there unless he or she makes some effort to gain the attention of the electorate or political appointing authorities. There is no official "performance review" system. Similarly, a judge can start a judicial career at any level in the judiciary, depending on his or her ability to influence the voters or the inclinations of the appointing authorities. Thus, a lawyer who has no prior judicial experience can become a justice on a court of last resort in a state or even the United States Supreme Court. Felix Frankfurter came to the Court after a 25-year law-teaching career. The late Chief Justice William Rehnquist was Chief of the Office of Legal Counsel at the Department of Justice. In fact, fewer than half of the justices who have served on the United States Supreme Court had prior judicial experience of any kind. Interestingly, there is no legal requirement that federal judges even be lawyers.[52]

Judges as Political Beings As will be discussed shortly, under most judicial selection systems in the United States, judges either run for election by the general population or are appointed by elected officials. Consequently, whether the post is that of federal or state judge, becoming a judge depends in large part on the candidate's ability to attract political support. Consequently, it is not surprising that many judges in the United States are "political people" — people who have been involved in politics on a regular basis in some capacity, whether as office holders, political organizers, fund-raisers, campaign managers or party chairs. It is sometimes the case, especially for judicial candidates for appellate courts, that any law practice experience they had ended many years ago and was superseded by a much longer political career. Whatever their past political background, however, once on the bench, judges are not supposed to engage in partisan political activity.

But while a judge may have to cease political activity of the partisan sort after going on the bench, the political orientation of candidates continues to make itself felt after appointment through their "judicial philosophy." A central component of that philosophy is a concept of the proper role of courts in society. Judicial philosophy may be a "liberal-activist" one that emphasizes the role of courts in fighting social injustice and

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50 For a further description of courts and judges in the United States with comparisons to other countries, *see* ABRAHAM, *supra* note 1.

51 For a more detailed comparison of the career paths of English and American judges, *see* P. S. ATIYAH AND ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 347-353 (Clarendon Press 1987).

52 A useful summary of the backgrounds of recent United States Supreme Court justices is set out in DANIEL A. FARBER, WILLIAM ESKRIDGE, JR. & PHILIP FRICKEY, CONSTITUTIONAL LAW, 3D ED. 55-58 (West 2003). Justice Frankfurter once remarked that "the correlation between prior judicial experience and fitness for the functions of the Supreme Court is zero." Felix Frankfurter, *The Supreme Court in the Mirror of Justice*, 105 U.PA.L.REV. 781, 795 (1957).

expanding individual rights. Or it may be a "conservative" philosophy of "judicial restraint," which maintains that courts should rarely intervene to upset a legislative judgment or interfere with administrative action. Or it may be a "conservative activist" philosophy — one that has characterized the Supreme Court at several points in its history and in recent years.

A judge's judicial philosophy is not necessarily what could be understood as overtly political, and certainly judges are not supposed to make decisions on political grounds. However, judicial philosophy necessarily includes attitudes about such "non-political" issues as the proper limits of tort recovery for personal injury, the rights of consumers against manufacturers, the rights of criminal defendants or even the rights of shareholders in a corporation against management. More generally, all people — including judges — have a natural tendency to be sympathetic toward one side or the other when they learn of a dispute between the government and the individual, the government and a business, rich and poor, businesses and individuals, or even state and federal governments. When the case is a close one and a decision can be justified either way by the law and the facts, these general inclinations can have a crucial influence.[53]

It should be emphasized that many of these elements of judicial philosophy are often unconscious or, when conscious, are not thought of as being political. They are in any event no different from the kinds of attitudes that often influence judicial decision-making in other legal systems. But the fact that judges in the United States have a well-developed political "past" makes the connection between political viewpoint and judicial decision more transparent. It is not uncommon for lawyers in an important case to read the judicial opinions and research the political background of the judge assigned to their case for some insight into the judge's political attitudes, so that they may better frame their arguments and assess their chances of success.

Judicial philosophy can grow and change, especially when nurtured by the lifetime tenure guarantees of the federal system and some state systems. For example, U. S. Supreme Court justices have produced surprises for Presidents who nominated them. The most notable of these was Earl Warren, a former Republican governor of California who was appointed by Republican President Dwight D. Eisenhower as Chief Justice. Following his appointment, the Warren Court proceeded to issue liberal opinions on civil rights, rights of the accused in criminal cases and in other areas, much to the dismay of conservatives. This led the plain-spoken war hero President Eisenhower to remark that his appointment of Earl Warren was the "worst damn-fool mistake I ever made as President."[54] Both William Brennan, appointed by Eisenhower, and Harry A. Blackmun, appointed by Republican President Richard M. Nixon, were Republicans who turned liberal on the Court. On the other side, Justice Byron White, appointed by Democrat John F. Kennedy, was a disappointment to liberals as he often sided with the conservative faction of the Supreme Court in criminal procedure and other cases involving constitutional rights of the individual.

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53 Of course, when there is a jury present, issues of fact or the application of law to fact are resolved by the jury and the judge has limited power to reverse jury findings. *See* Chapter III, pp. 87, 107.

54 JOHN D. WEAVER, WARREN: THE MAN, THE COURT, THE ERA 342-343 (Little, Brown & Co. 1967). On the democratic side, President Harry Truman considered his appointment to the court, Justice Tom Clark. "Tom Clark was my biggest mistake. It isn't so much that he's a bad man. It's just that he's such a dumb son of a bitch." His attitude is attributed to Clark's vote to invalidate Truman's seizure of the nation's steel mills to avert a strike. When he was attorney general, Clark had advised Truman that he had legal authority to do so. En.wikipedia.org/wiki/Tom_C._Clark. The *Steel Seizure Case* is discussed in Chapter I, p. 14.

Judicial Pay In 2005, United States district judges earned $162,100, court of appeals judges $171,800, Supreme Court associate justices $199,200 and the Chief Justice of the United States $208,100. According to a 2004 survey of the salaries of state judges conducted by the National Center for State Courts, judges of trial courts of general jurisdiction averaged $113,504, but varied widely from $88,164 to $158,100, the average judge of an intermediate state appeals courts earned $122,682, and associate justices of state supreme courts had salaries averaging $126,159. Although the salaries of judges are certainly not modest, they are less than those of many experienced and established private lawyers, from whose ranks judicial candidates are most often chosen. Clearly, for many lawyers, the attraction of being a judge is found in other aspects of the position, primarily power, prestige and a less-pressured work life.[55]

2. Judicial Selection Methods in the Federal System

As discussed earlier, to assure independence of the federal judiciary, the notion of their election (even by Congress) was rejected in favor of lifetime appointment by the President with "advice and consent" of the Senate.[56] Where the path to the bench is by way of executive appointment, the power of appointment, at least on the federal level, is generally exercised along political lines. More than 90% of judgeships bestowed by recent Presidents have been to members of their own political party, except for Gerald Ford, who appointed only 82% from his own party. The precise way that the appointment process works in the federal system varies depending on whether it is for the lower federal courts or the Supreme Court.

Lower Federal Court Appointments Generally, the President consults with the Attorney General and other advisors, to come up with a list of nominees. In addition, because of the need for Senate approval, certain customs and practices have arisen with regard to appointments to the lower federal courts. Senators with the same party affiliation as the President have a great deal of power to "suggest" nominees to the President for district court posts in their state and have virtually an absolute right to "veto" nominees the President may be considering if they are "personally obnoxious" to the Senator. Arrangements vary from state to state and there are even compromise agreements in some states that allow a Senator of the opposite political party of the President to "suggest" judicial candidates. The President has more latitude in naming judges for the courts of appeal, since circuits cover more than one state, but even there seats are in practice thought of as "belonging" to one or another state, thereby assuring a major role for the Senators from that state.[57]

United States Supreme Court Appointments The President's problem with Supreme Court nominees is less one of placating individual Senators than one of surviving the scrutiny of the Senate Judiciary Committee (which conducts hearings on judicial nominees) and the full Senate in its exercise of its right of "advice and consent." For better or for worse, the nomination and confirmation process has been a political one from the beginning. George Washington's nomination of John Rutledge to the Supreme Court in 1795 was rejected by the Senate because of the nominee's opposition to a treaty with Great Britain. Since that time, the Senate has rejected one out of every five nominations, though most of the rejections were before 1900. Earlier in this

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55 The salaries of the highest paid private lawyers are discussed in Chapter IV, p. 146.

56 *See* Article II §2 cl. 2 and Chapter I, p. 9. For more information on judicial selection, *see* ABRAHAM, *supra* note 1, at 22-39.

57 A deputy attorney general under President Kennedy once remarked that, in light of the realities of judicial selection, the Constitution "reads backwards" — that it should say "the Senators shall nominate and with the consent of the President appoint judges . . . ." *See* ABRAHAM, *supra* note 1, at 22, n.5.

century, there was opposition to Justice Louis D. Brandeis, the first Jewish member of the Court, from railroad and business interests concerned with his past public interest advocacy activities. This delayed approval of his nomination for some five months.

In recent years, as the Supreme Court has become polarized into liberal and conservative camps and a long line of Republican Presidents has sought to name more and more conservative justices to the Court, Senate "advice and consent" has once again come the forefront of the public consciousness. The defeat before the Senate in 1987 of President Reagan's nomination of Robert Bork caused some of the greatest controversy in recent years.[58]

The degree to which there have been complaints about "politicization" of the selection process depends on whose nominee is being held up at any given time. Senator Strom Thurmond, who complained the loudest when President Reagan's nomination of Robert Bork was rejected in 1987, had led an ideological campaign in 1967 against appointing Justice Thurgood Marshall, the first black justice on the Court, largely on the basis of Marshall's career as a fighter for "liberal" civil rights causes.

Some Presidents seem to purposely choose nominees who will not cause a political stir. One way to do that is to pick a nominee about whose attitudes very little is known. President George H. W. Bush did this with Justice David Souter. Souter was dubbed the "stealth" candidate by the press, the reference being to the United States warplane that is constructed in such a way as to be undetectable on radar. And the political nastiness of recent times has obviously inclined some Presidents to nominate moderate candidates. President Bill Clinton nominated Ruth Bader Ginsburg, a former law professor who had demonstrated moderate views while serving on the Court of Appeals, and picked Stephen Breyer, who was confirmed by an almost unanimous Senate vote, over more controversial choices he had been considering.[59]

The fact that political considerations enter into judicial selection should not be taken as an indication that those appointed are not qualified. At the very least, an incompetent judge is a political liability for the appointing politician. Especially as to the federal bench, there exists a convention of appointing highly qualified candidates. The American Bar Association (ABA) has been active in rating federal judicial candidates, but has not often found nominees unqualified. Of the 445 judicial candidates nominated since 1999, only 6 were deemed not qualified. As of this writing, the nomination of one is still pending. Of the 5 others to receive unqualified rankings, 3 were later confirmed by the Senate and 2 withdrew from consideration.[60]

3. State Judicial Selection Systems

States have different types of systems for selection of judges. Some are the same for all courts in the state, while others have different selection systems depending on what level of court is involved.[61]

58 The Bork debacle is all the more notable for the fact that the nominee took his defeat to the public by way of a book and regular newspaper articles seeking to "expose" the process that defeated his nomination as an illegitimate political move by the Senate that has no place in the process. *See* ROBERT BORK, THE TEMPTING OF AMERICA (Touchstone Books 1990) and Chapter IX, p. 323, note 20. It also has the distinction of having added a new verb to American English — "to Bork," meaning to attack in an unrestrained manner. There was also acrimonious debate over Clarence Thomas in 1991. While the Thomas hearings had some political overtones, they were largely focused on the judges' non-political activities — alleged sexual harassment of a female employee in his office.

59 *See* O'BRIEN, *supra* note 38, pp. 33-102, for these and other appointment stories.

60 For more detail on the federal judicial selection process, *see* HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT (Oxford U. Press 1992)

61 For a chart summarizing state systems, *see* BOOK OF THE STATES, *supra* note 7, pp. 318-321.

Executive Appointment Systems An executive appointment system, whereby the governor of the state appoints judges, exists in some states. The appointment is sometimes from a pre-screened slate of candidates, sometimes with input from the legislature, and sometimes without any limitation. Judicial terms of office can be for life or for a term of years from as short as 4 or 6 years or as long as 12 to 15 years.

Electoral Systems for Judicial Selection Many state systems provide for the election of judges by a vote of the general populace. Election of judges is based on the notion that judges, no less than any other public official exercising power in a democracy, should ultimately be answerable to the people. Today electoral systems are in decline, but still enjoy widespread use in the states.[62]

There are several different versions of electoral systems for judges. Sometimes judges are elected by a vote of the general populace and sometimes by a vote of the state legislature. In some states where the general electorate chooses judges, judicial candidates run by party affiliation just as executive and legislative candidates do. In others, they run as non-partisan candidates.

Modified "Missouri" Plans An interesting system for judicial selection was developed in the state of Missouri in 1940 and has been adopted in one form or another in almost half the states. The "Missouri Plan" is said to combine the best features of an election system and the best features of an appointment system, with additional measures taken to assure non-partisan selection of candidates based on merit. Under this plan, judicial candidates are screened by a nominating committee composed of lawyers, judges and laypersons. The committee selects three candidates for every judicial vacancy on the basis of their credentials and merits, and submits these nominees to the state's governor who must select one of the three. The appointment is for at least a year and until the next general election, at which time the question is placed on the ballot as to whether the judge should be "retained" in office. If the judge is retained, then the judge serves for a 12-year term on the appellate courts and for a shorter term in the trial courts. Statistics show that the electorate votes to retain virtually all judges. Some form of an appointment and retention system has been adopted in almost half the states.

Evaluating Judicial Selection Systems Election of judges has been criticized on several grounds. An obvious one is its failure to assure adequate judicial independence as judges will worry more about popular reaction to their decisions than the proper application of the law. Another concern is that the general population does not know enough about law or judicial qualifications to choose their judges wisely. Often the sophisticated voter and even the average lawyer will not be familiar with all the judicial candidates on the ballot. The question of how to finance judicial election campaigns complicates matters. Lawyers are a natural source of campaign contributions, but there is the danger of judges treating contributing and non-contributing lawyers differently after they are elected. This is possible not only with respect to the decision of cases, but also as to other discretionary functions that judges perform, such appointments of lawyers to represent indigent defendants. In addition, many think it is unseemly for judges or judicial candidates, who are often identified with political parties even in non-partisan elections, to participate in election campaigns.

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62 Some states have always provided for an electoral system. However, many states began with executive appointment systems and then changed to an electoral system in the mid-19th century, a time of great populism in the country, reflected and magnified by the presidency of Andrew Jackson, a popular general who championed "the common man." *See* FRIEDMAN, *supra* note 48, at 371.

With all its difficulties, however, electoral systems have managed to select qualified judges to many appellate courts. For example, the highest court of New York, the New York Court of Appeals, was elected before 1978 and was known as perhaps the best state court in the nation.[63] And appointment systems have their own problems. While the tradition with federal judges has been generally to avoid the appointment of unqualified candidates, governors of states have sometimes used their appointment powers to reward political supporters without sufficient concern for their judicial qualifications.

Recent developments have raised new questions about electoral systems. First, there has been a substantial increase in television advertising funded by industry and other special interest groups. Many of these ads are of the "attack" sort, more typical of a partisan executive or legislative elections than a dignified judicial selection process.[64] Second, while states with election systems prohibit judges and judicial candidates from engaging in "inappropriate political activity" and from "mak[ing] pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office,"[65] the Supreme Court in 2002 in *Republican Party of Minnesota v. White*[66] cast doubt on the constitutionality of such limits, striking down as a violation of 1st Amendment free speech a ban on judicial candidates announcing their views on disputed legal and political issues.

It should also be noted that many states that supposedly have electoral systems operate under a *de facto* modified appointment and retention system. The executive has the power to make interim appointments if judges die or resign in the middle of their term. The interim appointed judges who complete the unexpired term are listed as "judge" on the ballot in the upcoming election and they can argue that they have proven that they can do the job. These factors will likely give them an almost insurmountable advantage over other candidates. In some states there is a tradition of elected judges resigning before the end of their terms just so that the governor can appoint a replacement who will then have an advantage in the next election.[67]

4. Removal and Discipline of Judges

Impeachment of Federal Judges The only constitutional method of removing federal judges is impeachment by the House and conviction in the Senate for "Treason, Bribery, or other high Crimes and Misdemeanors."[68] The first judge to be impeached and removed was John Pickering in 1803, who was charged with misconduct in a trial and being drunk while on the bench. Justice Samuel Chase was impeached in 1804 for what could be described as political reasons, but he was acquitted in the Senate. Since then, Congress has used impeachment as a means of removing or attempting to remove federal judges from office only 7 times.[69] Hostility to judicial decisions has not

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63 Chief Judge Stanley H. Fuld, considered an exceptional judge, was so popular that he was nominated by all four political parties for reelection in 1966.

64 *See* THE NEW POLITICS OF JUDICIAL ELECTIONS 2004 (Nat'l Center for State Courts 2005).

65 ABA Model Code of Judicial Conduct, Canon 5(A)(3)(d).

66 536 U.S. 765 (2002). *See* J.J. Gass, *After White: Defending and Amending Canons of Judicial Ethics, Brennan Center for Justice at NYU School of Law* 5 (2004), www.brennancenter.org/resources/ji/ji4.pdf.

67 Just how much advantage is enjoyed by incumbent judges is testified to by the fact that many of them, particularly trial judges, consistently face no opposition at election time. For a comparative look at American and English judicial appointment practice, *see* ATIYAH & SUMMERS, *supra* note 51. For a web site with useful links on judicial selection, *see* www.ncsconline.org/WC/FAQs/Print/Prt_JudSelFAQ.htm.

68 Article II §4. For impeachment, a majority vote in the House is needed. For conviction and removal from office, a two-thirds majority is needed in the Senate. Article I §3 cl. 6.

69 However, several more judges have resigned rather than face impeachment.

been the motivating force in most impeachments. Indeed, most removals of federal judges from office in recent years have followed the judge's conviction of a serious crime in the ordinary courts.

Congress has removed three federal judges recently and each case presented its memorable aspects. Harry Claiborne of Nevada, the first federal judge in some 50 years to be impeached, had been convicted of the crime of federal income tax evasion. He was serving a prison sentence in a Louisiana federal prison, but steadfastly refused to resign from office. He continued to draw his salary until Congress voted by a wide margin to remove him. Judge Alcee Hastings of Florida was acquitted of bribery before a jury in 1983, but Congress felt there was sufficient evidence of guilt to proceed with impeachment. Congress impeached him and removed him from office in 1987. Hastings was subsequently elected to Congress and some people joked that he might get to vote on his own impeachment. Most recently, the 1989 impeachment of Judge Walter Nixon is notable because it resulted in a constitutional challenge to the impeachment process used. The Senate did not convict Nixon by way of a trial before the *entire* Senate. Instead, it appointed a committee of twelve Senators to hear the evidence and to report that evidence to the full Senate, which then voted on the impeachment charge. In *Nixon v. United States*,[70] the Court rejected Nixon's challenges to this procedure, holding that the lawsuit presented a non-justiciable political question solely within the power of Congress to determine.[71]

Authorization for lesser sanctions than impeachment was instituted in 1980, setting up a system for fielding complaints against federal judges within the Judicial Council of each circuit, a body that sets administrative policy within the circuit and includes district and circuit judges.[72] Investigations of all non-frivolous complaints can be ordered and certain sanctions short of dismissal imposed, such as a private or public reprimand or censure, certification of disability, a request for voluntary resignation, or prohibition against further case assignments. The system has been upheld against arguments that the system is unconstitutional because impeachment is the only constitutional sanction against a federal judge, and because, it violates 1st Amendment free speech rights.[73]

Removal of State Judges For states with electoral systems or systems providing for electoral retention of judges, removal is theoretically possible at each general election. However, incumbent judges — even more than incumbent legislators — tend to be reelected over and over again with little trouble. A recent exception to matter-of-course retention took place in California. There the Chief Justice Rose Bird and two other justices were ousted by the voters, who did not like their record of voting to overturn death penalty sentences.[74]

Whatever judicial selection system states have, they also provide for midterm removal for criminal behavior, incompetence, "lack of judicial temperament," and other good cause. Review of a judge's behavior is generally undertaken by a state

70 506 U.S. 224 (1993).

71 Three Justices took the position that judicial review of the challenge was not barred by the political question doctrine, but that the practice was constitutionally permissible.

72 Judicial Conduct and Disability Act of 1980, 28 U.S.C.A. §§351-364.

73 *See McBryde v. Comm. to Review Circuit Council Conduct and Disability Orders*, 264 F.3d 52 (DC Cir. 2001) (upholding constitutionality of public reprimand based on finding that judge for years had engaged in a "pattern of abusive behavior"; challenge to sanctions of not assigning any new cases for a year and not assigning cases involving 23 lawyers who had cooperated in Council proceedings moot).

74 *See* ABRAHAM *supra* note 1, at 36.

commission on the complaint of a lawyer, litigant or member of the public. The commission has power to take or recommend to the supreme court of the state appropriate disciplinary action, including removal from the bench. Most often these commissions are referred to as the Judicial Tenure Commission or Board of Judicial Standards. Some such organizations make recommendations for discipline or removal, but others, such as the California Commission on Judicial Performance and the New York State Commission on Judicial Conduct, are themselves empowered to impose sanctions, including removal. Impeachment by the legislature is usually an additional possible alternative.[75]

Civil and Criminal Liability of Judges Judges in the United States have no immunity from criminal investigation, prosecution or conviction, either for actions related to their judicial functions (such as taking a bribe) or otherwise. They can be investigated and prosecuted like any other citizen. Fortunately, relatively few instances of systemic corruption have arisen, the most notable being the FBI's "Operation Greylord" in the 1980s, when several judges in Chicago were convicted for bribery. However, prosecutions for individual corruption and other criminal acts do occur with somewhat more frequency.[76]

Judges are, however, very broadly protected by judicial immunity from civil liability for anything done as part of their judicial functions. This is deemed essential to protect judicial independence, though the facts of some of the cases cause some to doubt whether that aim is served in all cases.[77] Immunity from civil liability does not extend to orders for injunctive relief, mandamus or other such relief.[78]

D. Other Judicial Officials and Assistants

1. Magistrates

The term "magistrate" can have a general meaning, referring to any kind of judge. However, it also has a more specific meaning, referring to a lower level judicial officer who is under the supervision of a judge. Thus, in the federal system, the federal Magistrates Act creates the office of "magistrate judge."[79] In contrast to the political selection process for Article III judges, federal magistrate judges are selected on a merit basis after screening by a committee of lawyers and non-lawyers. The district judges in a district make a choice from a list provided by the committee. Magistrate judges serve 8-year terms. If they do well, they are usually offered the opportunity to serve additional 8-year terms.

Magistrate judges can hold hearings on all non-dispositive motions (decisions that do not decide a case on the merits or dismiss it). Without consent of the parties they have the power to hold hearings on dispositive motions and make recommended decisions, which must then be reviewed by the district judge. With consent, they can try civil cases (including jury trials) to final judgment just as a district judge would. The

75 *See* BOOK OF THE STATES, *supra* note 7, pp. 235-241 for a chart listing removal procedures for all states. For more detail, *see* FISHER, *supra* note 59, at 143-149.

76 *See* cases cited in Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 435-436 (2004). This article discusses all kinds of judicial misconduct and organizes examples into categories.

77 *See, e.g., Stump v. Sparkman*, 435 U.S. 349 (1978) (judge not liable for violation of civil rights when, at behest of teenager's mother, he ordered that teenager be surgically sterilized; law did not give power to enter such order, no case file was opened, no case number assigned, and no holding held); *Mireles v. Waco*, 502 U.S. 9 (1991) (judge not liable for injuries to lawyer when he ordered court officer to forcibly bring lawyer before the court and to use excessive force in doing so).

78 *See* John O. Haley, *Civil, Criminal and Disciplinary Liability of Judges*, 54 AM. J. COMP. L. 281 (2006).

79 28 U.S.C.A. §631 *et seq.* Federal magistrate judges have existed in some form since the first statute setting up the federal court system in 1789, but were called "commissioners" until 1968.

degree to which federal magistrate judges are given responsibility varies from district to district and depends in large part on the attitude of the judges of that district toward delegating judicial duties. Magistrate judges are used much more widely in the federal system today than in the past as the caseload of the federal courts has increased and the need for supervision of pre-trial proceedings has grown.

The limited nature of the duties of federal magistrate judges results from their limited tenure. Article III of the Constitution requires that the "judicial power of the United States" be exercised by federal judges who have lifetime tenure. The theory that permits magistrates to exercise judicial functions at all is the idea that they are "adjuncts" to the "Article III" district judge — helpers who assist the district judge by hearing evidence and making recommendations. Under this arrangement, they may hold hearings and write recommended decisions, but responsibility for the ultimate decision must reside in an Article III judge.[80] Magistrates then are "Article I" judges. The largest category of Article I judges are administrative agency adjudicators. Consequently, the limits on the powers of Article I judges are discussed in more depth in the chapter on administrative law.[81]

Many state trial courts have magistrates and give them similar duties. Sometimes lower level judicial officers in states are called "commissioners" or "referees." Often on the state level, such officers are attorneys in private practice who work part time in their judicial role.

2. Bankruptcy Judges

Bankruptcy law is entirely federal, though state issues arise to the extent that state contract, property and tort law are relevant to the debtor's rights and obligations.[82] Bankruptcy cases are handled by a special corps of federal bankruptcy judges attached to federal district court and appointed for 14-year terms by means of a merit selection process similar to that employed for magistrate judges. Because of their term limitations, bankruptcy judges are Article I judges like federal magistrate judges and are subject to some of the same limitations. Thus, absent consent of the parties, bankruptcy judges are limited to rendering recommended decisions on many issues. However, on matters directly concerning bankruptcy discharge and administration of the bankruptcy case, they may render final decisions like any other trial court. Such decisions are subject to a right of appeal to the district court, which then sits as an appellate court and provides the same scope of review and deference to fact-finding due in an appeal to an appellate court.[83]

3. Administrative Adjudicators

Administrative agencies exercise considerable judicial power when they adjudicate disputes arising in the programs they administer. Consequently, no understanding of the "judicial system" of the United States would be complete without consideration of their important functions. As already indicated, their functions and the limits on powers of other Article I judges are discussed in the next chapter on administrative law.

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80 *United States v. Raddatz*, 447 U.S. 667 (1980) (Article III not violated by magistrate conducting hearing and making recommended decision on suppression motion in criminal case so long as district judges has *de novo* review power). *But see Gomez v. United States*, 490 U.S. 858 (1989) (absent consent, magistrate may not preside over jury selection in criminal trial).

81 *See* Chapter VI, pp. 217-219.

82 Bankruptcy law is discussed in Chapter XV, pp. 587-590.

83 28 U.S.C.A. §§157-158. The areas of law in which Article I judges are allowed are explained in Chapter VI, pp. 217-218, in conjunction with *Northern Pipeline Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), a case in which the Supreme Court held the entire bankruptcy judge system unconstitutional.

4. Court Clerks, Law Clerks and Other Court Officials

Administrators Each court, trial or appellate, has a chief "clerk of the court" who is in charge of administrative matters and in whose office all litigation documents are filed and kept. In addition, judges are assisted by other clerks or secretaries who run their chambers, do filing and typing and draft routine orders and correspondence. Also important are court reporters who keep a record of all proceedings before the judge.

Law Clerks The person of greatest direct assistance to a judge on any level is a "judicial clerk" or "law clerk," also called "law secretaries" in some jurisdictions. All federal trial and appellate judges and all state appellate judges and justices have full-time law clerks to do legal research and drafting of opinions and memoranda of decisions. Most often judicial law clerks are recent law school graduates who work for the judge (or for the entire court if that is the system) for a short period of time, usually one or two years. Judicial clerks, especially those working for federal judges and state supreme court justices, usually have excellent law school records and often have writing and research experience as members of the law review of their law school. Pay for such clerks averages between $40,000 and $60,000, though permanent judicial clerks in the federal system can receive up to $82,000[84] While many law clerks could conceivably get higher paying jobs in private practice, they choose to be law clerks because of the experience and education they will gain and because of the prestige attached to such service. The most prestigious of judicial clerkship posts are those held by law clerks for justices of the United States Supreme Court, many of whom go on to impressive careers as private lawyers or law teachers. Some Supreme Court law clerks return later in life to the Supreme Court as Supreme Court justices. For example, the late Chief Justice William Rehnquist was clerk to Justice Robert Jackson.

The vast majority of state trial judges do not have full-time law school graduates as law clerks. However, many state trial court judges in urban areas have at least law-student law clerks on a regular if only on a part time basis. The reason for not providing clerks (aside from the high cost) is the assumption that state trial judges need them less, since most of their work has less to do with fine legal points than with factual issues and the exercise of discretion within known legal parameters. Many state trial judges disagree and point to the fact that they handle many of the same kinds of cases that their colleagues on the federal trial court bench do.

E. Subject-Matter Jurisdiction of State and Federal Courts

1. State Court Subject Matter Jurisdiction

In Chapter I, when the nature of state power was discussed, we saw how states before the Constitution had all the inherent powers of sovereign international states and, upon ratification, lost only those powers that they gave up in the plan of the Constitution. Consistent with this concept, state courts potentially have general and unlimited subject-matter jurisdiction over disputes of every conceivable type that are not prohibited to them by federal law. The symbol of such broad jurisdiction is the trial court of general jurisdiction of the state — the superior or circuit court — which has power to handle the widest range of cases. State court subject matter jurisdiction definitions may require that certain kinds of disputes be handled by one of its specialized courts, but for every type of case there will be some court of the state that has the power to hear it.[85]

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84 What Lawyers Earn, www.law.com/special/professionals/nlj/earn/earns_1.html#3.

85 States may limit the jurisdiction of their own courts, for example, as a matter of *forum non conveniens*. *See* Chapter VII, pp. 256-257.

2. Federal District Court Subject Matter Jurisdiction

In contrast to state courts, federal courts are courts of *limited* jurisdiction. As with any other organ of federal power, federal courts must trace their jurisdiction to some affirmative source of power in the Constitution. Federal judicial power is confined to cases "arising under [the] Constitution, the Laws of the United States, and Treaties," and controversies "between Citizens of different states."[86] The first category is generally referred to as "federal question" jurisdiction and the second as "diversity" jurisdiction.

Federal Question Jurisdiction Today, federal question cases comprise by far the most numerous category of cases in federal court. This was not always true. A lingering effect of the mistrust that some Framers had of the lower federal courts was that they were not given general federal question jurisdiction until 1875 — after the Civil War.[87] Before then, state courts were relied upon to enforce what federal law there was. The history of state court enforcement of federal law before the Civil War was marked by evasion, hostility and interference with federal policy at every turn.[88] The rationale for federal question jurisdiction is that federal courts will give a more consistent and more sympathetic interpretation of federal law than state courts. However, state courts retain concurrent jurisdiction over all federal question cases so that, if the parties wish to go to state court, they may. There are a few categories of federal question cases, however, where Congress has made federal court jurisdiction exclusive.[89] Federal question jurisdiction is most commonly invoked in such areas as civil rights, antitrust, violations of federal criminal statutes, bankruptcy, patent and copyright infringement, securities violations and labor law.

Article III is not self-executing, so it does not itself grant jurisdiction. Congress must pass a statute conferring jurisdiction as well.[90] In the case of federal question jurisdiction, Congress has passed a statute that tracks the "arising under" federal law language of Article III, quoted above. This language might seem to include every case in which a federal issue comes up. However, the federal question jurisdiction *statute* — despite using the same language — has been interpreted narrowly to mean that jurisdiction exists only for cases where the federal question presented is necessary to make out the *plaintiff's claim*. This rule, called the "well-pleaded complaint" rule, excludes any case where the federal issue is presented as part of a *defense*.[91] It does not matter that a defensively asserted federal issue is the most important or even the only real issue in the case. For example, a state-law defamation claim (a claim for damage to reputation caused by untrue statements) is sometimes met with a defense based on the free speech guarantees of the 1st Amendment to the Constitution.[92] Such

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86 Art. III §2. For more detail on subject matter jurisdiction, *see* WRIGHT, *supra* note 34, §§17-22A, and ERWIN CHEMERINSKY, FEDERAL JURISDICTION, 4TH ED. (Aspen 2003).

87 28 U.S.C.A. §1331. *See* Chapter I, p. 8.

88 *See generally*, John Gibbons, *Enforcement of Federal Law in State Courts 1789-1860*, 36 RUTGERS L. REV. 399 (1984). *See also* Chapter I, p. 23.

89 Exclusive federal jurisdiction is given in admiralty cases (28 U.S.C.A. §1333), bankruptcy cases (28 U.S.C.A. §1334), patent and copyright cases (28 U.S.C.A. §1338), claims arising under the securities exchange laws (28 U.S.C.A. §78aa), federal criminal law (18 U.S.C.A. §3231), and antitrust actions (28 U.S.C.A. §1337), though the exclusion from antitrust cases is only implied.

90 It has always been assumed that Art. III is self-executing and itself grants jurisdiction to the Supreme Court in the narrow category over which it has original jurisdiction without the need for a statute. *Kentucky v. Dennison*, 65 U.S. 66 (1860).

91 28 U.S.C.A. §1331, as interpreted in *Louisville & Nashville Railroad v. Mottley*, 211 U.S. 149 (1908).

92 *See* Chapter IX, p. 372, and Chapter XI, pp. 446-449.

a case can be handled only in state court.[93] The wisdom and legitimacy of the "well-pleaded complaint" rule of federal question jurisdiction have been questioned.[94] Clearly the rule abandons many important federal law issues to state courts. However, its advantages are that it is simple to administer and it allows jurisdiction to be determined at the very beginning of the lawsuit by looking only at the plaintiff's complaint.[95]

The well-pleaded complaint rule means in most cases that it is only when federal law authorizes the claim the plaintiff is bringing that there will be jurisdiction. However, the Supreme Court recently reaffirmed that even when state law authorizes the claim, federal question jurisdiction will exist if an essential element of the state-law claim requires resolution of a "substantial" federal issue. Exactly when the issue of federal law is sufficiently "substantial" is not exactly clear.[96]

Diversity Jurisdiction Federal court jurisdiction applies to disputes between citizens of different states or between a citizen and an alien.[97] Congress has always limited diversity cases to major disputes, providing a requisite amount that must be in controversy. In 1789, the amount was $500; today it is $75,000. Diversity cases make up about 20% of the federal district court case load.

The Framers of the Constitution created diversity jurisdiction out of a concern that state courts would favor their own citizens over citizens of a different state or country. It was thought that federal judges would be more neutral in such disputes, in part because they would not identify so strongly with any particular state and in part because lifetime appointment would mean that they would not have to face the wrath of the voters for unpopular decisions. There have been attempts in Congress in recent years to eliminate diversity jurisdiction based on the argument that state prejudice against outsiders is no longer a problem in the modern, mobile age. Proponents of diversity jurisdiction dispute this and, to date, diversity jurisdiction remains.

Natural persons' citizenship is their place of domicile, or their permanent home, at the time suit is filed.[98] A corporation has dual citizenship: it is considered a citizen both of the state where it is incorporated and the state in which it has its principal place of business. Since diversity cases are based on state law, it goes without saying that there is concurrent jurisdiction of all diversity cases in state court.

93 In general, the federal law must create the claim on which the plaintiff sues. Consequently, in most cases where a federal law *issue* arises as part of a *state-law claim*, there is no jurisdiction. *See Merrill Dow Phamaceuticals v. Thompson*, 478 U.S. 804 (1986) (no federal question jurisdiction just because proof of violation of federal drug labeling law would constitute negligence *per se* under state law). Violation of a regulatory statute as *per se* negligence is discussed in Chapter XI, p. 431.

94 *See* Donald Doernberg, *"There's No Reason For It; It's Just Our Policy": Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597 (1987).

95 Although Article III uses the very same words, it has been interpreted as potentially including jurisdiction over cases where the federal issue arises in the defense or even in some other context. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983) (approving statutory grant of jurisdiction where federal issue arose as an anticipation of a defense). *See* WRIGHT, *supra* note 34, §20.

96 *See Grable & Sons Metal Products v. Darue Engineering & Mfg*, 545 U.S. 308 (2005) (suit to obtain title to real property based on state law, but essential element required plaintiff to prove federal tax lien invalid under federal law). *Compare Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804 (1986) (no jurisdiction where state law tort claim included issue of whether drugs violated federal regulations).

97 28 U.S.C.A. §1332.

98 In an effort to limit diversity jurisdiction in cases involving aliens, Congress amended §1332 in 1988 to provide that "an alien admitted to the United States for permanent residence shall be deemed a citizen of the state in which such alien is domiciled." Thus, an alien admitted for permanent residence living in New York could not sue a U.S. citizen of New York in the federal court as had been permitted before, but would have to sue instead in state court.

Like federal question jurisdiction, the identical phrase in both Article III and the diversity jurisdictional statute — suits "between Citizens of different States" — has been interpreted more narrowly in the statute. As used in Article III, it is interpreted to permit Congress to create jurisdiction where there is only "minimal diversity," *i.e.*, where only one party is from a different state.[99] As used in the statute, however, the Court has held that the phrase requires "complete diversity." In other words, *all* the plaintiffs must be different states than *all* the defendants. Thus, there would be no diversity jurisdiction over a suit in which New York, Ohio and Michigan plaintiffs sued Florida, California and Ohio defendants, despite the fact that several out-of-state parties would be involved regardless of what federal district the suit was filed in.[100]

Removal Where subject matter jurisdiction would exist in either state or federal court, the initial court choice is made by the plaintiff. However, defendants can choose the federal forum as well through a procedure called "removal." A defendant sued in state court on a claim that would have qualified for federal court jurisdiction may remove the case from state court to the local federal court.[101] However, if removal is based solely on diversity of citizenship, the defendant may remove the case only if no defendant is a citizen of the state in whose courts the action was brought. The rationale for this rule is that diversity is designed to ensure that out-of-state parties are treated fairly, so it makes little sense to allow defendants sued in their home state's courts to have access to federal courts. Thus, if a New York plaintiff sues a California defendant in the state court in *California*, the defendant may *not* remove the case, but if the same case is filed in any other state court (*e.g.*, New York), it *is* removable.

Supplemental Jurisdiction Federal courts are authorized to assume jurisdiction over some claims that involve neither diverse parties nor federal questions if those claims arise out of a "common nucleus of operative fact" as claims asserted over which they have jurisdiction. This "supplemental jurisdiction" is based on the idea that it is uneconomical and unfair to the parties to require that they litigate such related claims in two court systems.[102] Under some circumstances, "pendent parties" on related claims can be added — parties as to whom no claims sufficient for federal jurisdiction exist.[103]

PART II: Federalism Complications in the Judicial System

Concurrent overlapping competence of state and federal courts to handle both state and federal claims can give rise to complexities and inefficiencies.[104] We will consider two issues that arise when federal courts adjudicate state-law claims and state courts adjudicate federal-law claims: (1) what law, state or federal, applies to what kinds of issues in such "mixed" cases and (2) the structure for appellate review of issues in mixed cases. Another feature of overlapping jurisdiction is the potential for

99 Congress has so provided some cases. *See State Farm Fire and Casualty Co. v. Tashire*, 386 U.S. 523 (1967) (upholding constitutionality of 28 U.S.C.A. §1335, the interpleader statute). *See also* the Multiparty, Multiforum Trial Jurisdiction Act of 2002, 28 U.S.C.A. §1369 (mass accidents where over 74 people die) and the Class Action Fairness Act of 2005, 28 U.S.C.A. §1332(d) (class actions based on diversity).

100 *Strawbridge v. Curtis*, 7 U.S. 267 (1806) (Marshall, C.J.). Excepted from federal court jurisdiction are domestic relations and probate cases. *See Ankenbrandt v. Richards*, 504 U.S. 689 (1992).

101 28 U.S.C.A. §1441. The case is removed to the federal court of the district where the state court is located.

102 *See United Mine Workers v. Gibbs*, 383 U.S. 715 (1966) and 28 U.S.C.A. §1367.

103 *Exxon Mobil Corp. v Allapattah Services*, 545 U.S. ___, 125 S.Ct. 2611 (2005).

104 Overlapping jurisdiction in the courts of *different states* also causes complication. This topic discussed in the chapter on civil procedure. *See* Chapter VII, pp. 249-265.

simultaneous litigation of the same dispute in both state and federal court. That issue will also be examined briefly.

A. Law Applied in Federal and State Courts

1. Law Applied When State-Law Claims Are Adjudicated in Federal Court

The Rules of Decision Act As already alluded to in Chapter I, Congress has provided since 1789 in the Rules of Decision Act that federal courts handling state-law claims must follow state law.[105] The Act has been interpreted to mean that federal courts must follow state law on all *substantive* issues, but that they may follow their own federal *procedural* law. This is consistent with the traditional conflict-of-laws notion that the forum court is permitted to apply its own procedural rules. The precise scope of the command of the Rules of Decision Act was made clear in the 1938 case of *Erie, Lackawanna R.R. v. Tompkins*, and issues under the Act are referred to as "*Erie* questions."[106]

Erie's dichotomy of substantive state law, but procedural federal law is consistent with general conflict-of-laws principles. But the special policies behind the *Erie* decision may cause the substantive-procedural line to be drawn in a different place than might be expected in the conflicts situation.

Anti-Forum-Shopping Policy The first relevant policy is the policy against "forum-shopping." The Framers of the Constitution made federal courts available as an alternative to state courts to provide a more neutral *forum* for disputes between citizens from different states. They did not intend that federal courts would provide a different *body of law* to decide those disputes. Thus, parties should not be able to "forum-shop" between state and federal court in order to obtain a better result in their cases, based on the state court applying state law and the federal court applying federal law.[107] Consistent with this policy, the substance-procedure question for *Erie* purposes is decided according to the "outcome determinative" test: an issue is considered to be a "substantive" one calling for application of state law if (1) applying federal law would cause the court to come to a different result and (2) that difference is the kind of difference that would influence the parties to choose federal court over state court.[108]

This test is easy to apply in most situations. For example, the law relating to the standard of conduct by which a court judges the defendant's actions in a tort case is

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105 *See* 28 U.S.C.A. §1652.

106 304 U.S. 64 (1938). *Erie* made clear that federal courts must follow *all* of state law, both statutory and common law. This "corrected" an old case interpreting the Rules of Decision Act that held that the "laws of the several states" that the Act required federal courts to follow meant only state *statutory* law, not common law decisions. *Swift v. Tyson*, 41 U.S.(16 Pet.) 1 (1842). The holding in *Swift* was understandable given the "discovery" view of the common law prevalent at that time: since there could only be one correct common law view, all courts, state and federal, should come to the same result. In Chapter II, we saw how Justice Holmes's realism about common law exploded the discovery myth. His view was ultimately adopted by the Court in *Erie*: that the common law, like any other law, is the command of a particular sovereign and uniformity of decisions is possible only if federal courts are required to follow the state courts' *own version* of the common law. *See* Chapter II, pp. 45-46.

107 Such "forum-shopping" was rampant before *Erie* required federal courts to follow state common law as well as statutory law. *See Black & White Taxi Co. v. Brown & Yellow Taxi Co.*, 276 U.S. 518 (1928) (plaintiff Kentucky corporation reincorporated in Tennessee to create the diversity of citizenship that would allow it to sue in the Kentucky federal court and thus avoid Kentucky state common law that would have defeated its claim in state court).

108 *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). Since defendants have the power to remove many diversity cases to federal court, defendants as well as plaintiffs can engage in "forum-shopping." *See* discussion of removal, *supra* p. 188.

clearly substantive under this standard. Other issues are less clear. For example, the law may provide that the "burden of proof" is on one party or the other in a particular kind of case. Burden of proof sounds "procedural" in an intuitive sense, but it clearly can affect the outcome of the case. Consequently, burden of proof is classified as "substantive," and state rather than federal law on burden of proof must be applied by the federal court.[109] The Court has held that all the following issues are substantive law issues calling for the application of state rather than federal law: time limitation periods within which suit must be filed,[110] a requirement that a bond be posted by shareholders before they may sue their corporation,[111] and laws prohibiting suit by any corporation not licensed to do business in the state.[112] Most importantly for purposes of later discussions, the Court has held that *choice-of-law* rules are substantive, thus calling for the federal court to apply the choice-of-law laws of the state where it sits.[113]

It is important to emphasize that the Rules of Decision Act is concerned only with one kind of forum-shopping: parties seeking to take advantage of the difference between *federal and state* law. It has nothing to say about parties taking advantage of a difference between the *law of two different states*. Shopping *between states* for better law, made possible by state choice-of-law rules, does not offend the need for federal and state courts in the same state to apply the same substantive law.

Supremacy of Federal Law Despite the importance of preventing forum-shopping, that policy may conflict with the supremacy of federal law. Some state laws or practices, regardless of how "substantive" they appear, may disrupt important and well-established federal court procedures. If so, the supremacy of federal requires they be displaced by federal law. In some cases, this is so even if applying federal law might change the outcome of the case and lead to forum-shopping. For example, in one case, state law required that a particular mixed fact-law issue be determined by the judge, while federal law would normally give such an issue to the jury to determine. The Court held that the "strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts" required that the federal court apply the federal rule.[114] It was also clear that who determined the issue would not in most cases affect how the issue was resolved and the state's choice of the judge was a matter of historical accident. In *Gasperini v. Center for Humanities,*[115] a New York law affected the judge-jury relationship directly by requiring its judges to reduce jury awards that "deviate materially from what would be reasonable compensation." The normal

109 *Palmer v. Hoffman*, 318 U.S. 109 (1945).

110 *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). These periods are referred to as "statutes of limitations."

111 *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Shareholder suits are discussed in Chapter XV, p. 576.

112 *Woods v. Interstate Realty Co.* 337 U.S. 535 (1949).

113 *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). *See, e.g., Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975) (in a diversity suit brought by the parents of a soldier killed in Cambodia against manufacturer of artillery shell, the federal court located in Texas had to apply Cambodian tort law since that is the body of law that Texas choice-of-law rules indicated would be applied had the suit been brought in the Texas state court). *See generally* Chapter VII, pp. 259-265, where choice-of-law rules are discussed. However, some federal appeals courts have applied *federal* common law conflicts rules to state law claims arising under a federal law giving federal courts jurisdiction over claims arising out of international banking transactions. *See Edelman v. Chase Manhattan Bank*, 861 F.2d 1291 (1st Cir. 1988). *See also* Donald T. Trautman, Toward Federalizing Choice of Law, 70 TEXAS L. REV. 1715 (1992).

114 *Byrd v. Blue Ridge Rural Electrical Cooperative*, 356 U.S. 525 (1958) (issue was whether the plaintiff was an "employee" of the defendant; if so, he was only entitled to Workmens Compensation administrative remedy; if he was not an "employee," he could sue in court for damages).

115 518 U.S. 415 (1996).

federal standard allows reduction only if the verdict was so excessive as to "shock the conscience" of the court. The Court upheld application of the New York rule by federal courts in diversity cases because it was clearly outcome-determinative and the state had substantive policy reasons for enacting it.

The strongest expression of federal procedural interests occurs when the federal law on the subject is set out in one of the Federal Rules of Civil Procedure or its equivalent. In such cases, the Supreme Court has followed a policy of presumptive application of the federal rule regardless of how "outcome-determinative" its effects might be.[116] This policy has resulted in differing outcomes between state and federal courts and to that extent encourages forum-shopping.[117]

2. Law Applied When Federal Law Claims are Adjudicated in State Court

The procedural-substantive dichotomy arises when a *federal claim* is filed in *state court*, and the Court has imposed a rough "reverse-*Erie*" rule: the forum state court applies its own procedural law even while applying substantive federal law. However, the supremacy of federal law can pre-empt a procedural state rule that "unduly" interferes with assertion of a federal claim. For example, in *Brown v. Western Railway of Alabama*, the plaintiff brought suit on a federal claim in the Georgia state court. The plaintiff's complaint was dismissed based on a Georgia state pleading rule that provided that pleadings would be "construed strictly against the pleader."[118] Despite the fact that rules about pleadings would seem intuitively to be "procedural," the Supreme Court held the Georgia rule invalid as applied to the federal claim on the ground that it "unduly interfered" with assertion of the federal claim. This was so despite the fact that the state court applied the rule evenhandedly to all claims that came before it, whether state or federal.

3. Appeals of Federal Law Issues in State Court and State Law Issues in Federal Court

As can be seen, state courts routinely decide issues of federal law and federal courts routinely decide issues of state law. If a state court is wrong on an issue of federal law, the Supreme Court has the power to review that state court's judgment on issues of *federal* law.[119] However, if a federal court in a diversity of citizenship case is wrong on an issue of *state* law, there is no comparable appeal to a state court with final authority to decide the issue of state law. An appeal to the United States Supreme Court is to no avail, since it has always disclaimed the power to review issues of *state* law arising in either state or federal courts. No appeal from the federal court to the state supreme court of the relevant state is possible. There is no mechanism for it and whole nature of the supremacy of federal law and institutions over the states would seem to deny any such power.[120] Thus, while federal courts are supposed to follow state law as

116 *Hanna v. Plumer*, 380 U.S. 460 (1965). *See generally* FRIEDENTHAL, KANE & MILLER, *supra* note 13, §§4.1-4.3.

117 *See, e.g., Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) (federal statute allowing transfers of cases permits transfer pursuant to forum-selection clause of contract even though applicable state law would render such clause unenforceable as a matter of state contract law); *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533 (1991) (FRCP 11 imposing liability on represented parties for prosecution of a groundless suit will apply to a suit in federal court regardless of whether such liability exists in state law for a suit filed in state court).

118 338 U.S. 294 (1949). *See also Felder v. Casey*, 487 U.S. 131 (1988) (state pre-suit notice of claim requirement when suing the government unduly interferes with assertion of federal civil rights claim).

119 *See Martin v. Hunter's Lessee*, discussed in Chapter I, p. 22.

120 *See infra*, p. 193 and note 127, and Chapter VI, p. 221.

declared by the state's highest court, state law is not always clear and there is no provision for definitive appellate review. Federal courts then are sometimes relegated to a "best guess" as to the content of state law.

The danger of lower federal court mistakes on issues of state law is lessened considerably by the fact that federal district judges are admitted to the bar of the state where the federal court is located, are usually experienced lawyers, and are often former state court judges from that state. In addition, many states have a procedure for federal courts to "certify" unclear issues of state law to the state supreme court.[121] But there is no federal certification law and not all states have a certification procedure. Moreover, certification sometimes does not work very well. One problem is certification is optional with the federal judge, who may resist admitting inability to determine an issue of state law. From the state side, state supreme courts often resist deciding legal issues in the abstract, and may even be prohibited by their constitutions or laws from doing so. Or an abstract answer may be given that is unclear.[122] The result is that mistakes are sometime made in forecasting how an issue would be decided in state court law, especially on an issue of first impression.[123] At the same time, because of the quality of some federal court decisions on state law issues of first impression, those federal decisions are sometimes followed by state courts, even though they technically qualify only as persuasive precedential authority.[124]

B. Simultaneous Litigation in State and Federal Court

Concurrent jurisdiction gives rise to the potential for conflict between state and federal court where both are asked simultaneously to assume jurisdiction over essentially the same dispute. Parties tend not to litigate in two forums at once, so the question does not arise often, but when it does, it raises difficult issues of federalism. Duplicative litigation is wasteful and it may be somewhat surprising that there is no prohibition *per se* against a party litigating in both state and federal court simultaneously. However, duplicative litigation is seen as one of the costs of federalism. Indeed, the Supreme Court has emphasized that federal courts should not abstain from exercising their jurisdiction in order to avoid duplicative litigation except in the most exceptional circumstances.[125] Conflicts in the exercise of jurisdiction are determined as follows.

1. Resolution by First Entry of Judgment

Under the requirement of "full faith and credit" federal and state courts must respect each others final judgments. So in the case of simultaneous litigation, the first judgment controls the result in the case and the issue of which court's judgment will prevail is determined by which court wins the "race" to judgment.[126] But the question arises as to what a state or federal court may do — while litigation is pending — to

121 *See, e.g.,* Mich. Ct. Rule 7.305(B).

122 *See Sun Insurance Office v. Clay*, 319 F.2d 505, 509-510 (5th Cir. 1963), where the federal court of appeals was somewhat puzzled by the Florida supreme courts answer to a question it had certified, so it went on to interpret state law on its own.

123 *See Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975) (setting aside federal court judgment based on state supreme courts overruling of caselaw on which federal court relied).

124 For a positive review of certification, *see*. Lillich and Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 U.C.L.A.L.REV. 888 (1971).

125 *Moses H. Cone Memorial Hospital v. Mercury Construction Co.*, 460 U.S. 1 (1983).

126 *See* Chapter VII, pp. 257-259. One exception to this rule, however, is a federal suit for writ of *habeas corpus*. A state prisoner convicted in state court whose federal constitutional claims have already been rejected by the state trial and appellate courts can get a fresh hearing of those claims in federal district court under certain circumstances. *Habeas corpus* is discussed in Chapter VIII, pp. 276-277.

prevent a judgment from being entered first in the other court. This raises the question of what power state and federal courts have to enjoin parties from litigating in the other forum.

2. Injunctions Against Litigation in Another Court

Because of the nature of the federal system, particularly the supremacy clause, state courts may not enjoin federal litigation, unless it is necessary to protect state court jurisdiction over real property located in the state.[127] At the same time, since 1789, the federal Anti-Injunction Act has generally prohibited *federal* courts from enjoining state proceedings.[128] This would seem to leave things at an impasse. However, there are three important exceptions in the federal Anti-Injunction Act. Federal courts may enjoin state court proceedings if "expressly authorized by Act of Congress or where necessary in aid its jurisdiction or to protect and effectuate its judgments."[129] Thus, in the event of a clash of jurisdiction, federal courts have substantial power to enjoin state litigation. However, several doctrines of "abstention" have grown up that limit federal courts in their exercise of power under these three exceptions to enjoin state court litigation.[130]

3. Abstention

Given the supremacy of federal law and federal institutions and the fact, as just discussed, that the federal court may even enjoin state court litigation in some circumstances, it may seem surprising that the most common result when the same controversy is pending in both federal and state court is that the federal court must defer to the state court. In such cases, it is said that the federal court must "abstain" from addressing the dispute. There are several different types of abstention and each has a different effect. In some a state case must be pending at the same time as the federal case and in others it is simply sufficient that the action *could* be filed in state court. The four major abstention doctrines are outlined here.

"Younger" Abstention One situation where simultaneous litigation is possible is where a party who has been sued or prosecuted in state court believes that the state proceeding is barred by federal law, but has no confidence that the state court will give proper consideration to the federal-law defense. Most often this involves situations where a state criminal defendant has a federal constitutional law defense to the state criminal prosecution — for example, when a state prosecutes a person for conduct asserted to be protected by 1st Amendment free speech rights. Federal civil rights laws give the person a claim in federal court to enjoin the prosecution on the ground that it violates federal rights.[131] But if the person seeks an injunction against the state proceeding, the federalism-based abstention doctrine of *Younger v. Harris*[132] will require that the federal court "abstain" in favor of the state court deciding the federal law issue. As a result, the person must rely on the state court to vindicate any federal rights by way of a defense to the state court prosecution. The only way that a federal court will become involved is if the person is able to convince the U.S. Supreme Court to grant *certiorari* after all state appeals are exhausted or if the criminal defendant seeks

127 *Donovan v. Dallas*, 377 U.S. 408 (1964).

128 28 U.S.C.A. §2283.

129 *Id.*

130 For a discussion of these abstentions and others, *see* CHEMERINSKY, *supra* note 86 §§11.1-14.4.

131 The claim would be based on 42 U.S.C.A. §1983, discussed in Chapter VI, pp. 222, 224. Section 1983 has been held to be come within the exception to the Anti-Injunction Act for injunctions "expressly authorized by Act of Congress."

132 401 U.S. 37 (1971).

habeas corpus review in the lower federal courts.[133] A narrow exception to the *Younger* doctrine is where it can be shown that the state prosecution is in bad faith.[134]

"Pullman" Abstention Another form of abstention applies when a federal suit challenges a state law as unconstitutional, but there are unclear issues of state law involved. Unclear state-law issues are generally of two types: (1) the challenged state law *could* be interpreted by a state court in a way that would make it constitutional or (2) there is a plausible argument that the law is invalid as a matter of state-law. In either event, clarification of state law would result in a plaintiff victory on state-law grounds, thus rendering federal court decision of the constitutional challenge unnecessary. This form of abstention applies even if no state court action is pending in which clarification of the state law issue could be obtained. Plaintiffs must file another suit in state court to obtain that clarification. Then, if they lose on that issue, than can return to federal court to press their federal constitutional claims.[135]

This form of partial abstention is named for *Pullman v. Texas Railroad Comm'n*,[136] the facts of which illustrate the typical case. In *Pullman*, a regulation of the Texas Railroad Commission segregated railroad employees by race according to their job description and reserved the higher status jobs for whites. Black railroad porters challenged the regulation, claiming that it constituted unconstitutional race discrimination. Texas law appeared to allow a basis for challenging the regulation on the ground that it was beyond the powers of the commission set out in state statutes, but the law was unclear on the point. Because of this, the plaintiffs were required to go to the Texas state courts to resolve that state law issue. If that challenge was rejected, they would be allowed to return to federal court to renew their federal constitutional challenge. Since *Pullman* abstention gives the state the first chance to take care of the plaintiff's problem on the basis of state law, it is said to promote harmony between state and federal courts.

"Colorado River" Abstention Where there is parallel litigation on the same subject pending in both state and federal courts and neither *Younger* nor *Pullman* abstention applies, *Colorado River* abstention is possible.[137] Unfortunately, this form of abstention is not well-defined. On the one hand, the Court has emphasized that federal courts should abstain only in the most exceptional circumstances. On the other hand, the lower federal courts do not seem to follow this principle, commonly dismissing pending cases before them. The Court has on several occasions had to reverse trial court decisions to abstain from exercising jurisdiction. Major unspoken reasons why lower federal court judges are so quick to abstain are undoubtedly found in the facts that such judges feel that they are overwhelmed with cases, and that duplicative litigation, whatever the reason for it, is not a priority for application of scarce judicial resources.[138]

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133 *Habeas corpus* is discussed in Chapter VIII, pp. 276-277.

134 The *Younger* doctrine has been extended to some civil cases. Generally, *Younger* applies only to civil judicial and administrative proceedings that seek some coercive remedy *against* the federal plaintiff. *See* Chapter VI, p. 223.

135 *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964).

136 312 U.S. 496 (1941).

137 *See Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) (simultaneous litigation over water rights in state and federal court; federal court abstention warranted).

138 *See, e.g., Moses H. Cone Memorial Hospital v. Mercury Construction*, *supra* note 125.