

CHAPTER

LAW, COURTS, AND POLITICS



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In Scott County, Kentucky (Georgetown), the courthouse is at the intersection of two major streets. Courthouses across the nation often find themselves at the intersection of law, courts, and politics.

On the evening of March 10, 2004, Alberto Gonzales, White House legal counsel, and Andrew Card, White House chief of staff, appeared at the bedside of Attorney General John Ashcroft, who was hospitalized suffering from pancreatitis. These top presidential aides came not to deliver a get-well card but, rather, to seek Ashcroft's signature to reauthorize a secret domestic surveillance program originally enacted by executive order of the president after the attacks of September 11, 2001, but without the knowledge of the Congress or the judiciary. Ashcroft refused to sign the reauthorization, however, because he had temporarily delegated the powers of attorney general to James Comey while he was recovering from surgery. But much more was at stake than the question of who can act for an ill governmental official. Earlier, Acting Attorney General Comey had refused to sign the reauthorization because high-ranking officials in the Department of Justice had raised serious questions about the legality of the program (Eggen and Kane 2007).

These events sound like something out of a movie, but they were not. Serious constitutional questions had been raised about the Terrorist Surveillance Program, which allowed for warrantless domestic surveillance without first securing the approval of the Foreign Intelligence Surveillance Court. Details about the secret program would eventually be revealed in December 2005 in the *New York Times*. The story itself became the center of political controversy; conservatives claimed it compromised national security, and liberals accused the *Times* of holding the story until after the 2004 presidential election. Interest groups reacted immediately by filing lawsuits challenging the legality of the Terrorist Surveillance Program. Eventually, the Supreme Court would refuse to hear a case involving the legality of the program. Meanwhile, Congress had already begun debating legislation to restrict the president's power to avoid using the existing Foreign Intelligence Surveillance Court. In January 2007, Alberto Gonzales, now the attorney general, informed the U.S. Senate that electronic surveillance being conducted under the questionable Terrorist Surveillance Program would now be subjected to the approval of the Foreign Intelligence Surveillance Court (Gonzales 2007).

The events described previously are ultimately about the law and the Constitution: Who can conduct warrantless domestic surveillance—judges, legislators, the president, or the attorney general? But they quickly become questions about politics: Who should decide whether and when to conduct warrantless domestic surveillance—judges, legislators, the president, or the attorney general? They illustrate that questions about law usually become questions about politics. And this is true whether we are talking about listening in on terrorist discussions or wondering if the Supreme Court will:

- overturn *Roe v. Wade* (1973), thus allowing states to stop abortions;
- allow more displays on public property of religious items such as the Ten Commandments; and
- make it easier to execute convicted murderers.

Supreme Court decisions about these and other issues are often the subject of national and sometimes international attention. But they are just a few among thousands of cases heard by courts across the nation. Every day, in courthouses across the nation, issues like these are decided:

- Should the jury award damages (sometimes for millions of dollars) for injuries suffered during automobile accidents or for medical malpractice?

- Should the judge sentence a convicted drug dealer to prison (often for a long period of time)?
- Should the court grant another hearing (sometimes after numerous previous hearings) for a prisoner on death row who contends he is innocent?

Taken individually, such cases and controversies are seldom as newsworthy as a Supreme Court decision, but, collectively, those decisions determine the balance between law and politics and, ultimately, affect the way we live.

Judicial Process: Law, Courts, and Politics in the United States looks at the nation's legal system through the lens of political science. **Political science** is the systematic study of government and politics, and the research it produces helps to guide our presentation of what is known about the judiciary and how it works. Toward that end, this chapter examines courts from four complementary perspectives: courts and government, courts as legal institutions, courts as political institutions, and courts and controversy.

COURTS AND GOVERNMENT

Courts are often called “the third branch of government.” To some, that simply indicates that the courts are listed third in the Constitution; to others, it means that the courts *should* be the least important branch of government. However, history has shown that the judiciary is a vital part of U.S. government.

Compared with the other branches of government, courts are indeed distinctive: Most of the principal actors have law degrees, procedures in court are formal, and the language used differs from ordinary English. But emphasizing how distinctive courts may be also gets in the way of thinking about the broader role of courts in American politics. One way to view the interconnectedness of courts with every aspect of American politics is to consider the table of contents of an American government textbook (Dautrich and Yalof 2009), where you will find chapters on the Constitution, federalism, the president, legislatures, elections, political parties, interest groups, public opinion, and the media. This section discusses the American judiciary in those same terms, not only to explain why this book is about law and politics in the United States but also to introduce some of the important, often controversial, topics that will be examined.

Courts and the Constitution

The Constitution is one of the most powerful symbols of American government. Because the public associates courts, particularly the Supreme Court, with the Constitution, the judiciary in the United States is granted considerable respect. That grant of legitimacy, however, doesn't always mean that the public likes how the Court interprets the Constitution. Throughout, this book considers how courts in the United States interpret their respective constitutions (both federal and state) and, along the way, discusses some of the controversial constitutional decisions of these courts, including, for example,

- *Miranda v. Arizona* (1966), requiring police to warn suspects of their right to silence before interrogation (discussed in Chapter 8)

- *Roe v. Wade* (1973), declaring a constitutional right to privacy (examined in Chapter 14)

State supreme courts interpret their own respective state constitutions, and those decisions at times also prove controversial. This book examines two kinds:

- Decisions declaring legislatively passed tort reform unconstitutional, producing strong condemnation from the business community (covered in Chapter 10)
- Opinions recognizing same-sex marriages, provoking vehement opposition from social conservatives (discussed in Chapter 13)

Courts and Federalism

The United States has a federal form of government; that is, power is divided between state governments and the national government. Where to draw the line between the respective powers of state and national governments has been one of the longest-running political battles in the United States. The issue clearly divided the framers of the Constitution, and some of those differences of opinion eventually were settled by a bloody civil war.

Often, the U.S. Supreme Court has been called on to decide disputes over federal versus state power, and, not surprisingly, its decisions frequently provoke profound controversy. In the twentieth century, states' rights became the rallying cry of the South as it resisted integration. In *Brown v. Board of Education* (1954), the Supreme Court ordered an end to "separate but equal" in the nation's schools. For decades, federal courts enforced a variety of laws ending segregation. Today, the issues have changed, but the courts' involvement in disputes about federalism continues. We consider two controversies:

- Should the federal courts declare the death penalty cruel and unusual punishment (covered in Chapters 9 and 13)?
- Should cities be allowed to sue gun manufacturers (covered in Chapter 7)?

Courts and the President

In the modern era, presidents have viewed the courts as an important part of their political agenda. When running for office, presidential candidates often denounce court decisions they dislike and pledge to appoint justices who will reshape the judiciary. After election, they use the courts and lawsuits to seek policy changes that are to their liking. Most important, they seek to influence the future decisions of courts through their nominations to the bench. This book examines two examples of controversies over presidential nominations to the Supreme Court:

- Threats by Democratic senators to use the filibuster to block President George W. Bush's nominations to the federal courts, including the U.S. Supreme Court (examined in Chapter 6)
- The divisive rejection of Robert Bork to a seat on the U.S. Supreme Court (analyzed in Chapter 15)

Governors and mayors also use the courts to advance their policy objectives. In some jurisdictions, they, too, have a great deal of control over who becomes a judge.

This book highlights two examples of policy debates in which executives (that is, mayors or governors) have turned to the courts:

- Several big-city mayors have sued gun manufacturers in an attempt to reduce gun violence (see Chapter 7).
- Attorneys general in a number of states have sued Big Tobacco to recover state expenses for treating smoking-related illnesses (discussed in Chapter 11).

Courts and Legislatures

At every level, the relationship between courts and legislatures is best viewed as a struggle for institutional balance (Campbell and Stack 2001). Legislatures sometimes find themselves unhappy with the interpretation of their laws made by courts. Sometimes, they have power over the jurisdiction or the composition of courts, but, at other times, they share that power with the voters or the executive. Responsible for passing the laws courts will apply, legislatures often do so without regard for the unintended consequences for the legal system. This book examines two examples of institutional tensions between legislatures and the judiciary:

- Chapter 4 looks at legislatures enacting wars on drugs that swell court dockets and fill already-overcrowded prisons.
- Chapter 9 examines the adoption of sentencing guidelines, which restrict judicial discretion, by legislatures that are unhappy with the "lenient" sentences handed out by judges.

Courts and Elections

Over the years, courts have been called on to decide disputed elections. The most prominent example was *Bush v. Gore* (2000). For the first time in our nation's history, the high court actually selected the president. But lawsuits contesting elections are hardly unique. In virtually every state, candidates who have lost elections by a narrow margin have turned to the courts, alleging election irregularities or even voter fraud. On occasion, courts have even declared the election-night loser to be the eventual winner. Just as important, courts across the nation routinely consider election laws, even deciding such fundamental issues as who gets on the ballot, what they get to say, and who gets to vote (Banks and Green 2001). Although *Bush v. Gore* (2000) is atypical because it selected the president of the United States, it is not atypical of judicial involvement in elections. The discussion of courts and elections examines the following decision:

- *Republican Party v. White* (2002), which allowed candidates for judicial office to state their views on controversial issues (recounted in Chapter 6)

Not only do courts influence elections, but the opposite is also true—elections affect the judiciary. In many jurisdictions, judges are elected directly by voters. Later in the book, we address a hotly debated issue:

- Are popularly elected judges worse (or better) than those selected in other ways (analyzed in Chapter 4)?

Courts and Political Parties

Historically, political parties valued judgeships as an important source of patronage. That practice continues today in some of the nation's largest cities, but, increasingly, political parties view judgeships in symbolic terms. At the national level, in particular, officeholders view nominations to the bench as opportunities to show the party faithful that they are working on their behalf. Thus, the right wing of the Republican Party demands that Republican presidents appoint staunch conservatives and strict constructionists. Likewise, modern-era Democrats have used nominations to vacant judgeships to publicly support important members of their governing coalition—women and racial minorities.

Increasingly, political parties use nominations not only to reward their followers but also to derail the judicial nominees of the other party. The result has been pitched political battles in the Senate, with Republicans attempting to defeat Democratic nominees who are characterized as too liberal on issues such as abortion and the death penalty and Democrats trying to derail Republican nominees whom they portray as too conservative on affirmative action and gun control. Chapter 6, therefore, discusses this question:

- Has federal judicial selection become too partisan?

At the state level, the political party that controls the governorship can influence the types of people selected to the bench. In turn, judicial reform has often focused on reducing the influence of political parties in judicial selection. Thus, Chapter 6 also considers this question:

- Does merit selection produce better judges than judicial elections do?

Courts and Interest Groups

America, it is said, is a nation of joiners. Not all of the resulting associations are formed with political action in mind, but, no matter their primary focus, interest groups try to influence governmental policy through a variety of methods, including cash contributions to campaigns and lobbying legislative and executive officials. On a regular basis, these interest groups also attempt to influence governmental policy by filing lawsuits either to gain victories in court that have been denied them in the legislative or executive arena or to protect victories gained in the other branches of government.

The most notable example of an interest group winning a major victory in court occurred in the area of civil rights. The National Association for the Advancement of Colored People (NAACP) sponsored *Brown v. Board of Education* (1954) and other lawsuits that led to desegregation. Based on that success, a broad array of liberal and conservative interest groups now appear regularly in court to advocate their views. Chapter 7 discusses two types of interest group issues:

- Interest groups regularly seek to influence judicial elections by providing financial backing to favored candidates.
- Interest groups regularly file policy-oriented lawsuits. For example, over the fierce opposition of the National Rifle Association, the Brady Center to Prevent Gun Violence has sued gun manufacturers.

Courts and Public Opinion

After *Bush v. Gore* (2000), politicians and political scientists alike pondered whether the Supreme Court had wounded itself in the eyes of the public. Evidence suggests that there was no diminution of Court legitimacy, and the Supreme Court remains as respected as ever (Kritzer 2001). But the possibility that high courts might lose the public's respect because of the decisions they make highlights the importance of public opinion for the judiciary. Although courts are shielded in the short term from the vagaries of public opinion, in the long run, public support for the fairness and impartiality of the institution is important (Gibson, Caldeira, and Baird 1998). Court officials at all levels have expressed concern about public dissatisfaction with the judiciary and have sought ways to increase public trust and confidence.

The jury provides a direct link between the courts and public opinion. To some, the jury is the most democratic of institutions, allowing ordinary citizens to pass judgments on their peers. To others, it allows randomness into the decision-making process and, thus, erodes the rule of law. Those are more than philosophical issues. Some are concerned that juries are too prone to acquit the guilty. Others are concerned that juries are all too likely to find businesses liable in civil matters. This book focuses on two examples of how public opinion affects the judiciary:

- Should jurors be allowed to engage in jury nullification (substituting their personal views for the law)? This is discussed in Chapter 12.
- Have juries been too willing to award excessive damages in civil cases? Chapter 10 presents the issues.

Courts and the Media

The media play an important role in what we know about the courts and how we view the actions of judges, juries, lawyers, and litigants. Through their coverage of courts at the local level, television, radio, and newspapers provide information about cases of local interest—often gruesome crimes and, occasionally, a tantalizing divorce case. At the national level, the media provide regular coverage of important Supreme Court decisions and large damage awards handed out by juries. Not all the coverage is so serious; the media also provide a regular diet of stories about dumb crooks and greedy plaintiffs. But the role of the media goes beyond just reporting the news. Sometimes, it affects the judiciary directly. Therefore, Chapter 12 discusses questions such as the following:

- How can a fair and impartial jury be selected when a case has generated considerable pretrial publicity?

Media coverage of our nation's judiciary extends beyond real cases to include fictional portrayals as well. To some, judge Judy is the model of how judges should act. Alas, drawing the line between myth and reality is not always easy. To explore that issue, Law and Popular Culture boxes examine major films and television programs about the U.S. judiciary. (See Law and Popular Culture for a chapter-by-chapter list.)

Clearly, courts and government are intricately related. In every way described previously, law, courts, and politics intersect to provide discretion for all the actors involved—when and how the courts decide to exercise that discretion is a focus of this book.

LAW AND POPULAR CULTURE

Overview

Law in the United States is more than the professional activities of lawyers and judges. Law is also linked to the images of law and courts held by ordinary citizens. Most immediately, the media provide coverage of prominent cases and major court rulings. More indirectly, books, movies, and television use courtroom dramas to entertain. Increasingly, though, the line between fact and fiction is blurred. Richard Sherwin, a former prosecutor, argues in his book *When Law Goes Pop* that the line between law and popular culture is vanishing. Symbols drawn from popular culture replace reality.

This book proposes that the interaction between law and popular culture has both benefits and drawbacks. On the positive side, both media coverage of real trials and portrayals of fictitious ones provide dramatic illustrations that the administration of law in the United States involves real people making discretionary choices. Thus, instead of remote figures discussing legal issues in the abstract, we have real (or apparently real) people confronting difficult, real-world problems. The downside of trying to dramatize occasionally dull legal happenings is that reality becomes distorted. Thus, popular culture often provides caricatures, not pictures, of law and the legal system, promoting both understanding and misunderstanding. At times, a principal task of a book such as this one is to encourage readers to unlearn what they think they know.

Beyond promoting understanding and misunderstanding about the law, popular culture both legitimizes and undermines respect for the legal system. Entertainment shows, for example, promote respect for the American legal system because, in the end, justice is done. At the same time, however, the dramatic requirements of popular media demand that justice be done only after a heroic battle against a flawed system. Thus, popular culture both highlights and exaggerates what is wrong with American justice. As a result, the viewer is exposed to contradictory images of legal professionals: Whether police officers, prosecutors, judges, lawyers, or jurors, they are alternatively portrayed as lazy or highly motivated, honest or corrupt; principled or money hungry. The hero of one film, for example, may be the villain in another.

To highlight the importance of law and popular culture, each chapter of this book focuses on a film or a television series that relates to the substance of that chapter, as follows:

Chapter	Film/Series	Issue
2	<i>Brokedown Palace</i>	American students experience a foreign jail.
3	<i>A Few Good Men</i>	Military justice up close.
4	<i>Traffic</i>	Multiple facets of the War on Drugs.
5	<i>A Civil Action</i>	Have You Heard the Latest Lawyer Joke? A lawyer's passion fuels a small town's personal injury lawsuit.
6	<i>Judge Judy</i>	Justice with an attitude.
7	<i>Chicago</i>	A lawyer manipulates the press.
8	<i>Law & Order</i>	Reality TV distorts reality.
9	<i>The Shawshank Redemption</i>	A successful escape from a brutal prison.
10	<i>The Insider</i>	The importance of whistleblowers.
11	<i>Kramer vs. Kramer</i>	The effects of divorce; career dad as single parent.
12	<i>Ranaway Jury</i>	Who is trying to hijack the jury?
13	<i>The Hurricane</i>	World-class boxer; fights false conviction.
14	<i>The Cider House Rules</i>	The medical ethics of abortion.
15	<i>The People vs. Larry Flint</i>	The Supreme Court confronts pornography.

As you watch these or other movies about law and the legal system, be prepared to answer the following questions:

1. To what extent does the film legitimate the law?
2. To what extent does the film stress flaws in the legal system? Who is at fault and why? For example, does the law stress money grubbing lawyers or incompetent judges?
3. To what extent does the film accurately depict the American legal system? To what extent does it distort reality?

COURTS AS LEGAL INSTITUTIONS

Courts are an important part of government in the United States. But, equally important, courts are distinctive because they are also legal institutions. They provide a forum for resolving disputes through the application of legal rules. In many ways, the courts are the most familiar part of the U.S. legal system. When people talk about "law," they often have the courts in mind. But courts involve more than law books housed in imposing public buildings called courthouses. One cannot think of courts without also thinking of lawyers and judges, plaintiffs and defendants, witnesses and jurors. In short, courts are only one component of a much broader legal system (Friedman 1975).

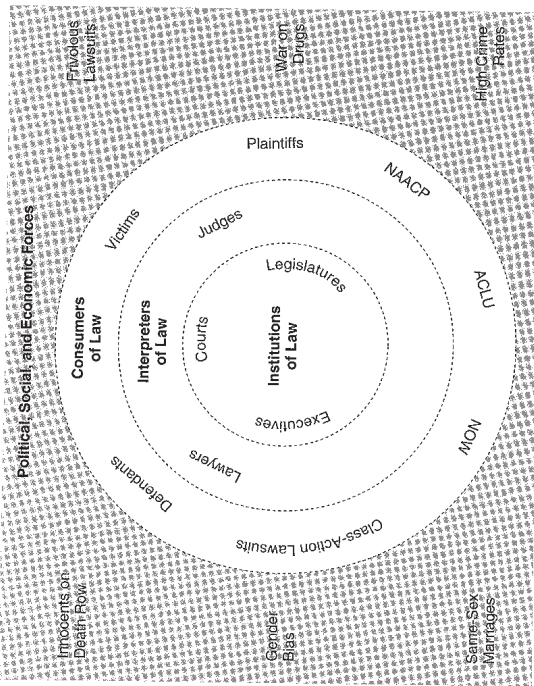
Legal system is a comprehensive term that encompasses an array of governmental institutions, a number of key actors, and a variety of other participants. The term can be clarified by discussing its components. As Figure 1.1 suggests, the legal system can be thought of as three concentric circles (Jacob 1995; Johnson and Canon 1984). At the center stand the institutions of law—law and courts primarily. They are the lawgivers. They serve as gatekeepers, largely determining which consumers of law have their cases decided by the institutions of law. Finally, the outer ring consists of consumers of justice—litigants, witnesses, and jurors. They bring disputes to the courts; are objects of legal activity, or are essential participants. In turn, each ring is affected by broader social, economic, and political forces.

The Inner Ring: Institutions of Law

The inner ring of the American legal system consists of the institutions of law: law and courts. **Law** is a body of rules, enacted by public officials and backed by the force of the state. **Courts** decide disputes based on law. Thus, we commonly speak of courts of law. Indeed, in modern industrialized societies it is impossible to speak sensibly of law and courts separately.

All three branches of government are active participants in deciding what the law is and how fast it changes. Today, legislatures are the principal lawgivers. They pass laws setting forth broad public policies. In implementing these general mandates, executive agencies issue detailed rules and regulations that likewise have the force of law. But these laws, whether passed by legislatures or implemented by executive agencies, may be ambiguous or contradictory. The judiciary, therefore, is the governmental institution entrusted with settling disputes on the basis of law. But the doctrine of separation of powers

FIGURE 1.1
The Legal System



oversimplifies a complicated reality. Courts in the United States do not just interpret the law enacted by the other two branches of government; the courts also make law. Courts, like legislative and executive bodies, are part of the political process of fitting law to the needs of a dynamic society. Court decisions have had a major impact on how the United States is governed. (See Case Close-Up for a chapter-by-chapter list of those decisions.) Two topics illustrate the controversy about how quickly (or slowly) law should change:

- Does the Constitution prohibit the execution of juveniles? See Chapter 9.
- Is it proper to display the Ten Commandments in public buildings? See Chapter 2, Chapter 2.

The more than 17,000 courts in the United States range from rural justice of the peace courts to the U.S. Supreme Court. Clearly, the most distinctive feature of the organization of American courts is the dual court system—one national court structure and court structures in each of the fifty states. The consequences of this system for the judicial process lead to questions such as these:

- Are too many lawsuits filed in federal courts? See Chapter 3.
- Are drug courts an effective way to deal with rising drug prosecutions? See Chapter 4.

CASE CLOSE-UP

Overview
Each chapter of this book features a case that reflects the interplay between law and politics in the United States. Many of the cases are significant U.S. Supreme Court decisions that have had such a major impact on the body politic that the name of the case has itself become readily identifiable. *Miranda*, *Roe*, and *Brown* clearly fall into that category. Just as identifiable is the subject matter of Supreme Court decisions. Prayer in the public schools, the rights of criminal defendants, the death penalty, and abortion certainly qualify. But not all the cases featured in this book involve the nation's highest court. One comes from the highest court in New York, another from the Massachusetts Supreme Court. Two are drawn from trial courts in New Mexico and Texas. The McDonald's coffee spill (heard in Albuquerque) is probably as important to American civil law as any Supreme Court decision.

The cases chosen are not meant to be exhaustive; rather, they have been selected to illustrate the various ways court decisions affect U.S. politics. In discussing these cases, we stress not only the legal principles involved but also the nature of the litigants themselves. Many of these cases involve ordinary citizens who, often by happenstance, found their names attached to a famous court decision.

Chapter	Issue	Decision
2	Government displays of the Ten Commandments	<i>McCreary v. ACLU</i> (2005)
3	Judicial review	<i>Marbury v. Madison</i> (1803)
4	Financing courts	<i>Wachtler v. Cuomo</i> (1991)
5	Right to counsel	<i>Gideon v. Wainwright</i> (1963)
6	Judicial election issues	<i>Republican Party v. White</i> (2002) and <i>Chisom v. Roemer</i> (1991)
7	School integration	<i>Brown v. Board of Education</i> (1954)
8	Police interrogation	<i>Miranda v. Arizona</i> (1966)
9	Juvenile death penalty	<i>Roper v. Simmons</i> (2005)
10	Coffee spill	<i>Liebeck v. McDonald's Corporation</i> (1995)
11	Tire failures	<i>Rodriguez v. Firestone</i> (2001)
12	Trial publicity	<i>Sheppard v. Maxwell</i> (1966)
13	Same-sex marriages	<i>Goodridge v. Department of Public Health</i> (2003)
14	Abortion	<i>Roe v. Wade</i> (1973)
15	Internet pornography	<i>Reno v. ACLU</i> (1997)

The Middle Ring: Interpreters of Law

The middle ring of the legal system consists of the interpreters of law, who serve as gatekeepers between the institutions of law (the inner ring) and the consumers of law (the outer ring).

A popular saying states that ours is a society of laws and not of men. That is certainly true up to a point, because it suggests that no person is above the law. No matter how rich or powerful you may be, you still must obey the law or face the consequences. At the same time, that saying is misleading, because it seems to suggest that somehow human minds play no role. But they do. Men and women perform a variety of roles of

critical importance in the legal system. One of the most important functions is interpreting the law.

Lawyers are important interpreters of the law. In the privacy of their offices, they interpret the law to their clients, many of whom will never see a judge. Thus, lawyers serve as the principal gatekeepers for the legal system. Except for minor civil cases (small claims primarily), almost no one in the United States files a case in court without first hiring a lawyer. Litigation is a highly structured process that defines disputes in special and technical ways. Thus, litigation is dominated by professionals who understand the special language and esoteric techniques needed to translate general concerns into legal issues that courts recognize (Milner 1986).

Chapter 5 examines how law schools train lawyers and the political importance of bar associations. More important, it discusses access to legal services. In criminal cases, indigent defendants have the right to a lawyer, but, in civil matters, the poor have difficulty securing a lawyer who will help them. Two contradictory topics about lawyers, therefore, dominate public discussions and are examined in Chapter 5:

- Does the United States have too many lawyers?
- Does the United States have too few lawyers who work for the poor?

Judges are society's authoritative interpreters of the law. People often disagree about the meaning of the law. Although their contrasting views deserve respect, ultimately judges have the final word in declaring the meaning of law. There is no agreement on how judges should be selected or what factors should be most important. Therefore, selection occurs in a variety of ways—election by the voters, appointment by the executive, or merit selection that combines the two. Chapter 6 examines major controversies such as these:

- Which system of judicial selection produces the best judges?
- Why have judicial elections become noisier, nastier, and more expensive?

The Outer Ring: Consumers of Law

The outer ring of the American legal system is composed of the consumers of law. On a daily basis, the courts require the presence of literally thousands of citizens to perform a variety of important roles. Some consumers initiate action: By calling the police or filing a lawsuit, they provide the raw materials for the courts. Conversely, other consumers are objects of court actions. They are the defendants charged with burglarizing a house or failing to pay money owed under a contract. To resolve those disputes, judges and lawyers may summon witnesses to testify about the relevant events. Some witnesses are the participants themselves. Others are total strangers who, by some quirk of fate, have been called on to provide their account of the events in question. A special set of consumers are jurors—ordinary citizens who are selected because they know nothing about the dispute in question. Although untrained in the law, they are still asked to render a verdict.

Some of the consumers of law are individual citizens who sue because they have been injured in an automobile accident or the like. Others are businesses that file suit to recover money owed by others. Increasingly, interest groups file lawsuits to promote public policies that favor their members. We consider two topics:

- Do greedy plaintiffs file frivolous lawsuits? See Chapter 10.
- Do some interest groups improperly file lawsuits to advance their political agenda? See Chapter 7.

Social, Economic, and Political Forces

These three rings of the legal system operate within the larger society of which they are a part. The legal system is affected by social, economic, and political forces in a variety of ways. For example, as U.S. social attitudes toward marriage have changed over time, the number of divorce cases has increased. Some social and economic forces take the form of political demands. Concern over drunk driving has prompted demands that legislatures pass stiffer laws. Similarly, calls to get tough on illegal drug use have led to a decades-long War on Drugs. And concerns over the high price of medical and automobile insurance have prompted calls for tort reform.

Several decades of polling point to three somewhat contradictory sets of public assessments about the courts:

- The general public has a relatively shallow reservoir of knowledge about the courts (discussed in Chapter 7). More citizens, for example, can identify by name persons who play judges on TV than can identify the chief justice of the U.S. Supreme Court.
- The general public is critical of the overall operations of the courts (discussed in Chapter 10). Ordinary citizens believe that judges don't deal harshly enough with criminals and that lawyers file too many frivolous lawsuits.
- Although citizens express widespread dissatisfaction with the courts' performance, the typical American citizen is highly supportive of courts and judges. Far more than legislators or executives, judges retain the public's respect and confidence (discussed in Chapter 7).

It is amid contradictions like those that public sentiments influence government policy. The judiciary is no exception. We can best assess the larger environment that courts operate within by focusing on courts as political institutions.

COURTS AS POLITICAL INSTITUTIONS

The political scientist J. Woodford Howard (1981) suggests that courts are bifocal; that is, they are both legal and political institutions. As just discussed, courts are clearly legal institutions. Their association with the norms and traditions of the law explains why courts and judges are accorded special roles in the American political system that are not enjoyed by other political institutions and actors. In interpreting and applying the law, courts make decisions in unique ways that differ from the ways other governmental bodies do so; law, precedent, and evidence do matter. Thus, legal rules offer a fairly good guide to many court processes and outcomes. Indeed, the law is often a starting point for explaining what courts do, but it does not tell the entire story. The legal rules are often imprecise in those areas where important government policies generate troublesome

questions. A critical weakness of some approaches to studying the law is that they overstate the importance of courts as legal institutions.

Social theories of law point out that courts are also political institutions. The courts, which interpret and apply the laws, do not exist in a vacuum. Rather, the creation, application, and interpretation of law exist within a political and social context. Courts are one governmental agency among many, and their activities are influenced, directly and indirectly, by what other branches of government do or do not do. Understanding the legal and political context within which courts operate is important in studying their role within American society (George and Epstein 1992).

Courts and Politics: How They Are the Same

Political science has a long history of studying the relationship between law and politics. At first blush, linking law and politics appears to be out of place. Law typically evokes positive images of dignity, principles, permanence, and the search for justice, whereas politics suggests negative images of seaminess, dishonesty, impermanence, and the hunt for experience. Those contrasting perceptions, however widespread, are nonetheless misleading. Law and courts cannot be understood without understanding their roots in U.S. politics. Narrow definitions of politics that focus on partisan influences, popular elections, and political parties cloud this vital process. A more comprehensive view is provided by David Easton, who defines **politics** as "the authoritative allocation of values for a society" (1965, 50).

Applying Easton's definition to the judiciary's activities highlights several essential features of its operation. Certainly, courts' decisions must be considered authoritative. Only courts have the legal power to sentence a convicted offender to prison, impose a monetary award in a civil case, or declare an act of Congress unconstitutional.

These **court decisions** often involve discretion. The judge may decide to sentence the offender to probation, award the amount of monetary damages requested by the injured party, or interpret a vague statute in a way that passes constitutional muster. In short, because laws are unclear, court officials must make important discretionary choices.

Finally, by stressing who gets what, Easton's definition calls attention to the fact that court decisions determine winners and losers and, therefore, allocate societal resources. Criminals sentenced to prison, defendants in civil cases who have to pay damages for the accidents they caused, and supporters of the legislation declared unconstitutional are losers in the judicial process. Their opposite numbers are winners. We see the allocative function of courts most dramatically when the stakes are high: The death penalty is imposed; companies are ordered to pay billions of dollars in damages; or acts of Congress affecting thousands of people are declared unconstitutional. Decisions like those have immediate, dramatic consequences. Most of the time, however, the stakes are low—a few months in jail or a few thousand dollars in damages. Cumulatively, though, those low-stake decisions are important. As judges sentence more defendants to prison for longer periods, the prison population swells, prompting demands for change. As judges and juries are increasingly willing to find defendants liable and to award greater damages,

demands arise to reform how the courts handle accident cases, medical malpractice, and the like.

Courts and Politics: How They Differ

Because courts are both legal and political institutions, their operations differ from those of other governmental bodies. One difference is in how they get their business. Legislative and executive branches of government are proactive institutions: They do not wait for others to bring problems to their attention. Rather, they seek out problems and, therefore, in large measure, control their own agenda. Courts, however, are passive and reactive. Judges can act only when they are called on by parties having no connection to the judiciary. Because they depend on others to bring matters to their attention, courts have a limited ability to control their agenda. Once a lawsuit is filed, the judge is expected to make a decision.

Therein lies another difference: Unlike other governmental officials, judges typically do not enjoy the luxury of *not* making a decision. Legislative and executive bodies normally do not take an action that they do not have to take. Through a variety of devices, they can decide not to decide politically charged issues. Indeed, at times, other branches of government deliberately let the judiciary handle important questions and then criticize them for the decisions they make; this adds to the controversy surrounding the courts.

Another way that courts differ from other governmental institutions is in how decisions are made. The legislative and executive branches are very responsive to elections, public opinion, and partisan pressure. Lobbying and direct contacts are of critical importance. By contrast, the judiciary is insulated from these standard practices of the political process. Writing letters, placing phone calls, or promising to deliver votes on election day are legitimate ways of trying to influence officials in other branches of government. But attempting those tactics with a judge will be met at best with a rebuff (the secretary will politely but forcefully suggest that the judge is unavailable) or at worst with a citation for contempt of court.

Because the judiciary is largely insular within the broader political system, politically disadvantaged groups often turn to the courts to seek redress. It is no accident, therefore, that many of the highly controversial Supreme Court decisions involve groups with little or no political standing. Prisoners, racial minorities, members of small religious groups such as Black Muslims and Jehovah's Witnesses, sexual minorities, and so on have too few votes to influence elected officials, but, armed with legal arguments, they have been able to gain important victories in the courts.

Yet another way that the judiciary differs from other governmental institutions is in the type of information presented. Before making a decision, the legislative and executive branches elicit a wide array of information from diverse points of view. By contrast, information in court is presented through the adversary process, which narrows and isolates the evidence. In addition, because a lawsuit typically involves only two sides, arguments to the courts tend to stress directly opposite points of view rather than the middle ground that is so important to other governmental institutions.

COURTS IN COMPARATIVE PERSPECTIVE

Overview

Perhaps what is most remarkable about *Bush v. Gore* (2000) is that the Court's decision was readily accepted by all sides. In other countries, such a decision might have led to riots in the streets, troop movements, and perhaps even a coup d'état. What happened and didn't happen in the wake of *Bush v. Gore* (2000) highlights important features of the American judiciary, features that are most readily apparent in a comparative perspective.

Internationalization has become a major theme in American higher education over the last decade or so—and for good reason. The United States is the world's most powerful nation; yet, we often fail to appreciate how our actions affect other nations and how other nations' actions affect us. The United States is the world's most important nation economically, yet, we often fail to appreciate how our economy affects other nations and how the economies of other nations affect us. The United States is the world's most powerful nation socially, yet, we often fail to appreciate how our music, clothing, and films affect—and offend—other nations.

To encourage students to think globally, each chapter of this book examines the court system in another nation (in the instance of the World Court, an international judicial body). The countries were selected to provide a range of nations, although they clearly are skewed toward Western industrial democracies. Discussions highlight key features of how (and why) justice is administered differently around the world. Our intent is not to suggest that the U.S. system is superior or inferior but to highlight genuine differences in how justice systems are organized around the world and to challenge readers to think about what is really important about justice and to place our nation's problems in comparative perspective. Following are topics to be discussed:

Chapter	Country	Topic
2	France	The French Republic and the Code Napoléon
3	Germany	Prohibiting crucifixes in public schools
4	Mexico	Corruption and the War on Drugs
5	Australia	Female lawyers
6	United Kingdom	Judicial independence or aloofness?
7	Nigeria	Ethnic and religious strife
8	Saudi Arabia	Pure Islamic law
9	China	Execution capital of the world
10	India	Bhopal and toxic lawsuits
11	Israel	Court independence in the midst of unrest
12	Russia	Jury trials with a difference
13	Canada	A new age of judicial policy making
14	World Court	Trying Slobodan Milosevic
15	Japan	Why courts don't engage in policy making

The relationship between courts and other political institutions differs in important ways around the world. In some nations, the courts are independent of the government; in others, they are subservient. In some nations, courts largely confine themselves to handling routine decisions, but, on occasion, court decisions have wide ramifications. (See Courts in Comparative Perspective for a chapter-by-chapter list of topics.)

DEBATING LAW, COURTS, AND POLITICS

Overview

One measure of the link between law and politics is the number of decisions that prompt controversy. Another measure involves how the judiciary does what it does. Each chapter examines one or two such controversies, as follows:

Chapter	Controversy	6	7	8	9	10	11	12	13	14	15	
2	The Law and Politics of Constitutional Interpretation	Fillbuster: This?	Can Courts Bring About Social Change?	Should Gun Manufacturers Be Sued?	Should the Exclusionary Rule Be Abolished?	Should the Death Penalty Be Abolished?	Should Limits Be Placed on Punitive Damages?	Who Should Be Held Responsible for Tobacco-Related Deaths?	Should Jurors Engage in Jury Nullification?	Immunents on Death Row?	Should Congress or the Court Decide Who Decides?	The Rejection of Robert Bank
3	When Will the Ninth Circuit Be Overturned Next?											
4	Are the Federal Courts Obstructing the War on Terrorism, or Are They Protecting Civil Liberties?											
5	Should We End the War on Drugs? Thinking About Law School? Public Defender Versus Assigned Counsel											

COURTS AND CONTROVERSY

Viewing courts as a part of the government and as both legal and political institutions illustrates that courts have a major impact on the U.S. political and social landscape. As Alexis de Tocqueville observed in 1835, "There is almost no political question in the United States that is not resolved sooner or later into a judicial question" (257). During the era in which he wrote, the Court was wrestling with matters such as the creation of a national bank and the legal status of slaves.

De Tocqueville's observation is as relevant now as it was then. Every year, the roll call of important Supreme Court decisions captures the major social and political issues facing the nation. In turn, many Supreme Court decisions have become lightning rods for controversy, with the winning side loudly applauding the Court's judgment and the losing party harshly criticizing the ruling. Controversy, however, is not limited to decisions of our nation's highest court. (See Debating Law, Courts, and Politics for a chapter-by-chapter list of topics to be examined.) Decisions at all levels—state and federal, trial and appellate—are regularly praised or damned (depending on which side won). Such controversy underscores the increasing importance of courts as policy makers.

A growing range of controversial issues is being brought to the American judiciary. Citizens across the nation are divided on how those issues should be decided. The same holds true for the judges who must decide them. In major cases, for example, the nine justices of the Supreme Court are seldom unanimous; indeed, they often decide cases by a single-vote margin (5-4). The same also holds true in state supreme courts and other appellate bodies, where three or more judges are making the decisions.

Differences of opinion on how to decide controversial policy matters before the American judiciary often reflect the ideological differences readily apparent in the other two branches of government. Votes cast by legislatures and decisions made by presidents and governors are regularly described in terms of liberalism and conservatism. Alas, those terms have little precise meaning in the United States. They have become merely labels rather than categories for analysis. Nonetheless, they do capture the flavor of many issues debated in American politics, including many coming before the courts.

We can loosely organize many of the controversial issues that come before the judiciary under the headings of social policies, criminal justice issues, and civil justice issues. Table 1.1 provides an overview of contrasting ideological positions on some of these issues.

TABLE 1.1
LIBERAL AND CONSERVATIVE POSITIONS ON ISSUES THAT COME BEFORE THE COURTS

The terms *liberal* and *conservative* are used as though everyone knows what they mean, but, at times, it is hard to effectively define these political beliefs. This table presents a simplified version of liberal and conservative stances on some of the issues discussed in this book.

	Liberals	Conservatives
Social Policies		
Abortion	Support "freedom of choice."	Support "right to life."
Posing the Ten Commandments	Oppose.	Favor.
Gay and lesbian rights	Support equal treatment.	Oppose erosion of societal values.
Criminal Justice Issues		
Death penalty	Oppose.	Favor.
Sentencing	Favor rehabilitation.	Favor tough sentences.
Innocents on death row	The possibility of error necessitates expansion of appellate review.	Unnecessary appellate review merely weakens the justice system.
Exclusionary rule	Safeguards vital rights.	Lets crooks go on technicalities.
War on Drugs	Skeptical.	Strongly favor.
Gun control	Favor.	Oppose.
Civil Justice Issues		
Tort reform	Plaintiffs have a right to sue for damages.	Favor placing limits on who may sue.
Product liability lawsuits	Manufacturers should be held responsible for defective products.	Unnecessary and unreasonable litigation harms our nation's economy.

Social Policies

In the aftermath of *Brown v. Board of Education* (1954), which ordered an end to racial segregation in the public schools, numerous groups have turned to the courts to redress grievances once settled by other government and social institutions. Judges have ordered sweeping changes in state prisons, for example. Critics argue that courts are ill suited to resolve these types of disputes and have overstepped their proper boundaries by unnecessarily treading on the toes of other institutions. Proponents counter that such decisions are part of an ongoing process of adapting law to changing circumstances and ensuring equal justice under the law. A number of these social policies center on issues of race, ethnicity, gender, and sexual preference. Some of the social policies discussed in this book include abortion, posing the Ten Commandments in public places, and gay and lesbian rights.

Criminal Justice Issues

Since the 1960s, getting tough on crime has become a staple of U.S. political dialogue at the local, state, and national levels, and the courts, much more so than police departments or prisons, are held responsible. Moreover, appellate courts are charged with releasing guilty defendants on technicalities. Some of the most prominent issues to be examined include the War on Drugs, proposals to abolish the exclusionary rule, concerns over innocents on death row, the continuing debate over the death penalty, and gun control.

Civil Justice Issues

More recently, attention has also been directed toward how the courts process civil cases. The American legal system is increasingly portrayed as suffering from a "litigation explosion." A lawsuit over a coffee spill at a McDonald's restaurant in Albuquerque, New Mexico, quickly became the focus of extensive national debate and a rallying cry for those who argue that an unprecedented growth in case filings is overwhelming the courts and increasing delay. Excessive jury verdicts are blamed for driving up the costs of insurance. The medical profession calls for changes in the rules governing medical malpractice lawsuits. The insurance industry sponsors national advertising campaigns denouncing "lawsuit abuse." Those issues have prompted both state and federal legislatures to pass tort reform laws and the like. The methods used to process civil (as well as criminal) filings have become a staple of U.S. political rhetoric. Some of the topics to be discussed in this book include the litigation explosion, tort reform, caps on punitive damages, lawsuits against Big Tobacco, and product liability lawsuits.

CONCLUSION

It is widely believed that the Department of Justice is above politics; after all, it is responsible for seeing that the nation's laws are enforced. In the past few years, however, a number of scandals, including the hiring and firing of U.S. attorneys for partisan reasons

and the involvement of senior officials of the Department of Justice in keeping secret the Terrorist Surveillance Program, have brought considerable scrutiny to this venerable institution. Were they just trying to protect the United States or were they making a shambles of the Constitution? These questions came to a head on September 17, 2007, when Attorney General Alberto Gonzales resigned his post. President Bush blamed the media and Congress for besmirching Gonzales's character, and high-level senators from both parties blamed Gonzales for letting politics infiltrate the Department of Justice. The politics may sound old and conventional, with conservatives bemoaning the loss of Gonzales and liberals celebrating his departure; but the stakes are high. The U.S. Department of Justice is a critical component of our nation's legal system.

The controversy over domestic surveillance and its impact on the legal system is just one example of how law, courts, and politics intersect in the United States. Every day, newspapers and television cover reactions to court decisions on important issues such as stays of execution for condemned murderers, businesses that are suing and being sued over stock manipulations, and big-name entertainers being arrested for drunk driving or being involved in messy (and often expensive) divorces. The judicial process pervades our society.

We begin our study of U.S. courts by recognizing that they are both legal and political institutions—hence, the title “Law, Courts, and Politics.” Idolizing courts as purely legal agencies ignores the fact that, in interpreting the law, judges often make choices based on criteria other than the letter of the law. That intersection of law and politics is what makes the U.S. judiciary such a fascinating and lively subject. In a fundamental sense, the legal and political contexts in which courts operate are often in considerable tension. Some forces and issues tug to make the courts more insular; others pull to make them more accountable to society. The analysis of those forces is the focus of this text.

CRITICAL THINKING QUESTIONS

1. How does Easton's definition of politics differ from popular notions of politics?
2. How different are courts from other governmental and political institutions?
3. Are courts more involved in policy making today than they were two or three decades ago? Why or why not?

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Useful URLs

<http://www.supremecourtus.gov>
 Supreme Court of the United States: This official site includes up-to-date Court opinions, biographies of the justices, and much more.

<http://www.house.gov>
 U.S. House of Representatives: This site offers access to members' official Web pages.

<http://www.senate.gov>
 United States Senate: Provides information on the history of the Senate, information on current senators, contact information, and information on the Capitol building, including a virtual tour.

<http://www.whitehouse.gov>
 President of the United States: The official White House site offers texts of presidential speeches, press briefings, and executive orders.

<http://www.ncsonline.org>
 National Center for State Courts: This nonprofit organization is dedicated to improving court administration.

<http://www.abanet.org>
 The American Bar Association (ABA), the largest organization of lawyers in the United States, provides ready access to a variety of material about the nation's legal system.

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