

UNIT 1

Introduction to Law and the Legal System





networks

The first unit of this text sets the stage for your study of law and legal issues. Chapters in this unit answer important questions regarding basic information such as:

- What is law?
- How are laws made?
- What roles can you play in influencing lawmakers?
- How is our legal system organized?
- How can you find and get help from a lawyer?

Knowing the answers to these questions will help you develop skills you will need for the rest of your life.

◀ The phrase “equal justice under law” refers to the goal of the U.S. court system to treat all persons fairly.

CHAPTERS IN BRIEF

CHAPTER 1

What Is Law?

Chapter 1 provides the definition of *law* and discusses the kinds of laws that exist. The chapter also examines how law is related to values, human rights, and responsibilities within the framework of the U.S. Constitution.

CHAPTER 2

Lawmaking

Chapter 2 illustrates how laws are made by U.S. legislatures and regulatory agencies and by appellate courts that establish precedents.

CHAPTER 3

Advocacy

Chapter 3 explores the roles of citizens in influencing the formation of laws. It also discusses advocacy and will teach you how to develop and implement plans for taking action to solve problems your community, state, and country.

CHAPTER 4

Settling Disputes

Chapter 4 focuses on settling disputes outside of court through negotiation, mediation, and arbitration. You will learn how to make smart decisions when you encounter conflict in your life.

CHAPTER 5

The Court System

Chapter 5 introduces international courts and the parallel systems of federal and state courts in the United States. You will learn about trial courts, appeals courts, military courts, and tribal courts, as well as the power of the Supreme Court within the U.S. system of justice.

CHAPTER 6

Lawyers

Chapter 6 helps you to determine when a lawyer is needed and how to find and work with lawyers. The chapter also discusses the career path to becoming a lawyer.

CHAPTER 1

What Is Law?

► Congress passes laws for everyone in the United States to live by.



The question “What is law?” has troubled people for many years. Many definitions of *law* exist. For our purposes, however, law can be defined as the rules and regulations made and enforced by government that regulate the conduct of people within a society.

As a child, you learned about rules first at home and later at school. At home, your parents or guardians made and enforced rules concerning issues such as chores and bedtimes. Later teachers and principals established rules about behavior in school. Rules made and enforced by the government are called laws. The government makes laws that affect almost every aspect of daily life.

One thing is certain: Every society that has ever existed has recognized the need for laws. These laws may have been unwritten, but even preindustrial societies had rules to regulate people’s conduct. Without laws, there would be confusion and disorder. This point does not mean that all laws are fair or even good, but imagine how people might take advantage of one another without a set of rules.

A democratic system of government cannot function effectively unless its laws are known and respected by the people the laws are intended to govern. In other words, society must be based on the “rule of law.” The rule of law requires that the rules by which we are governed be known in advance and created through democratic processes. Rules should not be made up after the fact by arbitrary actions or decrees. All members of society—average citizens and government officials such as senators, judges, and even the president—are required to support the legal system and obey its laws. Where rule of law exists, no one is above the law.

PROBLEM 1.1

List 10 of your daily activities (for example, waking up, eating, and going to school). Next to each item, list any laws that affect that activity. What is the purpose of each law that you identified? Would you change any of these laws? Why or why not?

Law and Values

Laws generally reflect and promote a society's values. Our legal system is influenced by our society's traditional ideas of right and wrong. For example, laws against murder reflect the moral belief that killing another person is wrong. However, not everything that is immoral is also illegal. For example, lying to a friend may be immoral but is usually not illegal.

We expect our legal system to achieve many goals. These include:

- protecting basic human rights,
- promoting fairness,
- helping resolve conflicts,
- promoting order and stability,
- promoting desirable social and economic behavior,
- representing the will of the majority, and
- protecting the rights of minorities.

Many of society's most difficult problems involve conflicts among these goals. For example, some laws give preference to minorities. Critics of these laws argue that they promote reverse discrimination and racial conflict. Proponents of such laws, however, argue that they make up for past discrimination and promote fairness by leveling an uneven playing field in society today.

Achieving the goals listed above while trying to minimize conflict is a difficult task for our legal system. Laws must balance rights with responsibilities, the will of the majority with the rights of the minority, and the need for order with the need for basic human rights. Reasonable people sometimes disagree over how the law can protect the rights of some without violating the rights of others. However, everyone must remember that laws are intended to protect people and prevent and resolve conflicts in everyday life.



◀ This sign reflects society's values about right and wrong. *What values are placed in conflict by laws protecting the environment?*

THE **CASE** OF...

The Shipwrecked Sailors

Three sailors on an oceangoing freighter were cast adrift in a life raft after their ship sank during a storm in the Atlantic Ocean. The ship went down so suddenly that there was no time to send out an SOS. As far as the three sailors knew, they were the only survivors. They had no food or water in the raft. And they had no fishing gear or other equipment that might be used to get food from the ocean.

After recovering from the shock of the shipwreck, the three sailors began to discuss their situation. Dudley, the ship's navigator, figured that they were at least one thousand miles from land and that the storm had blown them far from where any ships would normally pass. Stephens, the ship's doctor, indicated that without food they could not live longer than 30 days. The only nourishment they could expect was from any rain that might fall from time to time. He noted, however, that if one of the three died before the others, the other two could live a while longer by eating the body of the third.

On the twenty-fifth day, the third sailor, Brooks, who by this time was extremely weak, suggested that they all draw lots and that the loser be killed and eaten by the other two. Both Dudley and Stephens agreed. The next day, lots were drawn



and Brooks lost. At this point, Brooks objected and refused to consent. However, Dudley and Stephens decided that Brooks would die soon anyway, so they might as well get it over with. After thus agreeing, they killed and ate Brooks.

Five days later, Dudley and Stephens were rescued by a passing ship and brought to port. They explained to authorities what had happened to Brooks. After recovering from their ordeal, the two were placed on trial for murder.

The country in which they were tried had the following law: Any person who deliberately takes the life of another is guilty of murder.

PROBLEM 1.2

- a. Should Dudley and Stephens be tried for murder? Explain.
- b. As an attorney for Dudley and Stephens, what arguments would you make on their behalf? As an attorney for the government, what arguments would you make on the government's behalf?
- c. If Dudley and Stephens are convicted, what should their punishment be?
- d. What purpose would be served by convicting Dudley and Stephens?
- e. What is the relationship between law and morality in this case? Was it morally wrong for Dudley and Stephens to kill Brooks? Explain your answer.
- f. Can an act be legal but immoral? Can an act be morally right but unlawful? Explain.

Laws can be based on moral, economic, political, or social values. As values change, so can laws. Moral values deal with fundamental questions of right and wrong. For example, laws against killing promote society's primary moral value—the protection of life. However, even this shared moral value—protection of life—is not absolute or universal because in limited circumstances such as self-defense or war, the law allows intentional killing.

Economic values deal with the accumulation, preservation, use, and distribution of wealth. Many laws promote economic values by encouraging certain economic decisions and discouraging others. For example, the law encourages home ownership by giving tax benefits to people who borrow money from a lender to pay for a home. Laws against shoplifting protect property and discourage stealing by providing a criminal penalty.

Political values reflect the relationship between government and individuals. Laws making it easier to vote promote citizen participation in the political process, a basic American political value.

Social values concern issues that are important to society. For example, it is an American social value that all students are provided with free public education at least through high school. Consequently, all states have laws providing for such education. Like other values, social values can change. In the past, for example, society believed that school sports were not as important for girls as for boys. This value has changed. Laws now reflect the belief that females should be provided with sports opportunities similar to those offered to males.

Many laws combine moral, economic, political, and social values. For example, laws against theft deal with the moral issue of stealing, the economic issue of protection of property, the political issue of how government punishes those who violate criminal statutes, and the social issue of respecting the property of others.

Many Americans tend to think that laws can be passed to solve all of their problems. In 1919, the U.S. Constitution was amended to prohibit the manufacture and sale of alcoholic beverages in this country. The Eighteenth Amendment was passed in response to a significant national problem. However, prohibition of alcohol was extremely difficult to enforce, and 14 years later it was repealed by another constitutional amendment. (The text of the entire U.S. Constitution is available from the National Archives website.)

Some laws designed to protect certain values may interfere with other important values. After the terrorist attacks on September 11, 2001, Congress moved quickly to pass the *USA Patriot Act*, a federal law designed to protect against further attacks. Some people criticized this law, which makes certain searches and electronic eavesdropping easier, as an invasion of the civil liberties Americans cherish. Others believe that, as a country, we may have to sacrifice some liberty for additional security during dangerous times.



▲ Female participation in traditionally male activities is on the rise. How does this photo reflect society's changing laws and values?

THE Constitution

After one year from ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

—Eighteenth Amendment

Today, legislators try to deal with the country's devastating drug and gang problems by passing a wide variety of laws. People disagree on what role the law can play in solving these problems. Experience shows that there is a limit to what laws can reasonably be expected to do.

PROBLEM 1.3

- a. Identify a problem for which we need a law. Explain your answer.
- b. Identify an existing law that is not necessary. Explain your answer.

Human Rights

human rights basic privileges a person as a human being

Human rights are the rights all people have simply because they are human beings. To advocate human rights is to demand that the dignity of all people be respected. Both government and private individuals can violate human rights. Human rights apply in people's homes, schools, and workplaces. In fact they apply everywhere. Governments have the duty to respect, protect, and fulfill all individuals' human rights.

The Universal Declaration of Human Rights (UDHR) is a statement of basic human rights and standards for government that has been agreed to by almost every country in the world. (The text of the entire UDHR is available from the United Nations website.) First written and adopted by the United Nations (UN) in 1948 under the leadership of Eleanor Roosevelt, it proclaims that all people have the right to liberty, education, political and religious freedom, and economic well-being. The Declaration also bans torture and says that all people have the right to participate in their government process. Today these rights are generally promoted, recognized, and observed by countries that belong to the UN.

The UDHR is not a binding treaty. However, the UN has established a system of international treaties and other legal mechanisms to enforce human rights. These include the following major treaties:

- The International Covenant on Civil and Political Rights protects the freedoms of speech, religion, and press and the right to participate in government.
- The International Covenant on Economic, Social and Cultural Rights provides for the right to adequate education, food, housing, health care, protection of property, and employment in safe conditions at an adequate salary.
- The Convention on the Rights of the Child spells out basic human rights to which children everywhere are entitled, including the right to education and to be free from exploitation.

Some believe the right to a clean environment should be added to the Covenants, while others call for a right to economic development for poor countries. The United States has signed and ratified the Covenant on Civil and

▼ Eleanor Roosevelt believed that her work on the Universal Declaration of Human Rights was her greatest accomplishment. *How can human rights affect the writing of laws?*



Political Rights and has signed but not ratified both the Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child. A treaty must be ratified in order to be binding.

Even when the United States signs a human rights agreement, it often restricts its enforcement within the country. This action is done by announcing that the United States is taking **reservations**, which is a legal way of making a provision less enforceable than it might otherwise be. The government gives reasons for these reservations, including the fact that the treaty would take away the power of individual states to make law under our system of federalism, as well as the belief that other countries should not impose their views on the states. Those who advocate ratification argue that states could still decide how to implement treaties.

reservation a legal way of making a provision less enforceable than it might be otherwise

PROBLEM 1.4

You have been selected to join a group of space pioneers who will establish a colony on a distant planet. In order to create the best possible society, you and your group decide to make a list of the human rights that all space colonists should have.

- a. List the three most important human rights that you believe should be guaranteed to all colonists.
- b. Compare your list with those of other group members. Explain reasons for your selections.
- c. Why do you think some of the rights you listed are more important than others?
- d. Do any of the rights you listed conflict with one another? If so, which ones? Why?
- e. Compare your list of rights with those listed in the Universal Declaration of Human Rights. Which ones did you include? Which ones did you not include?
- f. Are all the human rights you listed also legal rights? When does a human right become a legal right?

Human rights are standards that all countries can use when writing laws. Sometimes human rights become law in a country when the government signs and ratifies an international treaty guaranteeing such rights. Human rights also can become law if they are included in a constitution or if the legislature of a country passes laws protecting or guaranteeing these rights. Even though they may not refer to them as “human rights,” there are many provisions that protect human rights in the U.S. Constitution and Bill of Rights and in federal, state, and local laws.

Many of the human rights documents—including the UDHR—mention cultural rights, and it is widely accepted that all people have a right to their own culture. But what does this right to culture mean when culture comes into conflict with other universally accepted human rights? For example, the practice of female infanticide, or the killing of female babies, might be accepted in one culture, but the world community condemns it as a violation of a human right, the right to life. So cultural rights, like many other rights, are not absolute.

Rule of Law

The second president of the United States, John Adams, Jr., said that ours is a “government of laws and not of men.” In this phrase he captured the core meaning of the term *rule of law*. Where the rule of law is present, laws are clear, well understood, and fairly enforced. And no one is above the law. The rule of law serves as a safeguard against arbitrary actions by government and also helps protect basic human rights.

A global organization, the World Justice Project, measures adherence to the rule of law in more than 100 countries. They do this through surveys of individual households and expert questionnaires in each country. Through these surveys they have created an annual rule of law index with scores for each country. The index is based on the following eight factors:

- **Constraints on government:** This factor focuses on limits on the power of government and includes checks on executive power by legislatures and courts, as well as checks on governmental power provided by a free media and active civil society.
- **Absence of corruption:** Government officials, including the police, do not use their public office for private gain (for example, by accepting bribes).
- **Open government:** Laws are published, and people have access to this information. They also have mechanisms for complaining about government action.
- **Fundamental rights:** Basic rights to expression, religion, and privacy are protected; government uses fair procedures and people receive equal treatment (no discrimination).
- **Order and security:** Crime is controlled, and people do not resort to violence to resolve problems.
- **Regulatory enforcement:** Government rules and regulations are fair and are enforced without undue influence (no corruption).
- **Civil justice:** The civil justice system is available to people without undue expense or delay, and operates fairly and without corruption.
- **Criminal justice:** The criminal justice system is fair, free of corruption, operates without undue delay, and deters crime.

Avoiding corruption is obviously one critical factor in assuring strong rule of law. Typically, the Scandinavian countries have the strongest scores in the rule of law index. Countries with massive corruption and where the rulers do not follow the rules have weak rule of law.

PROBLEM 1.5

Visit the World Justice Project at www.worldjusticeproject.org and look at the most recent rule of law index report to answer the following questions.

- a. Identify two countries with stronger rule of law index scores than the United States.
- b. Identify two countries with weaker rule of law index scores than the United States.
- c. What steps could be taken in the United States to strengthen rule of law?

Balancing Rights With Responsibilities

The emphasis on rights in the United States has led some people to criticize the country for being too concerned with rights, while neglecting responsibilities. Some say that “with every right there comes a responsibility” and urge people to act more responsibly toward one another, their families, and their communities.

While individual rights are important, they must be matched by social responsibilities, these critics say. For example, if people wish to be tried by juries of their peers, they must be willing to serve on such juries. If they want to be governed by elected officials who respond to their values and needs, they not only must vote, but also get involved in other ways: attend election forums, work for candidates, and run for positions on school boards, city councils, and community associations. Many laws also require people to act responsibly. For example, parents must provide their children with adequate food, shelter, and clothing; drivers must obey traffic laws; and all workers must pay taxes.

Critics of the emphasis on rights in the United States point out that “just because you have a legal right to do (or not to do) something does not mean it is the right thing to do.” For example, the First Amendment protects freedom of speech and sometimes gives people the right to say hateful and abusive things. However, it does not make such speech morally right.

Others emphasize the pride that Americans take because rights have been extended to women, people of color, and persons with disabilities, all of whom had been previously excluded from full participation in society. Striking the correct balance between rights and responsibilities can be difficult.



◀ Leaders helped minority groups fight for civil rights. How have laws changed to include women, minorities, and persons with disabilities?

THE CASE OF...

The Apathetic Bystanders

Catherine “Kitty” Genovese was attacked and stabbed to death in 1964 in a highly populated area of Queens, New York. During the half-hour ordeal, 38 people heard Kitty’s screams for help and watched from their windows. Twice the killer was scared off by the sound of voices and the realization that he was being watched. However, both times, when it became obvious that nobody was going to call the police, the killer returned to finish off his victim. Rather than give any aid to Kitty, such as calling the police or an ambulance, all 38 bystanders chose to pull their shades, draw their blinds, and ignore Kitty’s urgent pleas for help as her life was taken by the deranged attacker.

PROBLEM 1.6

- a. Why do you think the bystanders took no action to help Kitty?
- b. Did the bystanders commit a crime by not acting? Give your reasons.
- c. Did the bystanders do the right thing?
- d. Should the law require that citizens help out in cases such as this one?
- e. Draft a bystander responsibility law.

criminal law the branch of law dealing with crimes and their punishment

felony a serious criminal offense punishable by a prison sentence of more than one year

misdemeanor a criminal offense, less serious than a felony, punishable by a prison sentence of one year or less

civil law all law that does not involve criminal matters, such as tort and contract law. Civil law usually deals with private rights of individuals, groups, or businesses.

civil action a noncriminal lawsuit, brought to enforce a right or redress a wrong

defendant the person against whom a claim is made. In a civil suit, the defendant is the person being sued; in a criminal case, the defendant is the person charged with committing a crime.

plaintiff in a civil case, the injured party who brings the legal action against the alleged wrongdoer

Kinds of Laws

Laws fall into two major groups: criminal and civil. **Criminal laws** regulate public conduct and set out duties owed to society. A criminal case can be brought only by the government against a person charged with committing a crime. Criminal laws have penalties, and convicted offenders are imprisoned, fined, placed under supervision, or punished in some other way. In the U.S. legal system, criminal offenses are divided into **felonies** and **misdemeanors**. Felonies, such as murder or robbery, are more serious crimes. The penalty for a felony is a term of more than one year in prison. For a misdemeanor, the penalty is a prison term of one year or less. Less serious crimes, such as simple assault or minor theft, are called misdemeanors.

Civil laws regulate relations between individuals or groups of individuals. A **civil action** is a lawsuit that can be brought by a person who feels wronged or injured by another person. Courts may award the injured person money for the loss, or they may order the person who committed the wrong to make amends in some other way. An example of a civil action is a lawsuit for recovery of damages suffered in an automobile accident. Civil laws regulate many everyday situations, such as marriage, divorce, contracts, real estate, insurance, consumer protection, and negligence.

Sometimes behavior can violate both civil and criminal laws and can result in two court cases. A criminal case is brought by the government against a **defendant**, the person accused of committing the crime. A civil case is brought by the **plaintiff**—the person or company harmed—against the defendant.

In a famous series of cases, former star football player O.J. Simpson was prosecuted in connection with the deaths of his former wife, Nicole Brown Simpson, and her friend, Ron Goldman. The Los Angeles district attorney was the **prosecutor** in this criminal case. In order to win a conviction, the district attorney had to prove that O.J. Simpson was guilty **beyond a reasonable doubt**. This means that if the jury (or the judge in a case tried without a jury) has any reasonable doubts about the defendant's guilt, then it must vote not to convict. The jury verdict in Simpson's criminal case was *not guilty*.

Several months later, the parents of Ron Goldman brought a civil suit against O.J. Simpson to recover damages resulting from the wrongful death of their son. In a civil case, the plaintiff wins by convincing the jury (or the judge in a case tried without a jury) by a **preponderance of the evidence**. The jury (or judge) needs only to decide if it is more likely than not that the plaintiff's complaint is true. This is a lower requirement for proof than the beyond-a-reasonable-doubt standard used in criminal cases. The reason for the different standards of proof is that a defendant loses money in a civil case but can suffer lengthy imprisonment or even the death penalty as a result of a criminal conviction. The Goldmans won their civil case against O.J. Simpson. Because the public tends not to understand the difference between civil and criminal cases, there was much confusion about how a person could be found not guilty in a criminal case and then responsible in a civil suit for damages for the same act.

prosecutor the state or federal government's attorney in a criminal case

beyond a reasonable doubt the level of proof required to convict a person of a crime. It does not mean "convinced 100 percent," but does mean there are no reasonable doubts as to guilt.

preponderance of the evidence usually the standard of proof used in a civil suit; the burden of proof that a party must meet in order to win the lawsuit. To win, a party must provide evidence that is more convincing than the other side's evidence.

PROBLEM 1.7

Matt and Kenji take Kenji's brother's car without telling him and drive to a local shopping center. Ignoring the sign "Parking for Handicapped Persons Only," they leave the car and enter an electronics shop.

After looking around, they buy a new tablet. Then they buy some sandwiches from a street vendor and walk to a nearby park. While eating, they discover that the tablet does not work. In their hurry to return it, they leave their trash on the park bench.

When Matt and Kenji get back to the shopping center, they notice a large dent in one side of their car. The dent appears to be the result of a driver's carelessness in backing out of the next space. They also notice that the car has been broken into and that a smartphone has been removed.

They call the police to report the accident and theft. When the police arrive, they seize a small, clear bag containing illegal drugs from behind the car's backseat. Matt and Kenji are arrested.

- a. List all the things you think Matt and Kenji did wrong.
- b. What laws are involved in this story?
- c. Which of these are criminal laws? Which are civil laws?

Our Constitutional Framework

The U.S. Constitution is the highest law of the land. Drafted more than two hundred years ago, this remarkable document is the longest-lasting written constitution in the world. It sets forth the basic framework of our government. It also lists the government's powers, the limits on those powers, and the people's freedoms that cannot be taken away by the government.

limited government a basic principle of our constitutional system. It limits government to powers provided to it by the people.

The principle of **limited government** is a fundamental notion in our Constitution. Before the U.S. Constitution was written and ratified, the individual states were reluctant to give up power to the national government. After all, a revolution had just been fought against the government of the king of England to preserve individual liberty and the freedom to govern independently. As a result, the Constitution created a national government of limited powers, with authority to pass laws only in the areas listed in Article I of the Constitution. Those who criticize the reach of the federal government's power today often cite these historic reasons for limiting its power.

separation of powers the division of power among the branches of government (executive, legislative, and judicial)

Perhaps nothing is more important in the Constitution than the division of power among the three branches of the federal government: the executive, the legislative, and the judicial. This division is known as the **separation of powers**. The legislative branch, or Congress, writes and passes laws called **statutes**. The executive branch, which includes the president and federal agencies, is primarily responsible for implementing and enforcing the law. To do so, the executive branch makes rules and issues executive orders that have the force of law.

statutes written laws enacted by legislatures

The judicial branch, or the courts, resolves disputes and interprets laws. These rulings may interpret a provision of the Constitution, a statute, or a rule issued by an executive agency.

The three branches of the federal government are independent, but each has the power to restrain the other branches through a system of

► This image depicts the members of the Constitutional Convention formally endorsing their new plan of government. *What is the purpose of the U.S. Constitution?*



Architect of the Capitol

checks and balances. The system was designed to prevent one branch from becoming too powerful and abusing its power. For example, Congress may investigate actions by the president or other executive officials, and members of Congress or the executive branch may be prosecuted in court for violating that law. Another check is the president's power to **veto**, or refuse to approve, laws passed by Congress. Yet another check is congressional power to impeach the president or federal judges.

One of the most visible and important checks of one branch on another is the courts' power of **judicial review**. Judicial review enables a court to declare unenforceable any law passed by Congress or a state legislature that conflicts with the country's highest law, the U.S. Constitution. For example, Congress might pass a law prohibiting media criticism of elected officials. If challenged in court, this law would be declared invalid and unconstitutional because it violates the freedom of speech and press guaranteed in the First Amendment to the Constitution. In general, the courts can declare a law **unconstitutional** either because (1) the government has passed a law that the Constitution does not give it the power to pass or (2) the government has passed a law that violates somebody's rights. Judicial review also gives the courts the power to declare an action of the executive or legislative branch to be unconstitutional. For example, the courts can strike down law enforcement actions that violate a constitutional right.

Just as the Constitution provides checks on the power of each branch, it also reflects the view that the powers of the federal government as a whole should be limited. The federal government can only make laws about certain topics and these topics are listed in the Constitution. States, on the other hand, can legislate on a much wider range of topics. In some areas, the federal and state governments share lawmaking power. This division of power between the states and the federal government is known as **federalism**. This is why most civil and criminal laws are passed by state legislatures or local governments, and many laws differ from state to state.

The principle of limited government is also manifested in the **Bill of Rights**, the first 10 amendments to the Constitution. The Bill of Rights defines and guarantees the fundamental rights and liberties of all Americans, including the freedoms of religion, speech, and press; the freedom from unreasonable search and seizure; and other individual rights. The Supreme Court has ruled that most provisions of the Bill of Rights limit the power of state and local governments as well as the federal government.

Every state has a constitution, and most state constitutions include the major principles of the U.S. Constitution. All provide for different branches of government, separation of powers, and a system of checks and balances. Some state constitutions provide greater protection of rights than the U.S. Constitution. The Constitution sets a floor, but not a ceiling, on individual rights. For example, some state constitutions guarantee people greater rights than they have under the U.S. Constitution.

The U.S. Constitution and most state constitutions are difficult to change. The reason is that they were drafted with the belief that they should not be

checks and balances the power of each of the three branches of government (legislative, judicial, executive) to limit the other branches' power, so as to prevent an abuse

veto prohibit; in government, the veto is the power of the chief executive to prevent enactment of a bill (i.e., to prevent the bill from becoming a law)

judicial review the process by which courts decide whether the laws passed by Congress or state legislatures are constitutional

unconstitutional conflicting with some provision of the Constitution

federalism the division of powers between the states and the federal government

Bill of Rights the first ten amendments to the Constitution, which guarantee basic individual rights to all persons in the United States

THE Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

—First Amendment

► Federal troops enforced the U.S. Constitution and forcibly integrated this school in Washington D.C. What is the role of the federal government in protecting individual rights?



THE Constitution

No law, varying the compensation for the services of Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

—Twenty-Seventh
Amendment

changed without careful thought, discussion, and debate. The idea was to make these documents as permanent as possible. However, allowances were made to accommodate necessary changes. The U.S. Constitution may be changed in two ways. An amendment must be proposed either by a two-thirds vote of each house of Congress or at a constitutional convention called by two-thirds of the states. In either case, it must then be ratified, or approved, by legislatures or conventions in three-fourths of the states.

People try to change the Constitution for many reasons. One of the most common reasons for change has been to extend rights that were not originally written into the Constitution. Although ratification is difficult, 27 amendments have been added to the Constitution. These amendments often reflect the changing viewpoints of citizens and their elected representatives. For example, when the original Constitution was ratified in 1789, most states restricted voting to white males who owned property. Since then, various amendments have extended voting rights to people of color, women, and persons aged 18 to 20.

Amendments for a range of issues have been discussed and proposed over the years. Some think there should be a constitutional amendment to provide full congressional representation to the citizens of the District of Columbia. Another proposed amendment would require the federal government to adopt a balanced budget. Other amendments have been proposed to punish flag burning, protect victims of crime, and ban abortions. The Equal Rights Amendment, passed by Congress in 1972, prohibited discrimination on the basis of gender. However, it failed to be ratified by the required 38 states, so it did not become a part of the U.S. Constitution. In 1992, the Twenty-Seventh Amendment became part of the Constitution. This amendment, first proposed by James Madison in 1789, bans midterm congressional pay raises.

PROBLEM 1.8

For each of the following situations determine for whether it involves the principle of separation of powers, checks and balances, judicial review, federalism, or some combination of these principles. Specify the principle or principles involved and explain your answer.

- a. A state law requires that a prayer be said each day in public schools. A federal court rules that the law violates a First Amendment clause that prohibits the government from establishing a religion.
- b. The U.S. Congress passes a law requiring that Supreme Court sessions be televised.
- c. Because a prison is very old and overcrowded, a state court orders the state legislature to spend \$100 million on a new prison.
- d. A state government passes a law legalizing recreational and medicinal marijuana use despite a federal statute that lists it as an illegal drug. The federal Drug Enforcement Agency seizes drugs from a citizen in this state and prosecutes the person in federal court.
- e. The U.S. Supreme Court rules that flag burning is a protected form of free speech under the First Amendment. In response to their constituents' wishes, senators and representatives from several states propose an amendment to the Constitution making it illegal to burn the flag.
- f. A federal court serves the president of the United States with a subpoena seeking evidence of a crime. The president refuses to turn over the evidence claiming executive privilege. The U.S. Supreme Court rules that the president's executive privilege power is limited and that he must turn over the evidence.

► The U.S. Capitol is home to the legislative branch of the federal government.



The laws that U.S. citizens are expected to obey come from many sources, including federal, state, and local governments. Constitutions set forth laws and establish the structure of government. Legislatures, of course, make laws. In some situations, voters can act directly as lawmakers. Administrative agencies also make many laws. Finally, laws are sometimes made by courts when they decide appeals.

Legislatures

The U.S. Constitution divides the power to make laws between the federal government and the state governments. At both the federal and the state levels, legislatures are the primary lawmaking bodies. The U.S. Congress—the federal legislature—is made up of two houses. The Senate is composed of 100 members, with two from each state, and the House of Representatives has 435 members, with each state represented according to the size of its population. The U.S. Constitution gives Congress the power to pass certain laws that are binding on the people in every state. States have the power to pass laws that apply only within their boundaries.

The lawmaking authority of Congress is exercised through the passage of laws known as federal **statutes**. When Congress passes a federal statute, it affects people in every state. Federal statutes deal with issues of national impact, such as environmental quality, national defense, homeland security, labor relations, veterans affairs, public health, civil rights, economic development, postal services, federal taxes, and social security and other benefits programs.

statutes written laws enacted by legislatures



The states' lawmaking powers are vested in their legislatures, which pass laws called state statutes. Except for Nebraska, every state has a two-house legislature. Most states' legislatures meet on an annual basis; in a few states, the legislatures meet every two years. States pass laws with statewide impact in such areas as education, transportation and traffic, state taxes, marriage and divorce, most criminal laws, and the powers and duties of state government officials. Although tribal governments of Native Americans vary, many place legislative authority, and sometimes executive authority, in a tribal council.

The power of the federal government to pass laws is limited. Congress cannot legislate unless given the power to do so in the Constitution. The states, on the other hand, have broader power to legislate. In general, the states have power to legislate in all those areas over which the national government was not granted power by the Constitution. For example, a state could not enter into a treaty with another country or coin money, as those are among the specific powers assigned to the national government. These powers are set forth in Article I, Section 8, of the Constitution.

In addition to the U.S. Congress and state legislatures, cities, towns, and counties also have lawmaking bodies such as county or city councils, boards of aldermen, and local boards of education. Local governments pass laws known as **ordinances** or regulations. Legislative issues that concern local governments include land use, parking, schools, and regulation of local business. Laws passed by local governments apply only to a county, city, or town. Local lawmaking bodies receive the power to enact ordinances from the state. Many laws important in our daily lives are passed by local governments.

▲ Segregated drinking fountains were common in the American South in the 1960s. *Why was the federal government concerned about this situation?*

ordinance a county or city law

supremacy clause the provision in Article VI of the Constitution stating that in the event of conflict between state and federal law, the federal law must be applied.

Sometimes federal laws conflict with state and local laws. For example, in the 1960s, federal laws against racial segregation in restaurants and hotels came into conflict with laws in some states that required separate accommodations for African Americans and whites. The courts ruled the state laws invalid based on Article VI of the Constitution, the **supremacy clause**, which states that “the Constitution and the Laws of the United States . . . shall be the supreme law of the land.” The Supreme Court has also ruled that Congress has sometimes passed laws about topics that are the proper focus of the states. These laws have been found to be an unconstitutional intrusion on the rights of states. Finally, there are a few topics for which both the federal government and the states have legislative power. For example, while most criminal laws are passed by state legislatures, Congress has also passed a limited number of federal criminal laws.

Investigating the Law Where You Live

Research to learn where on the Internet you can find a list and explanation of your state’s statutes.

PROBLEM 2.1

Decide whether each of the following is a federal, a state, and/or a local law. Then give one example, not listed here, of a federal, a state, and a local law.

- a. No parking on the east side of Main Street between 4:00 P.M. and 6:00 P.M.
- b. All persons between the ages of 6 and 16 must attend school.
- c. Whoever enters a bank for purposes of taking by force or violence the property or money in custody of such bank shall be fined not more than \$50,000 or imprisoned not more than 20 years or both.
- d. In order to sell any product on public streets, the seller must first apply for and receive a vendor’s permit.
- e. No employer of more than 15 persons may discriminate on the basis of race, color, religion, sex, or national origin.
- f. All persons traveling on interstate airline carriers are subject to search before entering the airplane departure area.

bill a proposed law being considered by a legislature

legislative intent what the lawmakers who passed a law wanted the law to mean. If the language of a statute is unclear, judges will often look at the legislative intent to help them interpret the law.

Legislatures and other lawmaking bodies try to respond to the needs of the citizens they represent by introducing legislation in the form of **bills**. Bills are used to enact new laws or to amend or repeal old laws. Ideas for bills can come from legislators, the executive branch, individual citizens, citizens groups, businesses, or lobbyists representing specific interest groups. A bill passed by the legislature and not vetoed by the executive branch becomes a law.

After a bill becomes a law, the people must obey it. Sometimes, though, the language of a law is open to differing interpretations. It is not always easy to know exactly what a law prohibits or allows. Disputes over what a law means frequently end up in court. A judge who interprets what the legislature means is determining **legislative intent**.

THE **CASE** OF...

The Unclear Law

The city of Beautifica has established a lovely park in the city. The city council wishes to preserve some elements of nature, undisturbed by city noise, traffic, pollution, and crowding. The park is a place where citizens can find grass, trees, flowers, and quiet. In addition, there are playgrounds and picnic areas. At one time a road ran through the park. Now the road is closed. The city council has enacted a law requiring that all entrances to the park have the following sign posted: NO VEHICLES IN THE PARK.



▲ Park rules should be clear to everyone.

PROBLEM 2.2

The law seems clear, but some disputes have arisen over its interpretation. Interpret the law in the following cases, keeping in mind what the law says (the letter of the law) as well as the legislative intent. Examine each situation and decide whether or not the vehicle described should be allowed in the park. Write the reasons for your choices. When you finish analyzing all of the situations, rewrite the law to make it clearer.

- a. Tony lives on one side of the city and works on the other. He will save ten minutes if he drives through the park.
- b. To keep the park clean, trash barrels are located throughout the area. The sanitation department wants to drive a truck into the park to collect the trash from the barrels.
- c. Two police cars are chasing a suspected bank robber. If one police car cuts through the park, it can get in front of the suspect's car and trap it between the patrol cars.
- d. An ambulance is racing to the hospital with a dying patient. The shortest route is through the park.
- e. Elena wants to take her baby to the park in a stroller.
- f. A monument is being erected to the city's citizens who died in the Vietnam War. A tank, donated by the government, is to be placed beside the monument.
- g. Amul uses an electric wheelchair and wants to visit the park.
- h. Roshini wants to fly her toy drone in the park.

Drafting a Bill

No matter where the idea for a bill originates, eventually there must come a time when the bill is drafted—that is, when actual language is written. As you can see from *The Case of the Unclear Law*, even the simplest language might not be clear enough for people to understand. Legislation is often drafted and redrafted before being introduced and discussed by a legislative body. Despite these efforts, laws are sometimes difficult to read and understand. When misunderstandings occur, one of the basic purposes of law—letting people know what conduct is expected of them or what conduct is prohibited—is lost. When drafting laws, it is useful to ask the following questions to evaluate whether problems are likely to result.

- Is the law written in clear language?
- Is the law understandable?
- When does the law go into effect?
- Does the law contradict any other laws?
- Is the law enforceable? If so, by whom?
- Are the penalties for breaking the law clear and reasonable?

In deciding what a statute means, judges must follow certain rules. One rule is that courts will not enforce laws, particularly criminal laws, that are so vague that it is unclear exactly what conduct is prohibited.

TAKING ACTION: Law and Democracy

Drafting a Law Simulation

The harmful effects of cigarette smoking, both for smokers and for those nearby, continue to make headlines. In your town there is a discussion about prohibiting smoking in certain places. Opinion on this issue is divided. Some restaurant employees want to work in healthier, smoke-free environments. Some restaurant owners are concerned that no-smoking rules will harm their businesses and might result in a loss of jobs. Some citizens believe that smoking should be banned in all public places, including stores, restaurants, workplaces, and even outdoor spaces such as parks.

Still others believe that these restrictions go too far and intrude on the rights of people using

a lawful product (cigarettes). They believe that economic forces, rather than government action, will bring the best results. Some restaurants, for example, will choose to be smoke-free in order to attract patrons who care about this issue.

PROBLEM 2.3

You are a member of the citizens advisory group to your town council. Your group has been asked to draft a new ordinance dealing with smoking in public places.

- List the details that should be included.
- Create a draft of the ordinance, using the guidelines for drafting laws.
- Who would support your ordinance? Who would oppose it?

For example, a law that stated “it shall be illegal to gather on a street corner without a good reason” would be considered too vague because the phrase “good reason” is not clear. Another rule says that if there is doubt as to the meaning of a word in a criminal statute, the word must be strictly interpreted against the government. This usually means that words are given their ordinary meaning by the court. These rules are meant to encourage lawmakers to write clear laws and to ensure that people are not punished for failing to obey an unclear law.

Clarity in legal language is important. For that reason, some legislatures now attempt to write in simple, clear English rather than traditional legal language. Those who favor this practice argue that laws have been written in language that is too complex and should instead be written so that a person of ordinary intelligence and education can understand what is expected.

Agencies

Many of the laws that affect you are made by government agencies. Legislative bodies usually deal with problems in only a general way. They authorize administrative agencies to develop rules and regulations to make laws more specific. These regulations influence almost every aspect of our daily lives and have the force of law. For example, Congress passed a law requiring safe working conditions in places of employment. To implement the law, Congress established the Occupational Safety and Health Administration (OSHA). This agency develops specific regulations governing health and safety on the job. These regulations dictate specific requirements, such as the height of guardrails in factories, the number of fire exits, and the type of safety equipment to be worn by employees in various occupations.

Another example of a government agency is the Environmental Protection Agency (EPA). It works with other federal agencies, state and local governments, and Native American groups to develop and enforce regulations under existing environmental laws passed by Congress. The EPA sets national standards that help protect human health and safeguard the national environment, with enforcement delegated to state governments. The agency also works with industry and government at various levels on pollution prevention and energy conservation.

In response to the terrorist attacks of September 11, 2001, the federal government created new agencies and reorganized existing ones to increase homeland security. For example, in November 2002 President George W. Bush signed a bill creating a new federal Department of Homeland Security. The department’s primary mission is to help prevent, protect against, and respond to acts of terrorism on U.S. soil. An existing agency, the Department of Transportation (DOT), was also reorganized when the Transportation Security Administration (TSA) was created within DOT to protect the nation’s transportation systems.

▼ Specific rules and regulations are made by agencies such as the Department of Homeland Security. *Why do you think this agency is needed?*



U.S. Coast Guard photo by Petty Officer 3rd Class Cory Mendenhall

► A scientist conducts research to improve diagnostic tests for diseases. *How do administrative agencies work to protect the well-being of individuals?*



Investigating the Law Where You Live

Visit the official website of your state government. Note that your state has many agencies. Which state agencies are likely to be most important to you at some time in your life?

public hearings proceedings that are open to the public. During these proceedings, evidence is considered and then a decision is reached based on this evidence

The administrative agencies with the greatest impact on your daily life are those at the state and local levels. For example, a zoning commission and other local agencies where you live may have developed a plan that determines what kind of buildings can be located in specific parts of your town. A local agency may hold public hearings to determine whether a new restaurant can serve alcohol or feature live music.

Administrative agencies, then, are really hidden lawmakers, enacting numerous rules and regulations that affect business and industry as well as individuals. For example, regulations govern the amount of pesticides that can be used on produce, the number of animals that can be killed by hunters, the ingredients that can be used in canned food, the costs of phone calls and electricity, the hours of operation for bars and restaurants, the qualifications of people employed in various professions, and hundreds of other issues. In addition to their lawmaking functions, agencies also administer government programs and provide many services.

Regulations issued by these agencies become law without being voted upon. However, agencies usually hold **public hearings** before issuing proposed regulations. These hearings give individuals or businesses an opportunity to express their views on the proposals. In addition, regulations proposed by the federal government must be published in a special newspaper called the *Federal Register*. This allows people to learn about and comment on proposed rules.

Some people criticize rules and regulations created by federal and state agencies. Critics argue that these agencies have created bloated bureaucracies and require wasteful paperwork, interfering with the efficient operation of the marketplace. Others say administrative regulations give meaning to laws passed by legislatures, protect consumers and workers, and are an essential part of modern life.

CDC/James Gathany

PROBLEM 2.4

Complete one of the following exercises as a research project.

- a. Find an article in your local newspaper or online about an administrative agency. What is the agency's name? What does it do? Is it part of the federal, state, or local government? What does the article say about the agency?
- b. Find evidence of an agency at work in your community. What agency is acting? What action is the agency taking? Is there any way for the public to have an impact on the agency? If so, how? Is the agency part of the federal, state, or local government?

Courts

Law is also made by courts. Think about courtroom scenes you have seen on television. These courts were conducting **trials**. The person who loses a trial can sometimes ask a higher court to review and change the result of the trial. These higher courts are called **appeals** or **appellate courts**. When an appeals court decides a case, it issues a written opinion that sets a **precedent** for similar cases in the future. All lower courts in the jurisdiction where the precedent was issued must follow it. For example, if a state's supreme court ruled that the state's constitution required that school funding be equalized throughout the state—richer and poorer school districts would each have to spend the same amount per student—then all lower courts in that state would have to follow that precedent.

trial a court proceeding

appeals court a court in which appeals from trial court decisions are heard

precedent court decision on a legal question that guides decisions in future cases presenting similar questions

International Lawmaking

International law is usually defined as the law that applies to the conduct of countries. It is most often made when national governments make treaties with each other or with a group of countries. A **treaty** is an agreement or contract between countries. These treaties are sometimes created by the joint action of countries or by actions taken by the United Nations. Various international laws, usually made by treaty, regulate commerce among countries, refugees crossing national borders, ownership of property including copyrights and patents, the environment, and many other areas. The U.S. Constitution provides that treaties are the supreme law of the land if they are signed by the president and then ratified by a two-thirds majority of the U.S. Senate.

Treaties are also used to determine whether one country has a legal obligation to return someone accused of a crime or terrorist act to another country. The process in which one country asks another country to surrender a suspected or convicted criminal is called **extradition**. According to international law, each country is assumed to have authority over the people within its borders. To overcome this assumption, most countries have signed extradition treaties with other countries. The United States does not have extradition treaties with a number of countries, however, including China and North Korea.

treaty a pact between nations; if entered into by the United States through its executive branch, the pact must be approved by "two-thirds of the senators present," under Article II, Section 2 of the Constitution, to become effective

extradition the legal process in which one country or state asks another to surrender a suspected or convicted criminal



▲ The process of European integration has resulted in the creation of the European Parliament, the body that passes the majority of European laws. *Why are so many countries eager to join the EU?*

Important international law has been made by a series of treaties, signed since 1950 by various European countries, which formed the European Union (EU). These treaties established a European Parliament, which has the power to make laws that promote political and economic cooperation among European countries. A very visible example of this has been the EU's agreement to have a common currency called the euro. In 2018, twenty-eight countries belonged to the European Union, and five others were candidates for entry into the EU. Countries that join retain most of their sovereign power to make laws that are binding within their borders. However, in order to benefit all member countries, they do give up power in selected areas by delegating some lawmaking authority to an EU-wide organization.

The United Nations (UN), formed in 1945 and headquartered in New York City, has nearly 200 member countries, as well as many affiliated organizations such as the Commission on Human Rights, United Nations Educational, Scientific, and Cultural Organization (UNESCO), International Monetary Fund (IMF), World Trade Organization (WTO), World Health Organization (WHO), United Nations Children's Fund (UNICEF), International Labour Organization (ILO), and the World Bank. The UN also maintains a system of international courts and has become an important institution in the area of international law. Countries that join the United Nations agree to abide by the provisions of its charter.

The United States was one of the founding members of the UN and has been its biggest financial supporter. Some people in the United States, however, have criticized the UN for being inefficient, bureaucratic, and slow to act, often wasting time and money. Others criticize the United States for not fully supporting UN actions, especially when most UN member countries do not agree with U.S. policy.



◀ The United Nations building in New York City is the center of the organization's activities, which support global cooperation and world peace.

PROBLEM 2.5

The government of a country has been very corrupt for many years and has violated the human rights of many of its citizens by jailing and executing opposition leaders who are all from one ethnic group. The United States and most other countries have been critical of this government for its actions. The opposition groups in the country want to overthrow the government. The government reacts by rounding up and executing hundreds of members of the ethnic group leading the opposition.

The United States and many other governments around the world speak out against this action. The United Nations is considering a resolution authorizing sending UN troops into the country to stop what some are calling genocide, the systematic killing of an ethnic or cultural group. Some member countries believe the UN should not interfere militarily in the internal affairs of another country.

The UN Charter (Article 55) states: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

Article 56 states that all members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55.

- a. If you were the president of the United States, would you instruct our UN delegate to support the resolution authorizing the UN to send troops into this country? Explain.
- b. Assume the U.S. government does not think sending troops is the best way to solve this problem, but more than two-thirds of the countries in the UN vote in favor of the resolution. Should the United States contribute troops to the UN effort? Explain.
- c. After a presidential election and change of administrations in the United States, assume the U.S. government believes that forceful action must be taken against this government, but most other governments come to believe that the UN should not take joint action in this case. Should the United States take action alone?

► Community members advocate their cause by publicly expressing their opinions.



One of the most important goals of *Street Law* is promoting positive involvement in public affairs. This chapter discusses advocacy, or how civic engagement can influence the lawmaking process. In our democracy, the people are responsible for making the law, usually through their elected representatives. While voting is, of course, an important obligation of citizenship, an individual's lawmaking role is much broader than voting. Individuals are also responsible for working to change laws that are not helping to solve problems and working for new laws and policies that address problems in their communities, cities, states, or countries.

The Art of Advocacy

Advocacy is the active support of a cause. It also involves the art of persuading others to support the same cause. Advocacy is based on the careful gathering of facts, the development of excellent communication skills, and the creation of an effective plan and time line. In order to advocate effectively, you must determine what level or levels of government are responsible for addressing the problem.

High school students all over the country have become effective advocates on important questions ranging from national issues, such as violence prevention and military activity abroad, to local concerns, such as homelessness and school uniform policies. In some instances students have advocated change with their local schools and town or city councils. In other instances they have communicated with state or congressional representatives. For example, high school students concerned about smoking in student bathrooms lobbied for membership on their school's

TAKING ACTION: Law and Democracy

Changing the Law: Research and Role-Play

Work with your classmates in small groups to research one of the proposed laws listed below. Then answer the questions that follow. Each group will share its findings. The proposed laws would:

- require motorcycle riders of all ages to wear an approved safety helmet while riding on public roads.
- legalize the use of marijuana for medical purposes while under the supervision of a doctor.
- require voters to have a state-issued ID in order to vote.
- suspend a person's driver's license for failing to pay court-ordered child support.
- require every worker in the country to carry a national identification card with biometric information, such as a fingerprint, to make sure that all employees have legal status.



PROBLEM 3.1

- a. What arguments could be presented for and against the proposed law?
- b. What groups, organizations, or businesses are likely to lobby for or against the proposed law? What techniques could they use to influence legislators?
- c. How could social media be used to advocate for or against the proposed law?
- d. Predict the outcome if your community held a voter referendum on the proposed law. Explain your reasons.

safety committee. When they joined the committee, they worked with the school resource officer, building principal, and assistant principal to convince their county board of education to give them funds to purchase smoke detectors. The students then lobbied their state representative, who was so impressed with their solution that he introduced a bill in the next legislative session to make smoke detectors mandatory in public school bathrooms across the entire state.

Lobbying

Lobbying is a way to influence the lawmaking process by convincing lawmakers to vote as you want them to. The word *lobbying* comes from the seventeenth century, when interested persons would corner legislators in the outer waiting room of the legislature—the lobby. While lobbying often has a negative connotation, it is actually a basic right protected by the U.S. Constitution. Lobbying involves the right of free speech and often other rights, such as assembly, association, and freedom of the press.

A lobbyist is someone who works to convince a lawmaker to vote for or against a particular issue. Anyone can be a lobbyist. As a private individual, you can lobby elected officials on issues that affect your life. You can influence elected officials by expressing your opinions individually or as part of a group, either in person or by letter, petition, phone, or e-mail. Lobbyists also use political contributions, ads, favors, letter-writing campaigns, and other techniques to influence legislation on various issues.



▲ Many individuals and groups lobby for their causes in Washington, D.C.

Steps to Take

Writing a Public Official

- **Write in your own words.** Personal letters are far more effective than form letters or petitions. Explain to the official how the issue will affect you and your friends, family, or job.
- **Keep your letter short and to the point.** Deal with only one issue per letter. If you are writing about some specific proposed bill or legislation, identify it by name (for example, the National Consumer Protection Act) and by number if you know it (for example, H.R. 343).
- **Explain why you are writing.** Ask the official to state his or her own position on the issue. Request a reply and ask the official to take some kind of definite action.
- **Always put your return address on the letter, sign and date it, and keep a copy.** Your letter does not have to be typed, but it should be legible. Perhaps most importantly, it should reach the official before the issue is voted on.
- **Contact public officials by using e-mail or faxing a letter to their office.**

Today, special interest groups and organizations lobby on behalf of every imaginable cause and issue. Businesses and organizations hire professional lobbyists to influence federal, state, and local legislators. For example, the National Rifle Association employs lobbyists to oppose restrictions on gun ownership and use, while Handgun Control, Inc., lobbies for gun control. Literally thousands of professional lobbyists work in Washington, D.C., and in state capitals throughout the country. Those who lobby the federal government must register with Congress and file reports four times a year. In these reports, they must identify their clients and the specific bills on which they are working. They must also indicate how much money they have been paid for their lobbying work. In addition to lobbying for laws, grassroots groups can advocate for candidates.

Professional lobbyists have advantages over **grassroots lobbyists** because they may have more money behind them and they know legislators and their staffs personally. They know where the levers of power are. They know who to talk to and how best to talk to them. Nevertheless, grassroots lobbyists can be very effective, particularly when they join with others. Demonstration of grassroots support by large numbers of people is a very effective lobbying technique because legislators care about what their voters think.

Many critics of the lobbying system in the United States say it enables some people and businesses to “buy legislation.” It is true that contributors to political campaigns may have greater access to legislators and greater influence over how they vote on certain issues. However, others argue that lobbying is an integral part of American democracy. They claim that the use of money and influence is a legitimate way for groups to make their views heard. In general, however, issues facing lower-income Americans struggle to gain attention in the political system at least in part because those Americans cannot afford to form associations, contribute money, and hire lobbyists.

lobbying influencing or persuading legislators to take action to introduce a bill or vote a certain way on a proposed law

grassroots lobbyist a person, or group of people, who works to convince a lawmaker to vote for or against a particular issue by participating in rallies, meeting representatives, or letter writing campaigns

PROBLEM 3.2

- a. Select a current issue that concerns you. Search the Internet to find sites that deal with this issue. What information is available on each site? Does the information seem reliable? How can you tell? Do any of the sites suggest strategies you could use to lobby for the issue?
- b. Select a current issue that concerns you. Write a letter about it to a public official. Use the guidelines listed in the Steps to Take feature on page 31 to help you compose your letter. For example, you may write to your mayor, city council member, state legislator, congressional representative, or senator. E-mail your letter to the elected official and then analyze any reply you receive. Did he or she answer your questions or provide additional information?
- c. Do persons with more money have greater influence over legislators than those with less money? If so, is this unavoidable in a society like ours, or should steps be taken to reform the lobbying and campaign finance systems?

Steps to Take

Guidelines for Advocates

Before you begin to advocate, think through these steps for success:

- 1. Identify the issue.** Think about your school or community. Is there a problem that needs to be addressed? How do you know it is a problem? Can a new policy or rule address this issue?
- 2. Set a goal.** Visualize a better tomorrow by answering the following questions:
 - What solution are you proposing?
 - How will your community be improved if your solution is implemented?
 - What unintentional problems might be caused by your solution?
- 3. Become an expert on the issue.** Know the facts. Collect information to support your position. Monitor social media, search the Internet, and interview community members. Learn both sides of the issue.
- 4. Recruit allies. Identify roadblocks.** Identify coalitions already working on your issue. Social media features like hashtags, trend feeds, and contact networks can help you recruit allies and identify opponents. Why would opponents be against your proposed policy? What strategies might they use to resist your efforts? Who will be their allies?
- 5. Identify your strategies.** To advocate effectively, you will likely use a variety of Take Action Strategies. Consider the following:
 - create a social media group;
 - send out e-mail blasts;
 - conduct a survey;
 - create a petition, either digital or physical;

- coordinate a public rally, march, or vigil;
- testify at a public hearing on your issue;
- lobby in person; or
- attend a community meeting.

- 6. Plan for success.** What needs to be done first, second, etc.? Who will be responsible for what? How will you know you have been successful?
- 7. Work with the media.** The media is the best tool to get your solution out to a large audience. Seek to explain your issue and solution in just a few sentences. Incorporate your message into the following strategies:
 - start a social media campaign around the issue;
 - write a blog about the issue;
 - upload a video or participate in a podcast about the issue; and
 - circulate posters, flyers, and brochures.
- 8. Create a resource pool.** Money is only one resource that may be useful in your effort. Identify resources that exist within your group. What talents and skills do you and your team have to offer? Do you know a business or organization that may be willing to donate space, food, or other items to advance your cause?

Three Golden Rules for Advocacy

- 1. Clarity:** create a single message and stay focused on it.
- 2. Quantity:** create as large a network as possible to support your cause.
- 3. Frequency:** get your message out to as many people as possible as frequently as possible.

Voting

Voting is a basic constitutional right. Eligible voters may vote for president, vice president, two U.S. senators, and one U.S. representative. They may also vote for governor, state legislators, and numerous other state, county, tribal, and local officials.

Initiative and Referendum

In a representative democracy, laws are usually made by elected legislators acting on the voters' behalf. However, in some situations, the people can vote directly on proposed laws. Initiatives and referenda allow citizens to circulate petitions and put proposed laws on the ballot. An **initiative** is a procedure that enables a specified number of voters to propose a law by petition. The proposed law is then submitted to either the electorate or the legislature for approval. A **referendum** occurs when a legislative act is referred to voters for final approval or rejection. Recent state referenda have been held on issues, such as gun control, gay rights, abortion, environmental protection, and funding for schools, parks, roads, and other government programs. Many states also permit **recall** elections, which allow voters to remove elected officials from office.

Some people argue that allowing voters to express their opinions directly through initiatives or referenda, rather than indirectly through representatives, is a more democratic system of lawmaking. Rather than being a true democracy, the United States is technically a republic because the people elect representatives to vote on laws instead of voting on them directly. Supporters of the initiative and referendum processes point out that they promote direct involvement in lawmaking and reflect the true will of the people. Others argue that allowing direct voting on laws will sometimes result in majority populations voting to take away rights from minorities.

Some form of direct voting exists in 30 states. In 1897 South Dakota became the first state to adopt statewide initiative and popular referendum systems. Most of the states that now have this system adopted it during the first two decades of the twentieth century. Many laws have been proposed through the initiative process, including the right to vote for women, the eight-hour workday for government employees, term

initiative a procedure by which voters can propose a law and submit it to the electorate or the legislature for approval

referendum a procedure in which issues are voted on directly by the citizens rather than by their representatives in government

recall the removal of an elected official from office by a vote of the people



◀ Students get involved in elections by encouraging people to vote.



▲ Women were effective in lobbying. Their defeat of local candidates was especially persuasive in convincing Congress to pass the Nineteenth Amendment. *Why do some people believe that voting is the most important political right?*

limits for elected officials, campaign finance reform, and environmental protection. This system has also been used to pass laws and establish public policy related to affirmative action.

Who Can Vote?

To register to vote, you must be a U.S. citizen by birth or naturalization, at least 18 years old by the date of the election, and a resident of the community in which you register. It is a violation of federal law to falsely claim U.S. citizenship in order to register to vote. You cannot register to vote in more than one place at a time. A few communities have changed their laws to allow those who are 16 and 17 to register and vote in local elections.

Registering to vote is handled by each state. Applicants usually register by completing an application form in person or by mail. The *National Voter Registration Act*, also known as the Motor Voter Act, requires states to make registration forms available not only at motor vehicle departments,

but also at numerous state offices, welfare offices, and agencies that serve the disabled. In addition, some organizations and states make voter registration forms available on the Internet. As of 2018, 17 states plus the District of Columbia allowed voters to register on Election Day.

Where states have adopted same-day voter registration, voter participation has increased. In some other states, steps taken to prevent voter fraud have made it more difficult to vote. In 2018 the Supreme Court considered an Ohio law that eliminated people from the voter rolls if they failed to vote in a few elections and then did not respond to a notice from an election official. In a 5-4 decision, the Court found that this law did not violate the Constitution.

A fair election requires that voters have access to information about the candidates, the issues, and the details of the voting process. Many organizations—some partisan and some nonpartisan—provide election information online. The League of Women Voters (www.lwv.org) provides online information about federal, state, and local elections and candidates.

Information about federal elections, including past statistical data, is available from the Federal Election Commission (www.fec.gov). The FEC also provides online access to the National Mail Voter Registration Form, which has been translated into Spanish, Chinese, Filipino, Japanese, Korean, Vietnamese, and Tagalog to encourage registration by language minority groups.

Voting restrictions have been used in the past as a way to prevent certain groups from participating in elections. African Americans did not receive the right to vote until 1870, with the passage of the Fifteenth Amendment. Women gained the right to vote in 1920. Congress did not grant citizenship and therefore the right to vote to all Native Americans until 1924. Until the passage of the *Voting Rights Act* in 1965, some states had barriers such as poll taxes, literacy tests, and character exams that kept millions of people from voting. In 1971 the passage of the Twenty-Sixth Amendment gave 18 year olds the right to vote.

Today there are disagreements in many states about whether it is good policy to require people to have ID cards in order to vote. In 2008 the Supreme Court said in *Crawford v. Marion County Election Board* that requiring voter ID cards did not violate the Constitution. Those in favor of ID cards think that it is now too easy to cast fraudulent votes, while those opposed argue that requiring ID cards is unnecessary and would overly restrict minorities, the elderly, and the poor from being able to vote.

Participating in Elections

According to the U.S. Census Bureau, 70 percent of the voting age population was registered to vote in 2016, and 87 percent of those registered did in fact vote in the presidential election. This means that 61 percent of the voting-age population voted in that election. Typically, turnout in national elections is higher in presidential election years (e.g., 2008, 2012, 2016) and lower in years with only Congressional elections (e.g., 2010, 2014, 2018). Data from recent elections also suggest that lower income people, members of some racial minorities, and persons who have not attended college vote at rates significantly lower than the rate for middle-class whites. Young people typically vote at much lower rates than older people. Many countries—including some of the world's newest democracies—have much higher voter turnout for national elections than the United States.

THE Constitution

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

—Fifteenth Amendment

Investigating the Law Where You Live

Learn more about how to vote in your community. Where and how does one register to vote? Is there a residence requirement? If so, what is it? When and where does one go to vote?

PROBLEM 3.3

- a. Make two lists: one of all the reasons for voting and another of all the reasons for not voting.
- b. The following proposals have been made to encourage more people to vote. Do you favor or oppose each proposal? Explain your answers.
 - Allow people to register and vote on the same day.
 - Lower the voting age to 16 so some high school students could vote.
 - Keep the polls open for a week instead of one day.
 - Automatically register everyone who has a driver's license.
 - Allow for voting up to a month early.
 - Change election day from a weekday to a weekend day.

DELIBERATION

Should voting be compulsory in the United States?

Free and fair elections are essential to a democracy. They make true representative government possible. Through voting, people express their views about government. They choose leaders who they believe will improve their country and community. But what happens when people choose not to vote? What does that indicate about democracy?

In the United States, voter turnout can vary by state, by election type, and by a number of other factors. Only about 56 percent of eligible voters cast ballots in the 2016 U.S. presidential election. Usually, even fewer voters turn out for state or city elections. A 2016 report from Portland State University revealed that local election turnout in 10 of America's 30 largest cities was less than 15 percent.

Voter turnout varies widely based on age, income level, and race or ethnic group. American voters 65 and older turn out at 30 percentage points higher than 18- to 24-year-olds. Americans earning \$100,000–\$150,000 per year vote at a rate that is 30–50 percentage points higher than those earning less than \$20,000 per year. And in the 2016 election, white American voter turnout was 7 percentage points higher than black Americans, 16 percentage points higher than Asian Americans, and 18 percentage points higher than Hispanic voters.

Some people in the United States are concerned about low voter turnout. They fear that if citizens do not vote, unqualified or bad leaders will be elected or stay in power. They doubt that leaders will be accountable. How can leaders speak for “the people” when so few people actually chose them? They worry that variations in voter participation among different groups mean that the government is not truly representative of everyone.

Not everyone agrees that voter turnout is a problem. Some people want voters to demonstrate their desire to vote, even if that means that turnout numbers remain low. In a 2017 Pew Research Center poll, 39 percent of Americans said that citizens should have to prove they want to vote by registering in advance. There are other concerns that by making voting easier, the government would increase opportunities for voter fraud as well. For some of these reasons, states vary in their registration and voting requirements.

Some people believe that citizens should be required to vote. This is called compulsory voting. In countries where **compulsory voting** exists, voters are not required to vote for any particular candidate, but they must be able to prove they voted. In 22 democratic countries, citizens are required to vote in national elections. In some cases, without a valid excuse, they may face some form of punishment if they do not vote.

Should voting be compulsory in the United States?

Consider the arguments.

YES

Voting should be compulsory in the United States.

Elections with high rates of voter participation are more legitimate because they better represent the will of the people.

Compulsory voting increases voting among people who are poor, are less educated, and were previously disenfranchised. At one point, some U.S. states required voters to pay poll taxes and pass literacy tests. These state requirements aimed to disenfranchise African Americans, but also impacted poor people and illiterate people. The legacy of this practice continues today, as African Americans, poor people, and less educated people turn out to vote at lower rates. Compulsory voting amplifies the voices of people who have previously been disenfranchised, which is good for democracy.

Compulsory voting laws do increase voter turnout. In national elections compulsory voting has increased turnout by 10-15 percentage points and even more in local and regional elections. In Australia, where voting is compulsory, voter turnout averages 95 percent.

Compulsory voting laws reinforce that voting is a vital part of democratic citizenship. Furthermore, compulsory voting can create a feeling of civic duty and responsibility among a nation's people.

NO

Voting should not be compulsory in the United States.

Authoritarian governments often coerce people to vote and to attend political rallies to give the appearance that their leaders are popular. When so many people vote, compulsory voting makes a corrupt election seem legitimate. Voluntary voting makes democracy more transparent.

Compulsory voting may be particularly burdensome to low-income voters who may not have the flexibility to take time off of work to vote. In countries that fine people who don't vote, penalties will also more harshly impact these low-income voters.

There are easier ways to increase voting. Democracies should better educate potential voters about the issues and the candidates' plans. Then people will know what is "at stake" and why they should vote. One strategy is same-day voter registration, which has increased turnout in states with the practice by 3–7 percent.

People who are being forced to vote might not make wise or informed decisions. They may simply vote for someone at random and negate the votes of people who do care. Our democracy does not need more participation by people who do not know or care about the candidates or issues.

GUIDING QUESTIONS

1. What are the two most compelling reasons to support the deliberation question?
2. What are the two most compelling reasons to disagree with the deliberation question?
3. What is one area of this deliberation where the two sides might find common ground?

¹ Portland State University, "Who Votes for Mayor?," 2016, <http://www.whovotesformayor.org/>

² National Conference of State Legislatures, "Same Day Voter Registration," March 27, 2018, <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.

Campaign Finance Reform

The 200-year tradition of privately financed elections in the United States has been accompanied by 200 years of campaign finance reform. However, efforts to counteract the influence of money on politics have usually been unsuccessful. Politicians have been quick to condemn fundraising scandals but slow to agree on laws to prevent them.

According to the League of Women Voters, those who support campaign finance reform want to improve methods of financing political campaigns for several reasons: to ensure the public's right to know, to combat corruption and undue influence, to enable candidates to compete more equitably for public office, and to promote citizen participation in the political process. Some groups argue for complete public funding of certain elections.

In recent years, federal elections have become extraordinarily expensive. To win, most candidates have to be rich, skillful fundraisers, or both. In fact, the candidate who raises the most money seldom loses the election.

Critics of the current system argue that (1) people of lower or middle income cannot run for office successfully because they cannot raise huge sums of money; (2) special interests receive favors in exchange for substantial campaign contributions; and (3) elected officials spend too much time raising money and not enough time doing their jobs.

Others argue that political contributions are a form of speech protected by the First Amendment to the U.S. Constitution. From their perspective it violates a voter's or a candidate's constitutional rights to limit the amount of money that can be contributed to or spent on a campaign. In addition to their constitutional arguments, those opposed to reform in this area contend that as a practical matter it is difficult, if not impossible, to create enforceable campaign finance reform laws.

In 1976 the Supreme Court ruled in the case of *Buckley v. Valeo* that political contributions and expenditures are protected by the First Amendment. In 2010 the Supreme Court extended First Amendment protections to unions and corporations in *Citizens United v. Federal Election Commission*.

As a result of this case and others, the government cannot restrict independent political expenditures by corporations, unions and other associations of people. And there are First Amendment limits on the government's power to restrict contributions to candidates by individuals.

An independent expenditure is one made by a group that is separate from a candidate and that does not coordinate with the candidate. During the 2018 mid-term elections, more than \$1.2 billion was spent on advertisements by such groups.

▼ Delegates holding signs in support of Barack Obama and Joe Biden in 2008.



Some argue that this spending is good because advertisements inform the people and encourage candidates to take a stand on important issues. Others argue that these expenditures might be not completely independent of campaigns and because of their size could have an undue, corrupting influence on candidates.

A special campaign finance problem arises in states where judges are elected, rather than appointed, to their positions. Some states that initially appoint judges later make them stand before the voters in retention elections. An advantage of electing judges is that this builds a degree of accountability into the system. However, some believe that requiring judges to raise money to finance their campaigns compromises judicial independence. For example, studies of judicial elections have shown that the primary contributors to these campaigns are lawyers and law firms.

PROBLEM 3.4

- a. Which of the following proposals is closest to your view of campaign finance reform? Explain your reasons.
- The only way to take money out of politics is to have full federal funding of presidential and congressional elections.
 - In a free country with democratic elections, it makes no sense to try to limit how much money voters and candidates can contribute to campaigns. If people have the money and want to spend it on campaigns (either their own campaign or for the candidate of their choice), then they should be able to.
 - We have to balance the rights of those who want to contribute money to campaigns against the need to fight corruption and undue influence in politics. The best way to do this is through disclosure laws: let everyone see who is giving money to candidates. If elected officials favor the special interests that funded their campaigns, the voters can vote them out of office in the next election.
- b. Which of the following is closest to your view of judicial elections? Explain your reasons.
- Money and judicial elections do not mix. Independent commissions should appoint judges. Politics should be taken out of choosing judges.
 - The chief executive—the governor—should nominate judges, and the state legislatures should confirm them. The federal judicial system works this way and should be our model in the states.
 - In a democracy we have to trust the people. Judges should be elected just like other officials.

CHAPTER 4

Settling Disputes

► Conflict is part of everyday life.



Effective community advocates work to solve problems in their community by proposing and lobbying for better laws and public policies. In doing so, they often use the legislative process to resolve conflict. Conflict in the public arena—sometimes called controversy—creates an important opportunity to learn about issues that are of public concern in a democracy. The ability to collect the facts about an issue, formulate an opinion, listen to competing ideas, and discuss and debate the best course of action are all valuable civic skills in settling conflict. As you will learn later in this unit, courts can also help resolve conflicts, but most conflict is settled before it ever gets to court.

Because conflict is a natural part of everyday life, it is important to consider how to handle it. We often think of conflict as a problem, but it can also be productive. When conflict is managed responsibly, it can provide a great opportunity to learn. Therefore the most important question is not whether there will be conflict in your life, but how you will respond to it.

There are sometimes disadvantages in going to court to resolve conflict. The court process can be time-consuming and expensive. Going to court can even make some problems worse. For example, in divorces and child custody disputes, going to court often causes extreme anger and bitterness. Some people feel that by going to court, they will lose even if they win!

Methods for Solving Disputes

Among the most common methods for solving disputes out of court are negotiation, arbitration, and mediation. As you will learn, negotiation is the most informal of these methods. Mediation is more formal than negotiation. Arbitration is still more formal, and in some ways it resembles going to court.

Negotiation is the process by which people involved in a dispute discuss their problem and try to reach a solution acceptable to all. It is important to learn to negotiate, because the skills involved in handling conflict responsibly are used every day by people in all aspects of life. You negotiate when you have a disagreement with your parents, your friends, or your teacher and you work out an agreement. The informality of negotiation makes it ideal for many types of problems. Sometimes people hire attorneys to negotiate for them. For example, people involved in auto accidents sometimes hire attorneys to negotiate with the insurance company over payments for injuries or damages to their cars. However, even if you use an attorney to negotiate, you must approve any agreement before it becomes final. Attorneys sometimes file a case in court and then still attempt to work out a **settlement**, or agreement, before the case goes to trial. A large number of civil cases are settled this way, saving both time and money.

It is helpful to think of negotiation in three phases—preparation for negotiation, the negotiation itself, and post-negotiation. Each phase contains steps that encourage a fair negotiation process. Each party in the dispute should follow all of the steps in each phase to make sure the process helps to resolve the problem.

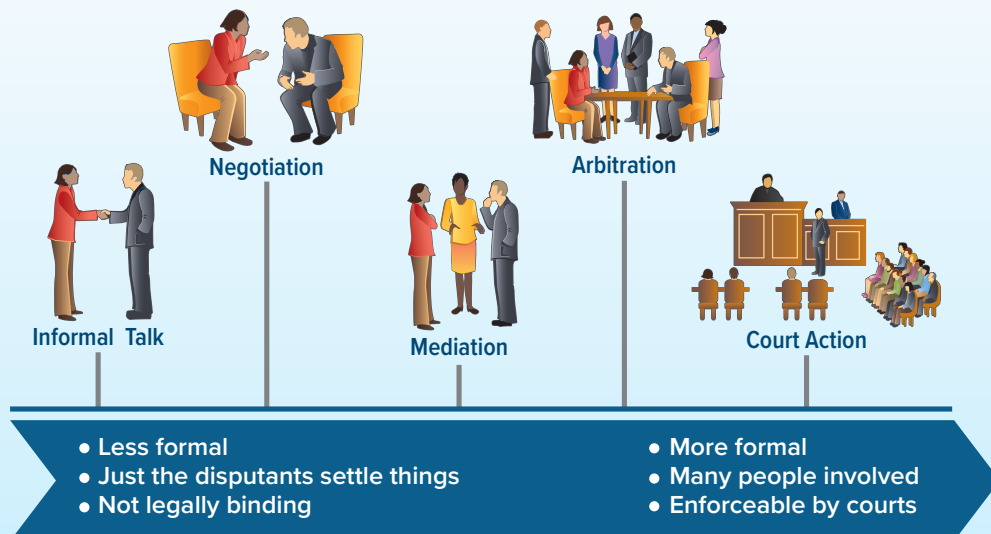
The steps in the first phase help both parties prepare to negotiate. First, all involved should come to the discussion with a sincere interest in settling the problem. Then the issue that is causing the conflict must be identified as clearly as possible. Everyone should think about what is really causing the

negotiation the process of discussing an issue to reach a settlement or agreement

settlement a mutual agreement between two sides in a civil lawsuit, made either before the case goes to trial or before a final judgment is entered, that settles or ends the dispute

FIGURE

4.1 Methods of Dispute Resolution



There are several ways to resolve disputes without violence. **ANALYZE THE DATA** How is negotiation different from mediation? From arbitration?



▲ Divorce negotiations often become heated as both parties try to agree upon the best possible solutions to their problems. *Why is it important to separate the demands (positions) from what the parties really want (interests) during the negotiation process?*

problem and try to separate the demands (positions) from what the parties really want (interests). In the third step, each party should consider the issue from the perspective of the other in order to help them understand the concerns and feelings on the other side of the conflict. Finally, each party should sort out his or her feelings about the problem so each can understand how the interests of the other party differ from their own. After this step, both parties should identify two workable solutions that might resolve the problem.

The steps in the second phase focus on the negotiation itself. Both parties must work together to identify the real issue that needs to be resolved. This stage involves listening carefully, understanding what is being said, and asking questions to clarify and gain more information. Once the issue is identified, both parties should work together to create a list of as many solutions to the problem as possible. Then the two or three most workable solutions should be identified from this list. Each party should be realistic about the solutions that are chosen, perhaps by giving examples so everyone can see how the potential solution will work. To conclude the negotiation, the main points of the agreement should be repeated to be sure that both parties understand them. It is also a good idea to write down the agreement and decide what should happen if the agreement is broken.

In the third phase of the negotiation process, both parties to the dispute should make a few final decisions. For example, they should decide what to tell others about how the problem was handled. Everyone involved should be in agreement on what people outside the negotiation will be told. This step could help deter problems in the future. In addition, both parties should be willing to discuss the problem again if the agreement does not seem to be working.

In **arbitration**, both parties to a dispute agree to have one or more persons listen to their arguments and make a decision for them. The

arbitration a way of settling a dispute without going to trial. The parties who disagree select one or more impartial persons to settle the argument. If the arbitration is binding, then all parties must accept the decision.

Steps in a Typical Mediation Session

Step 1. Introduction

The mediator helps the people involved in the dispute feel at ease and explains the ground rules for behavior during the mediation. Such rules can include agreeing to remain seated and agreeing that any party may request a break during the mediation.

Step 2. Telling the Story

Each person tells what happened. The person who brings up the problem usually tells his or her side of the story first. No interruptions are allowed. Then the other person explains his or her side. These people are the disputants.

Step 3. Identifying Positions and Interests

The mediator tries to make certain that each disputant is clearly understood by listening carefully to each side, summarizing each person's view, and asking questions. Sometimes the mediator will encourage the disputants to ask questions and summarize each other's point of view in order to check for understanding.

Step 4. Identifying Alternative Solutions

The disputants think of possible solutions to the problem. The mediator makes a list and then asks each disputant to explain his or her feelings about each possible solution. Sometimes in a difficult situation, the mediator might also meet with each disputant separately to discuss his or her concerns.

Step 5. Revising and Discussing Solutions

Based on the feelings of the disputants involved, the mediator may help the disputants change some of the possible solutions and identify a better solution to which the disputants can agree.

Step 6. Reaching an Agreement

The mediator helps the disputants reach an agreement that both can accept. The agreement is written down. The disputants also discuss what will happen if they find out the agreement is not working for them.

arbitrator is like a judge, but the process is less formal than a trial. Arbitrators, like judges, have the authority to make the final decision, and the parties must follow it (except in nonbinding arbitration). Arbitration is common in contract and labor-management disputes and in some international law cases. Agreements between labor unions and employers include arbitration clauses. This means that the union and the employer agree in advance to submit certain disputes to arbitration and to be bound by the arbitrator's decision.

Mediation takes place when a third person helps the disputing parties talk about their problem and settle their differences. Unlike arbitrators,

mediation the act or process of resolving a dispute between two or more parties

Investigating the Law Where You Live

Research to find out if there are any programs in your community for people who want an alternative to going to court. What types of disputes do these programs address?

ombudsperson a person who has the power to investigate reported complaints and help achieve fair settlements

mediators cannot impose a decision on the parties. The agreement is the result of the parties' willingness to listen carefully to each other and come up with a reasonable settlement to the problem.

The mediator acts as a neutral third party by listening carefully to both sides. He or she also tries to help the parties understand each other's positions and find ways to resolve the dispute. Mediation is voluntary; the disputants themselves must reach a decision about the problem. Mediation allows the disputants to air their feelings, avoids placing blame, and concentrates on the future relationship between the parties. The key issue is how the disputants will work or live together after the mediation.

Mediation is used to solve a variety of disputes. Community mediation programs help settle disputes between husbands and wives, landlords and tenants, and consumers and businesses. For example, the Better Business Bureau (BBB) may mediate disputes between shoppers and store owners. In other places, neighborhood justice centers help settle disputes between community residents. Government agencies, newspapers, and some universities have **ombudspersons**, people who have the power to investigate complaints and then help the parties reach some agreement. To locate a mediation program in your community, contact your local court, district attorney's office, or social services agency.

The key to the success of both negotiation and mediation is that the ideas for resolving the conflict come from the people who have the conflict. The disputants take responsibility for their actions and work out the problem. Unlike court cases, both of these processes result in an agreement that is focused on the future relationship between the disputing parties. Because the solution comes from the parties, they are more interested in making the solution work.

The parties do not provide the solution in an arbitration. The arbitrator determines the solution. However, parties to a contract often include an agreement to resolve disputes through arbitration because it is faster and less expensive than going to court.

PROBLEM 4.1

Examine the following situations and decide the best method for solving each problem. Consider informal discussion, negotiation, arbitration, mediation, going to court (including small claims court), seeking help from a government agency, and other methods. Explain your answers.

- a. Two sisters share a room. However, they disagree over how the room should be arranged and decorated.
- b. A new plasma television breaks after two weeks, and the salesperson refuses to fix it.
- c. A landlord will not make needed repairs because he believes the tenant caused the damage.
- d. A fast food restaurant and an employee disagree over the wages and conditions of employment.
- e. The Internal Revenue Service sends you a letter claiming that you owe another \$2,000 in taxes. You disagree.

TAKING ACTION: Law and Democracy

Problems at the Mall

Magda, David, and Rashida have been friends since the sixth grade. One of their favorite activities is to go to the mall and look around in the stores. Sometimes they make purchases and sometimes they just window-shop. There are lots of young people who do this, and it is fun to see people and hang out.

Recently, a number of stores at the mall have experienced an increase in shoplifting and vandalism. As a result, the stores have made a policy that no one under 16 years of age can enter without a parent or guardian. The new rules also state that if you are between the ages of 16 and 18 you cannot enter the store in groups larger than two. Other teens have to wait outside until each pair leaves. Store owners have threatened to call the police if the young people give them any trouble about the new policies.

This policy makes Magda, David, and Rashida angry. They believe it is unfair. After all, they are paying customers and spend money in these stores. Why is the rule directed only at young people? They do not want to get into trouble with



the police, but they do not understand why they have to be treated as troublemakers when they have not done anything wrong.

The manager of the shopping mall, along with one of the store owners, has agreed to meet with two of the teens and a mediator to try to find some workable solutions.

PROBLEM 4.2

In preparation for the mediation session, the disputants should consider the following issues:

- a.** What are your concerns? How would you state the issue in the dispute?
- b.** What is your starting position (demand)? What are your underlying interests (what do you really want)?
- c.** What is the best conceivable outcome from your perspective?

- d.** What do you think the starting position and underlying interests of the other side will be?
- e.** Identify two workable solutions that would solve the conflict.

Use the list of Steps in a Typical Mediation Session to walk through the process and develop a reasonable solution for the disputants.

CHAPTER 5

The Court System

► The use of juries builds the values of democracy into the court system.

trial courts courts that listen to testimony, consider evidence, and decide the facts in a disputed situation

parties the people directly concerned with or taking part in any legal matter

plaintiff in a civil case, the injured party who brings legal action against the alleged wrongdoer

prosecutor the state or federal government's attorney in a criminal case

defendant the person against whom a claim is made. In a civil suit, the defendant is the person being sued; in a criminal case, the defendant is the person charged with committing the crime.

adversarial system the judicial system used in the United States. It allows opposing parties to present their legal conflicts before an impartial judge and jury.



In the United States, there are many court systems. Each state has its own court system, and the federal court system exists at the national level. Each of these systems has trial and appeals courts. There are also a number of tribal justice systems as well as a system of military justice. The highest court in the land is the Supreme Court of the United States. The Supreme Court hears appeals from the other court systems.

Trial Courts

Trial courts listen to testimony, consider evidence, and decide the facts in disputed situations. Evidence can be anything that might tend to prove or disprove an issue in the case. In a trial there are two **parties**, or sides, to each case. In a civil trial, the party bringing the legal action is called the **plaintiff**. In a criminal trial, the state or federal government initiates the case and serves as the **prosecutor**. In both civil and criminal trials, the party responding to the plaintiff (civil) or prosecution (criminal) is called the **defendant**. Once a trial court has made a decision, the losing party may be able to appeal the decision to an appellate, or appeals, court.

The trial system in the United States is an **adversarial system**. This means it is a contest between opposing sides, or adversaries. The theory is that the trier of fact (the judge or jury) will be able to determine the truth if the opposing parties present their best arguments and show the weaknesses in the other side's case.

The adversarial process is not the only method for handling legal disputes. Many countries have different trial systems. Some European



◀ Judges play a more active role under the inquisitional system (left) than they do in the adversarial system (below). *In what ways are judges more involved in the court proceedings of an inquisitional system?*



countries use the **inquisitional system**, in which the judge is active in questioning witnesses and controlling the court process, including the gathering and presenting of evidence. These judges can order witnesses to appear, conduct searches, present and comment on evidence, and, in general, take the lead role in trying to uncover the truth. This system differs from the adversarial process, in which these matters are left to the competing parties, with a decision being made by the judge or jury based on the arguments and evidence presented.

The adversarial process is sometimes criticized. Critics say that it is not the best method for discovering the truth with respect to the facts of a specific case. They compare the adversarial process to a battle in which lawyers act as enemies, making every effort *not* to present *all* the evidence. According to this view, the goal of trial is “victory, not truth or justice.” Despite its drawbacks, the adversarial process is the cornerstone of the American legal system. Most attorneys in the United States believe that approaching the same set of facts from adversarial perspectives will uncover more truth than would other methods.

inquisitional system a European method for handling disputes in which the judge plays an active role in gathering and presenting evidence and questioning witnesses

PROBLEM 5.1

- a. Do you think the adversarial system is the best method for solving disputes? Why or why not?
- b. Indicate whether you agree or disagree with the following statement: "It is better that ten guilty persons go free than that one innocent person suffer conviction." Explain your answer.
- c. In a criminal case, should a lawyer defend a client he or she knows is guilty? Would you defend someone you knew was guilty? Explain.

Judges and juries are essential parts of our legal system. The judge presides over the trial and makes sure that attorneys follow the rules of evidence and trial procedure. In jury trials, the judge instructs the jury as to the law involved in the case and the jury determines the facts, including whether the defendant in a criminal case is guilty or not guilty. Finally, in criminal trials in most states, judges sentence individuals convicted of committing crimes. In nonjury trials, the judge determines the facts of the case and renders a judgment.

The Sixth Amendment to the U.S. Constitution guarantees the right to trial by jury in criminal cases. This right applies in both federal and state courts. The Seventh Amendment guarantees a right to trial by jury in civil cases in federal courts. This right has not been extended to state courts, but many state constitutions provide a right to jury trial in civil cases. However, the fact that a constitution protects the right to trial by jury does not mean that a jury is required in every case. Juries are not used as often as one might think. In civil cases, either the plaintiff or the defendant may request a jury trial. In criminal cases, the defendant decides whether there will be a jury. Most civil cases result in out-of-court settlements or trials by a judge. Most criminal cases are never brought to trial. Instead a **plea bargain**, or pretrial agreement between the prosecutor and the defendant and his or her lawyer, disposes of the case without a trial.

plea bargain in a criminal case, the negotiations between the prosecutor, defendant, and defendant's attorney. In exchange for the defendant agreeing to plead guilty, the prosecutor agrees to charge the defendant with a less serious crime, which usually results in a lesser punishment

If a jury trial is requested, a jury is selected and charged with the task of determining the facts and applying the law in a particular case. To serve on a jury, you must be a U.S. citizen, at least 18 years old, able to speak and understand English, and a resident of the state. As citizens we have a duty to serve on juries when called upon. At one time, people from certain occupations were exempt from jury service. These included members of the clergy, attorneys, physicians, police officers, firefighters, and persons unable to undertake juror tasks because of mental or physical disability. In some places, these persons are no longer excluded. Convicted felons are usually ineligible for jury service unless their civil rights have been restored. People who are not exempt and are called for jury duty are sometimes excused if they can show "undue hardship or extreme inconvenience."

Jury service is an important civic duty that is necessary to preserve the constitutional right to trial by jury. To determine who is called for jury

Steps in a Trial

Step 1. Opening Statement by Plaintiff or Prosecutor

The plaintiff's attorney (in civil cases) or the prosecutor (in criminal cases) explains to the trier of fact (the judge or jury) the evidence to be presented as proof of the allegations (unproven statements) in the written papers filed with the court.

Step 2. Opening Statement by Defense

The defendant's attorney explains evidence to be presented to disprove the allegations made by the plaintiff or prosecutor.

Step 3. Direct Examination by Plaintiff or Prosecutor

Each witness for the plaintiff or prosecution is questioned. Other evidence in favor of the plaintiff or prosecution is presented.

Step 4. Cross-Examination by Defense

The defense has the opportunity to question each witness. Questioning is used to break down the story or to discredit the witness.

Step 5. Motions

If the prosecution's or plaintiff's basic case has not been established from the evidence introduced, the judge can end the case by granting a motion (oral request) made by the defendant's attorney. Also, both before and during a trial, attorneys for either side may ask the judge for legal rulings that affect specific pieces of evidence or even the entire case.

Step 6. Direct Examination by Defense

Each defense witness is questioned.

Step 7. Cross-Examination by Plaintiff or Prosecutor

Each defense witness is cross-examined.

Step 8. Closing Statement by Plaintiff or Prosecutor

The prosecutor or plaintiff's attorney reviews all the evidence presented and asks for a finding of guilty (in criminal cases) or a finding for the plaintiff (in civil cases).

Step 9. Closing Statement by Defense

This is the same as the closing statement by the prosecution or plaintiff. The defense asks for a finding of not guilty (in criminal cases) or for a finding for, or in favor of, the defendant (in civil cases).

Step 10. Rebuttal Argument

The prosecutor or plaintiff may have the right to make additional closing arguments that respond to points made by the defense in its closing statement.

Step 11. Jury Instructions

The judge instructs the jury as to the law that applies in the case.

Step 12. Verdict

In most states, a unanimous decision by the jury is required for a conviction in a criminal case. In civil cases some version of a majority is needed. The exact requirement is determined by state law.

► Attorneys for both the defense and the prosecution screen prospective jurors through the process of voir dire examination. *Why might a prospective juror be dismissed?*



voir dire from the French phrase meaning "to speak the truth." It is the screening process in which opposing lawyers question prospective jurors to ensure as favorable or as fair a jury as possible

removal for cause part of the jury selection process. After voir dire, opposing attorneys may request removal of any juror who does not appear capable of rendering a fair and impartial verdict.

peremptory challenges part of the pretrial jury selection. Attorneys on opposing sides may dismiss a certain number of possible jurors without giving any reason. There is one exception: peremptory challenges cannot be used to discriminate based on race.

duty, the clerk of the court uses a list with names of registered voters, licensed drivers, or some combination of the two. Usually a questionnaire is sent to potential jurors to determine whether they are eligible to serve. Employers are required to let their employees take time off for jury service. Most courts pay jurors a small daily stipend, and some courts also provide a transportation fee. Some employers pay their employees during their jury service, but they are not required to do so. To reduce the burden of jury service, many courts have instituted a one-day, one-trial plan. Jurors must show up on the day they are called. A juror selected for a trial on that day must then return for the duration of the trial. If not selected, the juror will not be called again for some period of time, usually at least a year.

After they are selected, jurors are assigned to specific cases after being screened through a process known as **voir dire** examination. In this process, opposing lawyers question each prospective juror to discover any prejudices or preconceived opinions concerning the case. After questioning each juror, the opposing attorneys may request the removal of any juror who appears incapable of rendering a fair and impartial verdict. This is called **removal for cause**. In addition, each attorney is allowed a limited number of **peremptory challenges**. This means the attorneys can have prospective jurors removed without stating a cause.

Juries range in size from 6 to 12 persons, although all federal criminal cases require 12-person juries. In the federal system and most state systems, conviction in a criminal case requires a unanimous verdict. However, about half of the state systems allow for nonunanimous verdicts in civil cases.

PROBLEM 5.2

- a. What reasons can you give for excluding from jury service members of the clergy, attorneys, physicians, police officers, and convicted felons? Should everyone be required to serve on juries? Give your reasons.
- b. If you were a defense attorney questioning jurors at the voir dire in a murder trial, what questions would you ask potential jurors?
- c. For what reasons might an attorney use a peremptory challenge?

Appeals Courts

In an **appeals court**, one party presents arguments asking the court to review the decision of the trial court. The other party presents arguments supporting the decision of the trial court. There are no juries or witnesses, and no new evidence is presented. Only lawyers appear before the judges to make legal arguments.

Not everyone who loses a trial can appeal. Usually, an appeal is possible only when there is a claim that the trial court has committed an error of law. An **error of law** occurs when the judge makes a mistake as to the law applicable in the case. For example, a judge might give the wrong instructions to the jury or permit evidence that should not be allowed. A judge's error is considered minor as long as it does not affect the outcome of the trial. In cases involving minor errors of law, the trial court decision will not be reversed.

When an appeals court decides a case, it issues a written opinion or ruling. This opinion sets a **precedent** for similar cases in the future. All lower courts in the area where the decision was made must follow the precedent set in the opinion. This is what is meant by courts "making law." However, a higher court has the power to reverse or change the precedent. Courts in other parts of the country are not required to follow the precedent. A court in another jurisdiction or state can disagree with this precedent.

Typically, a panel of judges—or justices, as appellate judges are sometimes called—decides such cases. The panel may consist of three or more judges. Nine justices hear cases argued before the Supreme Court of the United States.

When these judges disagree on a decision, two or more written opinions may be issued in the same case. The majority opinion states the decision of the court. Judges who disagree with the majority opinion may issue a separate document called a **dissenting opinion**, which states the reasons for the disagreement. In some instances, judges who agree with the majority's outcome, but for reasons different from those used to support the majority opinion, may write a **concurring opinion**.

Dissenting opinions are important because their reasoning may become the basis of future majority opinions. As society and the views of judges on appellate courts change, so can legal opinion. An example is the 1896 case of *Plessy v. Ferguson*, which upheld racial segregation in

appeals court a court in which appeals from trial-court decisions are heard

error of law a mistake made by a judge in legal procedures or rulings during a trial that may allow the case to be appealed

precedent an appellate court decision on a legal question that guides future cases presenting a similar legal question

dissenting opinion in an appeal, the written opinion of the minority of judges who disagree with the decision of the majority

concurring opinion an additional written court opinion in which a judge or judges agrees with the outcome reached by the court, but for reasons different from those used to support the majority opinion

THE CASE OF...

Taking a Car by Mistake

Joe Harper left the key in his 2018 blue sports utility vehicle (SUV) while he ran an errand. When he came back an hour later, he got into someone else's blue SUV by mistake.

This car also had the key in the ignition. Harper, who did not notice it was a different car, started it and drove away. He was arrested for auto theft as a result of his mistake.

At the trial, the judge told the jury it was not necessary for them to consider whether Harper

intended to steal the car. Instead, the judge instructed the jury that to find Harper guilty of auto theft, they had to decide only whether he was caught driving a car that was not his. Using these guidelines, the jury found Joe Harper guilty.

This case illustrates an error of law that could be appealed. Auto theft law requires that the accused person must have intended to steal the car. Because Harper did not intend to steal the car, the guilty verdict would be reversed by an appellate court.

Landmark Supreme Court Cases

Visit the Landmark Supreme Court Case website at landmarkcases.org for information and activities about *Plessy v. Ferguson* and *Brown v. Board of Education*

railroad cars as long as facilities for whites and African Americans were “separate but equal.”

U.S. Supreme Court Justice John Marshall Harlan dissented from the majority opinion because it allowed a state to pass regulations based solely on race, which he believed violated the U.S. Constitution. In the 1954 precedent-setting case of *Brown v. Board of Education*, some of the reasoning expressed in Justice Harlan's dissent in *Plessy* was accepted by the Supreme Court, and the “separate but equal” doctrine was declared unconstitutional.

State and Federal Court Systems

Figure 5.1 illustrates the two separate court systems in the United States—state and federal. State courts are courts of general jurisdiction. They can hear cases that deal with state law as well as many areas of federal law. The federal courts are courts of limited jurisdiction. Their power is limited to deciding certain types of cases. Federal courts hear criminal and civil cases involving federal law, including the Constitution. They also hear some civil cases involving parties from different states when the amount in dispute is more than \$75,000. Federal trial courts are known as U.S. District Courts. If you lose a trial in the U.S. District Court, you may be able to appeal to the U.S. Circuit Court of Appeals in your region. The United States has 94 district courts and 13 circuit courts. The court of final appeal is the Supreme Court of the United States.

State Courts

Most state court systems resemble the federal court system in both structure and procedure. All states have trial courts. These are called superior, county, district, or municipal courts, depending on the state.

State trial courts are often specialized to deal with specific types of legal issues. Examples include family, traffic, criminal, probate, and small claims courts.

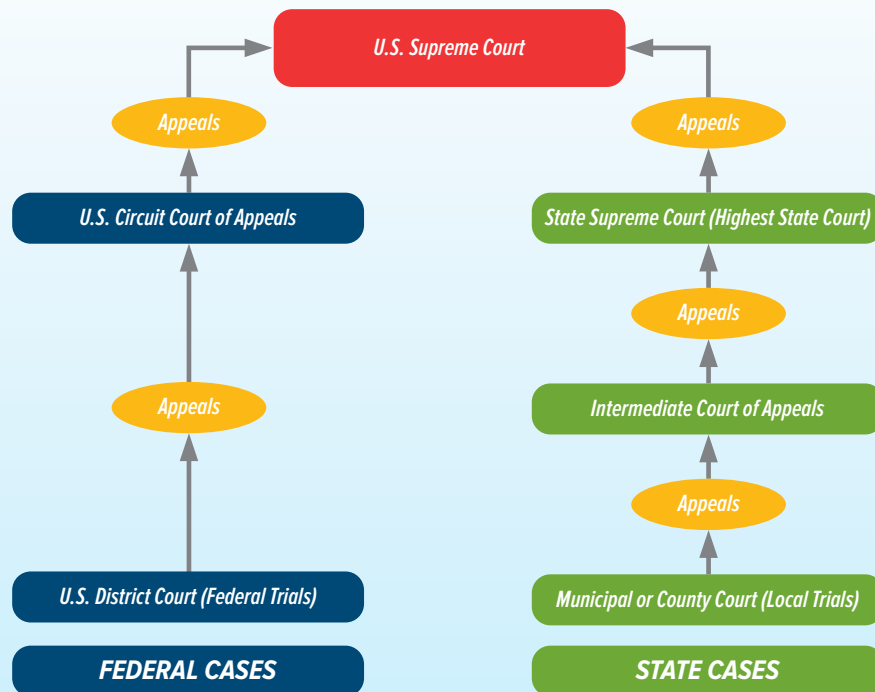
Family or domestic relations courts hear actions involving divorce, separation, and child custody. Cases involving juveniles and intrafamily offenses (fights within families) may also be heard. Cases involving juveniles are usually heard in a special juvenile court. Traffic courts hear actions involving violations committed by persons driving motor vehicles. Criminal courts hear cases involving violations of law for which the violators could be punished. Frequently, criminal court is divided between felony and misdemeanor cases. **Probate** courts handle cases involving wills and claims against the estates of persons who die with or without a will. Small claims courts hear cases involving small amounts of money (maximums of up to \$10,000, or more, depending on the state). Individuals may bring cases to small claims court without lawyers, though it is sometimes advised that lawyers be present. Filing procedures are easy, and the court fees are low.

Investigating the Law Where You Live

Find out what courts exist in your community. What kinds of cases do they handle? How are the appeals handled in your state? What is the highest court in your state? Where is it located? Search online to find a diagram of your state's court system.

FIGURE

5.1 Federal and State Court Systems



The U.S. judiciary consists of parallel systems of federal and state courts. **ANALYZE THE DATA** How are the systems the same? How are they different?

probate the process of proving to a court that a will is genuine; distributing property according to the terms of a will

Investigating the Law Where You Live

Research to learn more about the federal judicial district in which you live. Which federal court of appeals handles appeals from your local federal trial court? Learn more at www.uscourts.gov.

If you lose your case in the trial court, you may be able to appeal to an intermediate court of appeals or, in some states, directly to the state's highest court. If a state supreme court decision involves only state law, it can be appealed no further. Each state's highest court has the final say on interpretation of state laws and the state constitution. If a state supreme court decision involves federal law or a federal constitutional issue, it may be possible for the losing party to appeal to the U.S. Supreme Court.

Federal Courts

Article III of the U.S. Constitution creates a Supreme Court and gives Congress the power to create lower courts. Congress has divided the United States into 94 federal judicial districts, with a district court known as a federal trial court in each district. The district courts handle a variety of federal criminal and civil cases. Each district court has at least one judge and some have more than 20. There are also federal bankruptcy and tax courts that only handle certain kinds of cases. As the map in Figure 5.2 on the next page shows, some federal judicial districts cover an entire state, while other states have several districts within their boundaries.

Congress placed the 94 districts in 12 regional circuits, each of which has a court of appeals. Court of appeals judges handle appeals of trial court decisions to determine whether district court judges applied the law correctly. Most courts of appeal have between 10 and 15 judges. However the largest court of appeals (for the Ninth Circuit, which includes California) has more than 40 judges. There is also a U.S. Court of Appeals for the Federal Circuit. This court, which meets in Washington, D.C., hears appeals from federal trial courts from all over the country. However, it only hears cases dealing with certain legal topics—primarily international trade, patent law, certain money claims against the federal government, and veterans issues. In creating the U.S. Court of Appeals for the Federal Circuit, Congress believed that its judges would develop special expertise in these complex cases.

Overall, the federal courts handle more than 400,000 cases per year. The federal courts also handle more than 1,000,000 bankruptcy petitions each year. All together, the state court systems handle more than 100 million cases per year. About 1,700 federal judges decide the former matters, and about 30,000 state court judges decide the latter. Federal court judges are appointed by the president and confirmed by the Senate. The U.S. Constitution protects the independence of these judges by providing that they hold office “during good behavior.” For the most part, federal judges serve until they resign, retire, or die. Removal of federal judges requires that Congress follow formal impeachment procedures.

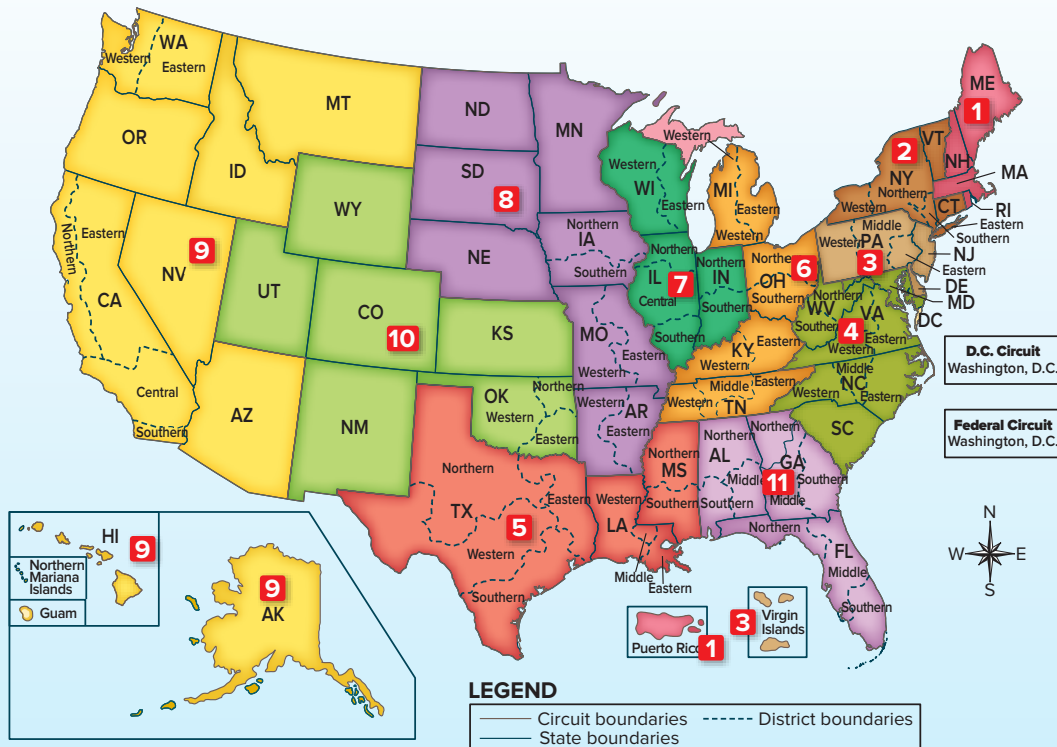
PROBLEM 5.3

For each case, decide whether it will be tried in a federal or state court. To what court could each case be appealed? Explain. Then give an example, different from those listed, of a case that could be heard in a state court and a case that could be heard in a federal court.

- A state sues a neighboring state for dumping waste in a river that borders both states.
- A wife sues her husband for divorce.
- A person is prosecuted for assaulting a neighbor.
- Two drivers from the same state crash their cars into each other. One driver sues the other for medical bills and car repairs.
- A woman who has patented an invention sues another person later claiming to have invented the same item.

FIGURE

5.2 The Federal Judicial Circuits



Congress created district courts to serve as trial courts for federal cases. **ANALYZE THE DATA** Which federal judicial circuit hears cases from the state where you live?

Independent Courts

A key element of a democracy is that courts must act impartially and make fair decisions without undue influence by outside forces.

One method of trying to ensure an independent judiciary is to appoint judges for a life term. This is done in the federal system and in a few states. Federal judges are nominated by the president and confirmed by the Senate. Judges who are appointed for a life term can make decisions in cases without being concerned about how it might affect their reelection.

In most state courts, judges are elected. Some believe that the need to raise funds for elections can result in a judge's being biased when deciding a particular case. Others believe that a system of electing judges ensures accountability and is appropriate in a democracy.

Another method of trying to preserve the independence of judges is known as merit selection. Using this approach, a judicial commission made up of lawyers, judges, and sometimes laypeople either decides who will be a judge or sends names of qualified candidates to the governor, who then chooses judges from that list.

In addition to issues of judicial selection and retention, independent courts must have fair procedures, the power of judicial review, and the

benefit of an executive branch that will enforce court orders if necessary.

In some countries, judges and courts are not independent. They are influenced or in some cases controlled by the legislature or the president.

Read each of the following situations carefully. For each one, determine whether the actions violate judicial independence. Explain your reasons

- a. Marsha Monroe is running for election to be a judge on her state's supreme court. She visits the offices of George Sanchez, the president of a large corporation, and asks for a donation of \$1,000 to help in her campaign.
- b. Some U.S. senators are unhappy about decisions of some federal judges. When the budget for the federal judiciary comes before Congress, these senators propose a reduction in salary for federal judges.
- c. Judge Max Kaufman presides over a case involving a corporation. A distant cousin of his is employed by that corporation and is a witness for the corporation at the trial. Judge Kaufman rules for the corporation.
- d. Judge Maureen Kim is running for reelection and knows that crime is a big issue with the voters in her state. In the months just before the election, she hands down some unusually long sentences for drug offenses.



Aaron Roeth Photography



◀ Native American groups govern their own people. *Why do tribal court systems exist?*

Tribal Courts

Many people, especially those who live in states with small Native American populations, do not realize that several hundred Indian tribal groups operate as semi-autonomous nations within the United States. These “domestic dependent nations,” as the U.S. government refers to them, retain certain legal authority over their respective reservations.

Sometimes these tribal powers are called inherent powers. These powers include the power to regulate family relationships, tribal membership, and law and order among tribal members on the reservation. Occasionally Congress grants power, such as environmental regulation, to a tribal group. This is called a delegated power. Most Native American groups have justice systems, often called tribal court systems. Tribal courts hear a broad range of both criminal and civil cases involving both Native Americans and non-Native Americans. The jurisdiction of tribal courts varies based on such factors as the location of the offense (on or off the reservation) and the status (Native American or non-Native American) of the defendant and plaintiff.

Military Courts

In many ways, the military acts as another domestic dependent nation of the United States. It has its own set of laws, written by Congress and known as the Uniform Code of Military Justice (UCMJ), and its own system of courts. Of course, the military courts ultimately must abide by the Constitution and by the rulings of the Supreme Court. Military courts are most often called courts-martial and are convened to try U.S. military members who have violated the UCMJ.

Military courts may also be used during wartime to try enemy combatants. The more famous of these tribunals was the Nuremberg trials, held after World War II to prosecute members of Nazi Germany for war crimes. Most recently, military tribunals have been established in Guantanamo Bay, Cuba, to prosecute detainees captured during the War on Terror. These tribunals have been the subject of several Supreme Court cases and

THE CASE OF...

Gideon v. Wainwright

In 1963, a case called *Gideon v. Wainwright* came before the U.S. Supreme Court. In this case, a Florida man named Clarence Gideon was charged with unlawful breaking into and entering a poolroom. Gideon asked the trial court to provide him with a free lawyer because he was too poor to hire one himself. The state court refused to provide him with an attorney. It said that state law provided free attorneys only to poor defendants charged with capital offenses (those crimes that carry a penalty of death or life imprisonment).

The Fourteenth Amendment to the U.S. Constitution says that no state may deprive a person of life, liberty, or property without **due process** of law. Due process means fair treatment. Gideon argued that to try someone for a felony without providing him or her with a lawyer violated the person's right to due process of law. State courts had been split on the question of whether a free attorney

had to be provided to an indigent defendant in a felony case. One powerful argument against Gideon was that the Supreme Court should not be telling the states how to administer their criminal justice systems. However, the Supreme Court agreed with Gideon.

PROBLEM 5.4

- What precedent did the Supreme Court set with its ruling in *Gideon v. Wainwright*? Who has to follow this precedent?
- Who would have had to follow the precedent if the case had been decided by a judge in a state supreme court?
- Does the Gideon precedent apply if you are charged with a misdemeanor? Does it apply if you are sued in a civil case?

due process the idea stated in the Fifth and Fourteenth Amendments that every person is entitled to fair treatment by the government. The requirements of due process vary with the situation, but they require at a minimum notice and an opportunity to be heard.

there is still a great deal of controversy surrounding the tribunals and the due process afforded to the detainees.

The Supreme Court of the United States

The most important legal precedents are established by the U.S. Supreme Court, where nine justices hear each case and a majority rules. All state and federal courts in the United States must follow U.S. Supreme Court precedents. Some of these precedents, such as *Brown v. Board of Education*, which ended state-sponsored segregation in public education, are fairly well known by the public. Surveys show, however, that the public has little understanding of how the Court operates.

The Supreme Court does not accept most of the cases it is asked to hear. Each year, the Court is asked to hear more than 7,000 cases. The parties who lost their case in a lower court file a **petition for certiorari**—a request for the lower court to send up its ruling—asking the Court to hear their case. More than 99 percent of these requests are denied. The justices typically hear oral arguments and issue written opinions in fewer than 80 cases each year.

With few exceptions (such as federal voting rights cases), the Court does not have to hear a case it is asked to hear. With so many cases to

Landmark Supreme Court Cases

Visit the Landmark Supreme Court Cases website at landmarkcases.org for information and activities about *Gideon v. Wainwright*.

choose from, it is able to set its own agenda. Most often petitions for certiorari are granted when lower courts have decided the same issue differently because the Court sees its role as making laws uniform across the country. The Court also takes cases that it believes deal with critical national issues. More than half of the petitions each year come from people who cannot afford to pay the \$300 filing fee. Usually, these petitioners are incarcerated.

The party who petitions to the Supreme Court is generally the losing party in an appellate case that was argued in a federal circuit court of appeals or a state supreme court. This party's first step is to request in writing that the Court hear the case. The written legal briefs, or legal arguments, initially submitted to the Court emphasize *why* the case should be heard rather than how it should be decided. The party who has won the case in the lower court may submit a brief arguing why the case should not be heard. If the party appealing gets four of the nine justices to agree to hear the case, then the petition for certiorari is granted. This is the one exception to majority rule at the Court.

If the Court decides to hear the case, the parties then write briefs arguing *how* the case should be decided, and an oral argument is scheduled with the Court. During this hour-long argument, which is open to the public, each side usually has 30 minutes to present its case to the justices. The justices, who have already read the briefs and studied the case, ask many questions of the lawyers. After the case has been argued, the justices meet in a private conference to discuss the case, and the process of drafting an opinion begins. While the media tend to emphasize the disagreements among the justices, in a typical term the Court decides more cases 9 to 0 than 5 to 4.

The federal government participates in a significant number of the cases before the Court. Sometimes the U.S. government is a party to the

petition for certiorari *Certiorari* is a Latin word meaning "to be informed of." It is a formal application by a party to have a lower-court decision reviewed by the U.S. Supreme Court, which has discretion to approve or deny any such application.

▼ In 2019, the U.S. Supreme Court included (first row, L-R) Associate Justice Stephen G. Breyer, Associate Justice Clarence Thomas, Chief Justice John G. Roberts, Jr., Associate Justice Ruth Bader Ginsburg, Associate Justice Samuel A. Alito. Back row: Associate Justice Neil M. Gorsuch, Associate Justice Sonia Sotomayor, Associate Justice Elena Kagan, Associate Justice Brett M. Kavanaugh. *How does the Court determine which cases it will hear?*



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

case. More often, it offers its views to the Court as an *amicus curiae*, or “friend of the Court,” with an interest in the case. The Office of the Solicitor General of the United States represents the federal government in the Supreme Court.

When a party files a petition for certiorari and the solicitor general’s office also asks the Court to take the case, the Court is much more likely to grant review. In these cases a lawyer from the solicitor general’s office may also participate in the oral argument, presenting the federal government’s views—and answering the justices’ questions—during 10 of the 30 minutes allotted to the party whose side the government supports.

The Court’s term begins on the first Monday of each October, and final decisions on cases argued during that term are handed down by the end of June of the following year. In a typical year, about 80 percent of the cases the Court hears come from the federal courts, and 20 percent from state courts. In more than half of the cases argued before the Court, the lower court opinion is reversed.

The nine U.S. Supreme Court justices are nominated by the president and confirmed by the Senate. They have the authority to interpret the meaning of the U.S. Constitution and federal laws. All lower courts must follow these interpretations and other rules of law established by the Supreme Court. The Court’s opinions are released electronically the same day they are issued. Later they are published in law books.

In recent years, many of society’s most controversial issues have been heard by the Court. These include the death penalty, freedom of speech, gun control, abortion, and civil rights. Because these issues are so significant and because justices are appointed for life, the views of persons nominated to become justices have become very important.

Some individuals criticize the practice of appointing justices on the basis of their personal or political viewpoints. These critics say appointees should be above politics because they sit for life and the Court makes its decisions in private. They say that other criteria should be used to select justices, such as demonstrated experience and expertise as a lawyer or a judge, as well as intelligence, integrity, and good moral character. Others say that the process—presidential nomination and Senate confirmation—is inherently political and that it is impossible to be above politics when it comes to judicial nominations to the Court.

As noted, all lower courts in the United States must follow legal precedent established by the Supreme Court. The rule that precedent must be followed is called **stare decisis**. This Latin phrase literally means “to stand by that which is decided.” Following precedent gives the legal system predictability and stability. While the Court usually follows its precedents, it has the power to overturn a rule of law established in a prior case. This action sometimes occurs when society’s prevailing views change and the justices want the law to reflect these changes. It may also occur when one or more justices who voted a certain way in an earlier case leaves the Court, and new justices are appointed who disagree with the prior decision. If this happens, the justices may overrule the existing precedent. When the Court decided *Brown v. Board of Education* in 1954, it voted to overturn the “separate but equal” rule it had established more than 50 years earlier in *Plessy v. Ferguson*.

stare decisis the rule stating that precedent must be followed, providing the legal system with predictability and stability

TAKING ACTION: Law and Democracy

Who Should Be on the Supreme Court?

The president of the United States selects nominees for all federal judgeships, including the U.S. Supreme Court justices, “with the advice and consent of the Senate.” The Senate must approve all nominees before they are appointed. Once appointed, justices serve for life unless they resign or are impeached. When the Senate receives a nomination from the president, it sends the nomination to the Senate Judiciary Committee for consideration. The committee schedules a hearing on the nomination. After the hearing, the committee votes. If a majority votes in favor of the nominee, the nomination is sent to the full Senate for consideration. If the majority of the Senate also votes for the nominee, the nominee is confirmed.



▲ U.S. Supreme Court building

PROBLEM 5.5

- a. You are legal counsel to the president. One of the Supreme Court justices has just announced his resignation. Many groups and individuals are suggesting names of people they think should be nominated by the president. Write a memo to the president describing the type of person who should be nominated to the U.S. Supreme Court.
- b. As legal counsel to the president, look at the following characteristics of potential Supreme Court nominees. Rank them from most important to least important. Be prepared to give your reasons.
 - 45 years old
 - Asian American (assume there are no Asian Americans on the Court)
 - female
 - graduated first in class from a top law school
 - respected trial court judge
 - friend of the president
 - believes that affirmative action is unconstitutional
 - believes in a woman’s right to an abortion
 - lives in California (assume there are no current justices from the West Coast)
- c. Assume you are a member of the Senate Judiciary Committee. A nominee for the Supreme Court has an excellent reputation as a lawyer and lower court judge but is likely to vote, if confirmed, to overturn the case that established a woman’s right to choose an abortion. Voters in your state tend to support the right to choose. How would you vote on the nominee?

International Courts

A number of international courts have been set up by the United Nations (UN) and other international organizations to apply and enforce international law. The International Court of Justice (ICJ), the principal judicial organ of the UN, is located at The Hague in the Netherlands. This court may settle any dispute based on international law that a country submits to it. Both countries involved must agree to have the ICJ settle the dispute.

The International Criminal Court, created by the UN in 1998, began operating in 2003. This court has jurisdiction to try individuals for crimes such as genocide, crimes against humanity, war crimes, and crimes of aggression. Initially, more than 80 UN member countries ratified the treaty setting up the International Criminal Court, but the United States opposed ratification. Opposition in this country is based on the belief that this court might put American citizens, including U.S. military personnel, on trial for political reasons. For example, a member of the U.S. military might be tried because some countries oppose U.S. military policy in some part of the world. Other international courts include the International Court of Justice, the Inter-American Court of Human Rights, the African Court of Human and People's Rights, and the European Court of Human Rights.

▼ The International Court of Justice, also known as the World Court, is located in the Peace Palace in The Hague, the Netherlands. *What kind of disputes does the International Court of Justice settle?*



UygarSirin/Getty Images

► The sixteenth president of the United States, Abraham Lincoln was also a lawyer.



litigator a trial attorney;
a barrister

There are more than 1.3 million lawyers, also referred to as attorneys, in the United States. More than 70 percent of them are in private practice. Around 10 percent are government lawyers who work for federal, state, or local agencies. Another 10 percent work for corporations, unions, or trade associations. A small number of lawyers work for public interest or legal aid organizations. An even smaller number are law professors, judges, or elected officials.

Contrary to popular belief, most lawyers rarely go to court. Most law practice involves giving advice, drafting legal opinions, negotiating settlements, or otherwise providing out-of-court legal assistance.

Some lawyers do, however, go to court. They are called trial attorneys or **litigators**. In civil cases, lawyers act as advocates for their clients' positions. Likewise, in a criminal case, the lawyer for the defendant has a duty to do everything possible—without violating a code of professional ethics—to secure the release and acquittal of his or her client.

When Do You Need a Lawyer?

It is important to know when to see a lawyer. Many people think of seeing an attorney only after they get into trouble, but perhaps the best time to consult an attorney is before the problem arises. Preventive advice is an important service that lawyers provide. If you are under 18 and not legally emancipated, you will need a parent or another representative known as a “next friend” to use most of the services that lawyers provide.

You should consider consulting an attorney about a number of common situations. These include:

- buying or selling a home or other real estate,
- organizing a business,
- changing your family status (for example, by divorce or adoption),
- making a will or planning an estate,
- handling accidents involving significant personal injury or property damage,
- signing a large or important contract, and
- defending a criminal charge or bringing a civil suit.

If a question of law is involved, a legal document needs to be drawn up or analyzed, or you are involved in a court case, you will probably need legal help. However, if your problem is minor, you may be able to handle it on your own or with the help of someone other than a lawyer. For example, you can usually sue someone in a small claims court without a lawyer. Likewise, an argument with a spouse may be better handled through a marriage counselor or mediator. Relatives, friends, teachers, members of the clergy, doctors, or accountants may be more appropriate sources of advice in certain situations.

If you are not sure whether you need a lawyer, it may be advisable to see one to help you decide. Many **bar associations**—organizations that license lawyers—and other groups have services to help you decide if you need a lawyer. These are often provided free of charge or for a small fee.

bar associations an organization that licenses lawyers in some states

▼ Involvement in a car accident may require you to seek the advice of a lawyer. *How would a lawyer's services help someone involved in a car accident?*



PROBLEM 6.1

For each of the following situations, discuss the reasons you may or may not need an attorney.

- a. You hit another car in a parking lot. Your insurance agent indicates that the company will pay for bodily injury and property damage.
- b. You borrow a friend's car without his knowledge, and he reports it to the police as stolen.
- c. You buy a new laptop for \$800. One month later, the laptop stops working. You return to the store, and the salesperson tells you he is sorry but these laptops have only a two-week guarantee.
- d. You decide to trade in your old car and buy a new one.
- e. Two friends are caught robbing the cashier at a local store, and they name you as someone who helped plan the robbery.
- f. You are turned down when you apply for a job. You think you were rejected because you are deaf.
- g. You do not want your family to inherit the \$10,000 you have saved. After being told you will die within a year, you want the money to be used for cancer research.
- h. You and your spouse can no longer get along. You want a divorce.
- i. You earn \$5,000 working in a restaurant during the year. You want to file your federal income tax return.

How Do You Find a Lawyer?

If you need a lawyer, how do you find one who is right for you and your particular problem? Perhaps the best way to find an experienced lawyer is through the recommendation of someone who had a similar legal problem that was resolved to his or her satisfaction. You might also ask your employer, members of the clergy, businesspeople, or other professionals for the name of a lawyer they know and trust.

Probably the best way to find a lawyer is through the recommendation of a friend who used a lawyer for a similar problem and felt well represented. In addition, the *Martindale-Hubbell Law Directory*, available in your public library and online, lists most lawyers in the United States and provides general information about education and professional experience of each lawyer. Lawyers sometimes advertise their services. In many places, advertisements for lawyers appear in newspapers and magazines or on radio and television. In addition, a variety of websites also provide referrals to lawyers.

Lawyers have not always been allowed to advertise. For years, it was considered improper and was forbidden by bar associations and courts. In 1977, the Supreme Court ruled that advertising by lawyers was protected by the First Amendment's freedom of speech clause.

Investigating the Law Where You Live

Find out the contact information for the bar association in your state. Does it provide a lawyer referral service?

► Lawyers specializing in certain legal services, such as bankruptcy and personal injury, often advertise on large billboards. *What is the best way to find an experienced lawyer?*



Those in favor of allowing lawyers to advertise think that it helps consumers decide which lawyer to hire. They add that statistics show advertising lowers legal fees through competition. Those against advertising by lawyers think that it encourages lawyers to be salespersons who are likely to make exaggerated claims. They think that lawyers should be hired based on competence and skill, qualities difficult to ascertain through advertising.

Many lawyers now advertise through various means, including on billboards, buses, radio, and television. But the trend is clearly toward online, digitally-driven advertising. Advertising has enabled large, lower-cost law firms, often called legal clinics, to develop, and some have spread nationwide. However, many attorneys and others still consider advertising improper.

In fact, lawyer advertising is a relatively new phenomenon. It began in 1977 when the Supreme Court struck down restrictions on lawyer advertising in Arizona in the case of *Bates v. State Bar of Arizona*.

PROBLEM 6.2

Conduct an online search for ads from lawyers and law firms. Enter the phrase “find a family lawyer near me.” Analyze three advertisements. What are some advantages of lawyer advertising? What are some disadvantages of lawyer advertising?

Becoming a Lawyer

Some students in high school law classes are interested—or become interested—in becoming a lawyer. The path to becoming a lawyer in the United States usually involves completing a four-year college program, demonstrating strong academic skills, taking the Law School Admission Test (LSAT), completing law school (usually a three-year program) and passing a state-administered bar examination. The rules for eligibility to take the bar exam and to qualify for bar admission are set by each state. However, to receive a license to practice law, one must be a graduate of a law school that meets certain standards, and one must achieve a passing score on the bar examination. In addition, states check the character and fitness of each person who applies for a license to practice law.

In 2018 more than 100,000 students were enrolled in law school. More than 30,000 students graduate from law school each year and, typically, between 60 and 70 percent of those graduates pass a bar exam. Pass rates vary from state to state and even from year to year. In 2016 women outnumbered men for the first time in law school classrooms. The number of students of color enrolled in law schools has increased somewhat over time, but lawyers of color are significantly underrepresented in the legal profession. Many organizations work to increase diversity in the legal profession.

The Law School Admission Test is administered by the Law School Admission Council (LSAC). LSAC provides a great deal of information for students interested in applying to law school (www.lsac.org). LSAC also sponsors dozens of programs and events each year to encourage students from communities that are underrepresented in the legal profession to consider law as a career.

PROBLEM 6.3

- a. What job opportunities are available to persons who graduate from law school and pass the bar exam?
- b. What are some of the obstacles to becoming a lawyer and how can these obstacles be overcome?



◀ Becoming a lawyer in the United States involves earning a four-year college degree, taking the LSAT, and completing law school.