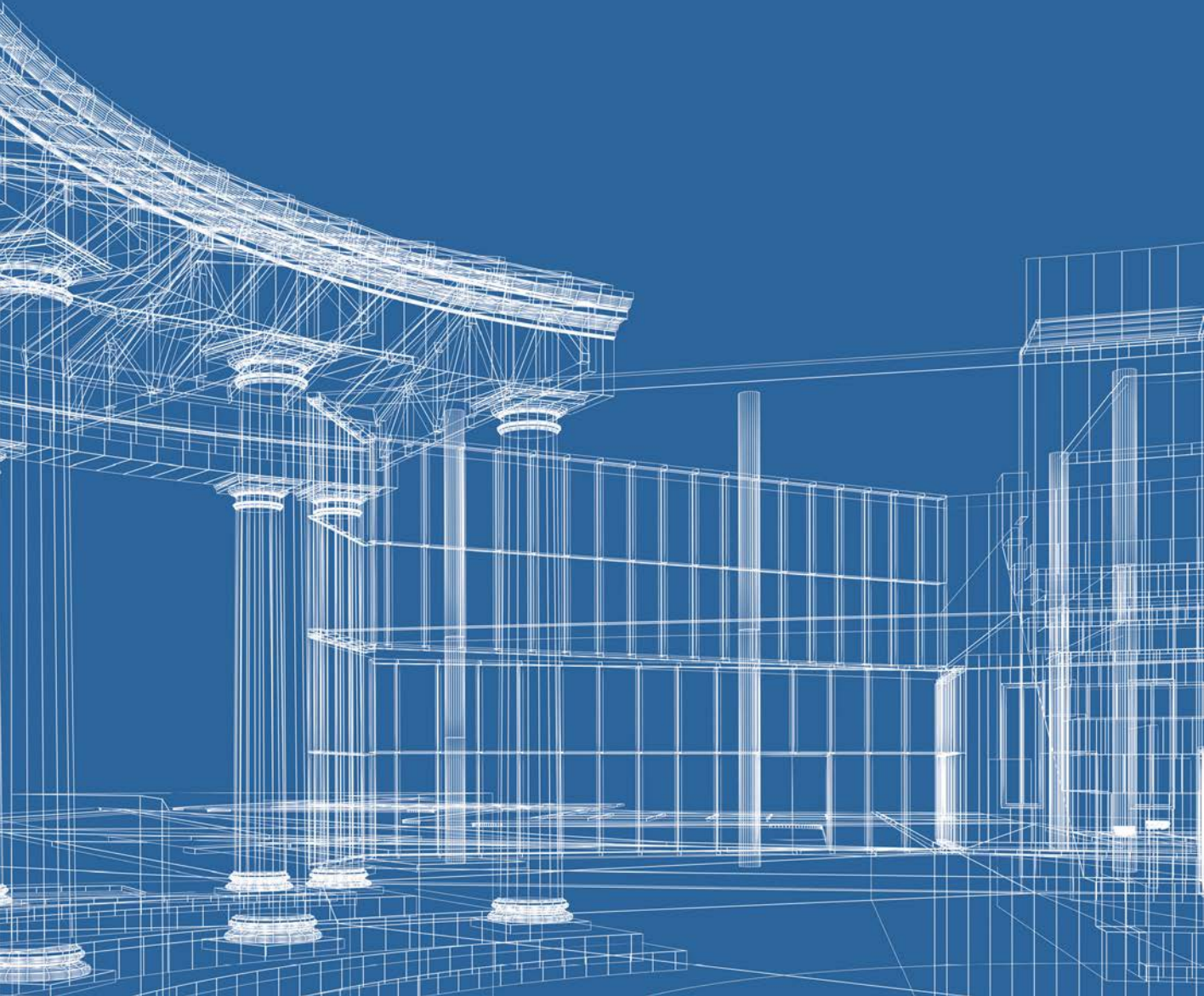


Seventh Edition

Judicial Process

Law, Courts, and Politics in the United States

David W. Neubauer
Stephen S. Meinhold



Seventh Edition

Judicial Process

Law, Courts, and Politics in the United States

David W. Neubauer
University of New Orleans

Stephen S. Meinhold
University of North Carolina Wilmington



Australia • Brazil • Japan • Korea • Mexico • Singapore • Spain • United Kingdom • United States

This is an electronic version of the print textbook. Due to electronic rights restrictions, some third party content may be suppressed. Editorial review has deemed that any suppressed content does not materially affect the overall learning experience. The publisher reserves the right to remove content from this title at any time if subsequent rights restrictions require it. For valuable information on pricing, previous editions, changes to current editions, and alternate formats, please visit www.cengage.com/highered to search by ISBN#, author, title, or keyword for materials in your areas of interest.

Important Notice: Media content referenced within the product description or the product text may not be available in the eBook version.

To Carole and Jennifer



**Judicial Process: Law, Courts, and Politics
in the United States, Seventh Edition**

David W. Neubauer and Stephen S. Meinhold

Product Director: Paul Banks

Product Team Manager: Carolyn Merrill

Content Developer: Jessica Wang-Strykowski

Product Assistant: Michelle Forbes

Marketing Manager: Valerie Hartman

Manufacturing Planner: Fola Orekoya

IP Analyst: Alexandra Ricciardi

IP Project Manager: Farah Fard

Production Service: Cenveo Publisher Services

Cover Image: Givina/Shutterstock.com

© 2017, 2014, 2011 Cengage Learning

WCN: 02-200-203

ALL RIGHTS RESERVED. No part of this work covered by the copyright herein may be reproduced, transmitted, stored, or used in any form or by any means graphic, electronic, or mechanical, including but not limited to photocopying, recording, scanning, digitizing, taping, web distribution, information networks, or information storage and retrieval systems, except as permitted under Section 107 or 108 of the 1976 United States Copyright Act, without the prior written permission of the publisher.

For product information and technology assistance, contact us at **Cengage Learning Customer & Sales Support, 1-800-354-9706**. For permission to use material from this text or product, submit all requests online at **www.cengage.com/permissions**. Further permissions questions can be emailed to **permissionrequest@cengage.com**.

Library of Congress Control Number: 2015947661

Student Edition:

ISBN: 978-1-305-50652-7

Cengage Learning

20 Channel Center Street

Boston, MA 02210

USA

Cengage Learning is a leading provider of customized learning solutions with office locations around the globe, including Singapore, the United Kingdom, Australia, Mexico, Brazil, and Japan. Locate your local office at **www.cengage.com/global**.

Cengage Learning products are represented in Canada by Nelson Education, Ltd.

To learn more about Cengage Learning Solutions, visit **www.cengage.com**. Purchase any of our products at your local college store or at our preferred online store **www.cengagebrain.com**.

Printed in the United States of America
Print Number: 01 Print Year: 2015

Brief Contents

1 Law, Courts, and Politics 1

Part I Institutions of Law

2 Law and Legal Systems 16

3 Federal Courts 46

4 State Courts 80

Part II Interpreters of the Law

5 Lawyers and Legal Representation 113

6 Judges 149

Part III Consumers of the Law

7 Mobilizing the Law: Litigants, Interest Groups,
Court Cases, and the Media 186

Part IV Trial Courts

8 Trial Courts: The Preliminary Stages of Criminal Cases 212

9 Trial Courts: How Criminal Cases End: Bargaining
and Sentencing 242

10 Trial Courts: How Civil Cases Begin 281

11 Trial Courts: How Civil Cases End 315

12 Trials and Juries 343

Part V Appellate Review

13 The Appellate Process 374

14 The Supreme Court: Deciding What To Decide 406

15 The Supreme Court: The Justices and Their Decisions 436

Contents

Preface **xii**

About the Authors **xviii**

1 Law, Courts, and Politics **1**

- Courts and Government **2**
- Courts as Legal Institutions **5**
- Courts as Political Institutions **8**
- Courts and Controversy **10**
- Conclusion **12**

Part I Institutions of Law

2 Law and Legal Systems **16**

- What is Law? **17**
- Legal Systems **19**
 - Law and Courts in a Digital Age: Leaking Secrets on the Internet **20**
- Civil Law **20**
- Socialist Law **21**
 - Courts in Comparative Perspective: The French Republic and the Code Napoleon **22**
- Islamic Law **23**
- Common Law **24**
 - Key Characteristics of the Common Law **26**
 - The Adversary System **27**
 - The Major Components of U.S. Law **29**
 - Debating Law, Courts, and Politics: The Law and Politics of Constitutional Interpretation **36**

Interpreting the Law	37
Debating Law, Courts, and Politics: Deepwater Horizon Litigation Scorecard	38
Case Close-Up: <i>Salazar v. Buono</i> (2010)	40
Conclusion	41

3 Federal Courts 46

Case Close-Up: Where to Hear the Deepwater Horizon Lawsuits?	47
Principles of Court Organization	48
The History of the Federal Courts	50
United States District Courts	55
United States Courts of Appeals	61
The United States Supreme Court	62
Courts in Comparative Perspective: The Federal Republic of Germany	63
Specialized Courts	64
Debating Law, Courts, and Politics: Are the Federal Courts Obstructing the War on Terrorism, or Are They Protecting Civil Liberties?	68
Law and Courts in a Digital Age: Listening in on National Security	69
Federal Judicial Administration	70
The Ongoing Federal Courts Caseload Controversy	73
Attacks on the Federal Judiciary	75
Conclusion	75

4 State Courts 80

The History of State Courts	81
Trial Courts of Limited Jurisdiction: Lower Courts	83
Trial Courts of General Jurisdiction: Major Trial Courts	84
Intermediate Courts of Appeals	86
Courts of Last Resort: State Supreme Courts	88
The Lower Courts: a Closer Look	89
Juvenile Courts	92
Court Unification	94
Case Close-Up: <i>Kimbrough v. United States</i> (2007)	97
The Politics of Court Reorganization	99
Court Reform: The Next Steps	100
Drug Courts	101

Law and Courts in a Digital Age: Sex Offender Registry	102
Debating Law, Courts, and Politics: Marijuana: Evil Drug or Medicine?	104
Consequences of Court Organization	105
Courts in Comparative Perspective: The Federal Republic of Mexico	106
Conclusion	107

Part II Interpreters of the Law

5 Lawyers and Legal Representation 113

Legal Education	114
Law Schools Today	116
Debating Law, Courts, and Politics: Thinking About Law School?	117
Licensing Requirements	121
Legal Ethics and Discipline	123
Law and Courts in a Digital Age: How Safe Are Your Secrets?	124
Bar Associations	125
The Work of Lawyers	128
Courts in Comparative Perspective: <i>Italy</i>	129
Where Lawyers Work	131
Diversity and Stratification of the Legal Profession	133
Debating Law, Courts, and Politics: BP Faces Off Against Its Old Foes	134
Access to Legal Services	138
Case Close-Up: <i>Gideon v. Wainwright</i> (1963)	139
Conclusion	144

6 Judges 149

Judicial Selection	150
Law and Courts in a Digital Age: <i>Judge Judy: Justice with an Attitude or Just Plain Nonsense?</i>	152
Appointment of Federal Judges	153
Judicial Elections	159
Case Close-Up: <i>Caperton v. Massey Coal Co.</i> (2009) and Campaign Cash	163
Merit Selection	164
Courts in Comparative Perspective: <i>Judges in the United Kingdom</i>	166

Which System is Best?	167
Debating Law, Courts, and Politics: 3/9th Is Two Votes Away from a Majority	170
Case Close-Up: <i>Chisom v. Roemer</i> (1991)	171
Judges At Work	172
Judging The Judges	174
Debating Law, Courts, and Politics: Can We Find Fair and Impartial Judges to Preside Over the BP Oil Spill Cases?	178
Conclusion	178

Part III Consumers of the Law

7 Mobilizing the Law: Litigants, Interest Groups, Court Cases, and the Media 186

Legal Mobilization	187
Courts in Comparative Perspective: <i>The Federal Republic of Nigeria</i>	188
Court Caseloads	189
Party Capability	190
The Adjudicatory Process	192
Traditional Versus Policy Lawsuits	193
Debating Law, Courts, and Politics: Can Courts Bring About Social Change?	195
Interest Groups in Court	196
Case Close-Up: <i>District of Columbia v. Heller</i> (2008)	200
Interest Group Litigation and the Oil Spill	203
The Media and the Legal System	204
Law and Courts in a Digital Age: Did You See What I Saw?: Ferguson, Missouri, and the Diffusion of Police Body Cameras	205
Conclusion	207

Part IV Trial Courts

8 Trial Courts: The Preliminary Stages of Criminal Cases 212

Crime	214
Courts in Comparative Perspective: <i>The Kingdom of Saudi Arabia: Pure Islamic Law</i>	215
Policing	216

Arrests	217
The Defendant	218
Initial Appearance	220
Bail	220
Prosecution	222
Filing Charges	222
Preliminary Hearing	223
Grand Juries	224
Exclusionary Rules	226
Case Close-Up: <i>Miranda v. Arizona</i> (1966)	227
Law and Courts in a Digital Age: Do the Police Need a Warrant to Seize a Cell Phone?	229
Pretrial Motions	230
Debating Law, Courts, and Politics: Should Criminal Charges Be Filed in Response to the BP Oil Spill?	231
Case Attrition	232
The Criminal Justice Wedding Cake	235
Conclusion	237

9

Trial Courts: How Criminal Cases End: Bargaining and Sentencing 242

The Courtroom Work Group	243
The Many Faces of Plea Bargaining	244
Plea Bargaining and Courtroom Work Groups	248
Forms of Punishment	250
Debating Law, Courts, and Politics: Should Fines for the <i>Deepwater Horizon</i> Explosion Be in the Millions or the Billions?	253
Normal Penalties and Sentencing Decisions	254
The Fairness of Sentencing	256
The Severity of the Penalty	258
Sentencing Guidelines	259
The Death Penalty	263
Debating Law, Courts, and Politics: Should the Death Penalty Be Abolished?	266
Case Close-Up: <i>Roper v. Simmons</i> (2005)	267
Courts in Comparative Perspective: <i>The People's Republic of China</i>	270
Law and Courts in a Digital Age: The Shooting in Ferguson Goes Viral	271
Conclusion	272

10 Trial Courts: How Civil Cases Begin 281

Deciding to Sue 282

Resolution Without Filing a Lawsuit 287

Too Many Lawsuits? 287

Courts in Comparative Perspective: *The Republic of India: The World's Largest Democracy* 291

Law and Courts in a Digital Age: Europe and the Right to Be Forgotten 292

Tort Reform 293

Case Close-Up: *Exxon v. Baker* (2008) 294

The Complex World of Torts 298

Alternative Dispute Resolution 302

Debating Law, Courts, and Politics: Is the \$20 Billion BP Claims Process Faster, Fairer, and Fatter? 305

Conclusion 307

11 Trial Courts: How Civil Cases End 315

Civil Procedure 316

Steps in a Civil Lawsuit 318

Negotiations, Settlements, and Dispositions 324

Debating Law, Courts, and Politics: The Billion-Dollar Blame Game Trial 326

Dynamics of Trial Court Dispositions: Three Case Studies 327

Settling Tort Cases 327

Case Close-Up: *Rodriguez v. Firestone* (2001) 328

Courts in Comparative Perspective: *The State of Israel* 329

Negotiating Small Claims 332

Bargaining Divorce Cases 333

Winners and Losers 336

Law and Courts in a Digital Age: Divorce and Social Media 337

Conclusion 338

12 Trials and Juries 343

History and Function 344

Courts in Comparative Perspective: Russia 346

Jury Selection 349

Law and Courts in a Digital Age: Disturbing Imagery and Jury Service 350

The Moving Party Presents Its Case	353
Expert Witnesses	355
The Defense Presents Its Case	357
Rebuttal	360
Closing Arguments	360
Jury Instructions	361
The Jury Decides	361
Prejudicial Pretrial Publicity	363
Case Close-Up: <i>Sheppard v. Maxwell</i> (1966)	364
Trials as Balancing Wheels	366
Debating Law, Courts, and Politics: Are Juries Vanishing?	367
Conclusion	368

Part V Appellate Review

13 The Appellate Process 374

The Nature of the Appellate Process	375
Law and Courts in a Digital Age: Are the Police Watching Your Car?	376
Appellate Court Procedures	379
The Business of the Appellate Courts	381
Caseloads and Expedited Processing Techniques	384
Postconviction Remedies	385
Debating Law, Courts, and Politics: Innocents on Death Row?	387
Decision Making in Appellate Courts	388
Explaining Decision Making in Appellate Courts Today	389
State Supreme Courts	390
Case Close-Up: Same-Sex Marriage: <i>Obergefell v. Hodges</i> (2015)	392
Courts in Comparative Perspective: Canada	394
U.S. Courts of Appeals	396
Conclusion	399

14 The Supreme Court: Deciding What To Decide 406

Jurisdiction of the Supreme Court	407
Courts in Comparative Perspective: <i>The International Court of Justice</i>	408

Doctrines of Access	410
Case Close-Up: <i>Roe v. Wade</i> (1973)	413
Mobilizing the Law to Reach the Supreme Court	417
Law and Courts in a Digital Age: Violent Comments on the Internet: What Can You Say?	418
Case Selection	421
The Court's Docket	425
Debating Law, Courts, and Politics: Should Congress or the Court Decide Who Decides?	429
Conclusion	430

15 The Supreme Court: The Justices and Their Decisions 436

Case Close-Up: <i>Reno v. American Civil Liberties Union</i> (1997)	437
Selecting the Justices	439
Senate Confirmation	444
Debating Law, Courts, and Politics: The Rejection of Robert Bork	447
The Decision-Making Process	448
The Justices' Policy Preferences	454
Law and Courts in a Digital Age: Photo Identification and Voting	457
From Warren to Roberts	458
Impact and Implementation	461
Courts in Comparative Perspective: <i>Japan</i>	465
Conclusion	466

Glossary 474

Case Index 489

Subject Index 493

Preface

This book is written for undergraduate courses that deal with America's judicial system and are usually taught under some variation of the title *judicial process* or *judicial politics*; *the American legal system*; or *law, courts, and politics*. The intended readers are students majoring in political science, prelaw, or criminal justice; students interested in going to law school; or those simply needing a social science elective. That student interest in judicial process courses remains steady reflects the fact that law, courts, and politics remain important topics of discussion in American society. Indeed, as Chapter 1 discusses, it is hard to read the day's news without being confronted with some aspect of court actions or how the law influences the choices that people and institutions make.

How does this book differ from other texts on judicial process? It differs in two principal ways.

First, *Judicial Process: Law, Courts, and Politics in the United States* is designed to be a comprehensive, stand-alone text. Some judicial process texts are too short, omitting important topics and providing only cursory coverage of others. This book provides an adequate breadth of coverage and an appropriate depth of treatment.

Second, this book presents a balanced treatment of both law and politics. Other texts provide only minimal coverage of important aspects of law and the legal process while focusing too much on politics; others err in the opposite direction. This book offers a full and focused discussion of legal topics such as the adversary system, common law, precedent, and major branches of law while, at the same time, recognizing the political, social, and economic conditions that underlie and impact law and the legal process.

Major Themes

Working within the framework of law and politics, *Judicial Process: Law, Courts, and Politics in the United States* focuses on the social, political, and economic dynamics of the legal system. Toward this end, the book stresses two themes: courts as legal institutions and courts as political institutions.

Courts as Legal Institutions

This text provides readers with a working knowledge of the major structures and basic legal concepts that underlie the judiciary in the United States. Court jurisdiction, the role of the

Constitution, and other legal processes and institutions are all important matters that are carefully explained. To understand the legal system, however, students need to know more than just the formal rules. Also necessary is an understanding of the assumptions underlying these rules, the history of how they evolved, and the goals they seek to achieve. Moreover, we stress that the American judiciary is not monolithic. Rather, the judicial process consists of a number of separate, and often competing, units. Conflicts over the goals that these units are expected to achieve, in turn, influence how justice is dispensed.

Courts as Political Institutions

Many books leave the false impression that an understanding of the formal law and major court structures is all that one needs to know about the judicial process. This kind of approach provides only a limited view of the dynamics of how courts administer justice. In particular, it omits the key fact that courts often must make discretionary choices. The idea that the law is not self-executing is expressed in terms of the courts as political institutions. As the newly written first chapter emphasizes, the courts are best viewed in the same way as any other branch of government. As political scientists, we are not afraid to say that courts are political—and properly so. All too often, calls for removing judges and juries from politics amount to little more than attempts to capture these institutions by one set of political interests at the expense of others.

Topics in This Edition

This seventh edition covers both fundamental and up-to-date topics to emphasize the twin themes of courts as legal institutions and courts as political institutions.

New to This Edition

- Updated coverage of the impact of the war on terrorism on the U.S. legal system
- Comprehensive updates to all tables, graphs, and charts
- New material focusing on law, courts, and social media
- Updates on controversial U.S. Supreme Court decisions, including same-sex marriage
- Expanded coverage of the three female justices on the U.S. Supreme Court
- Updated content on comparative legal systems around the world
- New coverage concerning the legalization of marijuana for recreational use
- Continuing coverage of U.S. Supreme Court decision making and the Roberts Court

Focus on Fundamentals

Coverage of the essential structure and practices of the U.S. judiciary system remains thorough and complete and includes the following:

- Origins of U.S. law
- Institutions, consumers, and interpreters of law
- Federal and appellate court systems

- The complex structure of state courts
- Lawyers: their education and their role
- Selection and discretion of judges
- Steps in civil and criminal trials
- A close look at the Supreme Court

Key Features

To provide multiple perspectives on the complex issues of law and its administration, each chapter of *Judicial Process*, Seventh Edition, includes the following.

Case Close-Up

To highlight the importance of courts as legal institutions, each chapter contains at least one Case Close-Up. Many of the cases featured are landmark decisions of the U.S. Supreme Court; others are state or local cases chosen to illustrate key features of the impact of court decisions on American society. These discussions move beyond the dry legal prose to look at the people involved and what happened after their brief experience with the judiciary.

Debating Law, Courts, and Politics

To highlight the importance of courts as political institutions, the Debating Law, Courts, and Politics boxes engage students in a current debate about some aspect of the judicial process. (In earlier editions, this box was called Controversy.) Most of these Debating Law, Courts, and Politics boxes start with a question and end by asking for students' opinions. These boxes challenge readers to move beyond the immediate, sometimes emotional, aspect of an issue and probe more deeply into why people hold differing opinions about the question.

Courts in Comparative Perspective

To highlight the relationship between the judiciary and the societies served, each of the Courts in Comparative Perspective boxes focuses on some aspect of a legal system in another nation. Most students are familiar only with the way justice is dispensed in the United States, and are shocked to discover that justice systems in other countries operate very differently from ours. These boxes shape such amazement into a more comparative way of thinking.

Law and Courts in a Digital Age

These features focus on the growing impact of technology, social media, and the Internet on law and the courts. Technology is omnipresent in our lives and it creates both opportunities and challenges for all aspects of the legal system. For example, do the police need a search warrant to seize your cell phone? Should police wear body cameras? Boxes frequently end with several questions for discussion, to further stimulate critical thinking and student debate.

Pedagogical Innovations

Several pedagogical innovations anchor this edition to encourage active learning and deeper engagement with the text.

Critical Thinking Questions

Each chapter ends with Critical Thinking Questions, which ask students to pull material from the chapter together and apply key concepts to new material.

Web Resources

Students will find a lot of helpful guides to supplement their reading with online resources. The Internet is a major source of information, and the Web makes learning and exploring easier. Facts, figures, and opinions are readily available. Some Web pages, however, are little more than thinly veiled propaganda pieces, presenting the world from the vantage point of one interest group.

To encourage active, rather than passive, learning, each chapter contains several Web resources designed not only to sharpen students' Web skills, but also to further their understanding of concepts discussed in the chapter.

Glossary

Another key feature of this edition is the comprehensive glossary. More than just a compilation of the terms highlighted in boldface throughout the text, it also defines the most commonly used legal terms.

Key Developments

To provide a better sense of how the discussions in the chapters relate to material covered in other courses—such as constitutional law—several chapters contain features labeled “Key Developments,” which summarize the major legal developments concerning the topic at hand. We suggest that you use these as cross-references for other courses and also update the material when the Supreme Court hands down new decisions or Congress passes new laws.

Online Instructor Resources

An Instructor's Manual/Test Bank and book-specific PowerPoint lectures are available for instructors on Cengage's instructor companion website. The revised Instructor's Manual/Test Bank offers chapter key points, suggestions for class discussions, writing assignments, and exam questions to make course preparation easier. A set of book-specific PowerPoint lectures makes it easy for you to assemble, edit, publish, and present custom lectures for your course. The slides provide outlines specific to every chapter of *Judicial Process* 7E, and include tables, statistical charts, graphs, and photos from the book as well as outside sources. In addition, the slides are completely customizable for a powerful and personalized

presentation. The Instructor’s Manual/Test Bank and PowerPoint lectures have all been updated with new material to reflect changes in the new edition. Access these instructor resources at www.cengage.com/login. Sign in to your existing Cengage account or register by clicking on “Create a New Faculty Account.”

To the Students

This book is written with you in mind. Over the years, our students have helped us evaluate a variety of topics and approaches, and the best of what works is used in this book. A spiral approach—beginning from a core of information and working outward to cover a wider range of relevant perspectives—allows you to start with the people who sparked a case and expand your view to the broader issues involved.

Our major objective is to demystify law, courts, and politics in the United States. We have found that people often approach the law as an ideal system that is set apart from the rest of society. In fact, courts do not stand in silent isolation, somehow removed from the communities they serve. Law and courts are at the core of how our nation governs itself.

This is not to suggest that the judicial process in the United States is perfect—far from it. But when people begin to discuss what needs to be changed, they often disagree; these disagreements often reflect political, social, and economic divisions in our society.

The Seventh Edition contains several special features that will help make this introduction to the judicial process more informative, more enjoyable, and more relevant for you:

- *Case Close-Up* These highlight important decisions—of the Supreme Court and of state or local courts—that illustrate the impact courts have on our everyday lives. In addition to the case history itself, each chapter looks closely at the people involved and what happened to them after their brief experience with the judicial system.
- *Debating Law, Courts, and Politics* These items analyze current debates about some aspect of the judicial process to help you look beyond the emotional aspects of an issue to the deeper reasons people disagree. They all start with a question and end by asking your opinion: What do your answers suggest about you as a person?
- *Courts in Comparative Perspective* These presentations help you discover what is unique about the U.S. courts by comparing them with other nations’ systems.
- *Law and Courts in a Digital Age* These boxes focus on legal issues related to technology, the Internet, and social media.

Other Helpful Features

Critical Thinking Questions Each chapter ends with a set of critical thinking questions to integrate material from the chapter and to help you consider what you are reading and relate it to your own experiences. Contrast how the concepts presented in the book relate to recent events.

Glossary The basic terminology of law, courts, and politics is explained throughout this book. Typically, the language of the law strikes students as both foreign and familiar. Some of our legal terms are indeed foreign because they are derived from Latin and French. But, with a little guidance, these “foreign” terms are readily understandable. Important terms are set in **boldface type**, and these terms are collected with their definitions in the Glossary.

Indexes To help locate important topics, this book contains a detailed Subject Index, including authors and subjects, and a separate Case Index of court decisions discussed in the text. By studying the U.S. judicial process, you explore one of the most important aspects of our society—and ourselves.

Acknowledgments

Writing the Seventh Edition was made easier by the assistance and encouragement of people who deserve special recognition. We would like to thank the political science team at Cengage Learning—Carolyn Merrill, Jessica Wang-Strykowski, and Michelle Forbes.

We would like to send a special thanks to the reviewers of this edition: Steve Anthony, Georgia State University; Jacqueline H. Sellers, College of Southern Maryland, and Patricia Sullivan Talty, University of Massachusetts at Lowell.

We also gratefully acknowledge the help of a number of people who provided invaluable input to previous editions, including Keith Boyum, California State University-Fullerton; Robert C. Bradley, Illinois State University; Richard A. Brisbin, Jr., West Virginia University; James Eisenstein, Pennsylvania State University; Margaret Ellis, University of Oklahoma; Jasmine Farrier, University of Louisville; James C. Foster, Oregon State University; Sheldon Goldman, University of Massachusetts at Amherst; Barbara L. Graham, University of Missouri-St. Louis; Scott E. Graves, Georgia State University; Ed Heck, San Diego State University; Valerie Hoekstra, Arizona State University; Mark Iris, Northwestern University; David Jones, University of Wisconsin-Oshkosh; Mark Kaplinsky, Xavier University; William E. Kelly, Auburn University; Mark Landis, Hofstra University; Drew Lanier, University of Central Florida; William McLaughlan, Purdue University; Steven Puro, St. Louis University; David Roebuck, Columbia College; Elliot Slotnick, Ohio State University; Rorie Spill Solberg, Oregon State University; Ruth Ann Strickland, Appalachian State University; Susette Talarico, University of Georgia; Neal Tate, Vanderbilt University; Jan P. Vermeer, Nebraska Wesleyan University; Russ Wheeler, Federal Judicial Center; Robert Whelan, University of New Orleans; William Wilkerson, SUNY Oneonta; and Alissa Pollitz Worden, State University of New York-Albany.

About the Authors

David William Neubauer was born in Chicago, Illinois, on February 25, 1944. He grew up in Aurora, graduating from West Aurora High School in 1962. After receiving an A.B. in political science in 1966 from Augustana College in Rock Island, he undertook graduate work at the University of Illinois, receiving his Ph.D. in 1971.

Neubauer has taught at the University of Florida, Washington University in St. Louis, and, most recently, at the University of New Orleans (UNO). He regularly teaches a judicial process class, a course on the criminal courts, and a graduate seminar in public law. Promoted to professor in 1981, he chaired the Department of Political Science at UNO from 1982 to 1986.

Professor Neubauer is the author of *Criminal Justice in Middle America* (General Learning Press, 1974) and *Debating Crime Rhetoric and Reality* (Wadsworth, 2001). He is co-author, with Henry F. Fradella, of *America's Courts and the Criminal Justice System*, Eleventh Edition (2014). Most recently, he wrote, with Stephen Meinhold, *Battle Supreme: The Confirmation of Chief Justice Roberts and the Future of the Supreme Court* (Wadsworth, 2006). He has published in *Law and Society Review*, *Judicature*, *The Justice System Journal*, and *Justice Quarterly*.

Stephen Scott Meinhold was born in St. Charles, Missouri, on August 17, 1968. He graduated from Francis Howell High School in 1986 and received a B.A. in political science from the University of Missouri at St. Louis in 1990. Meinhold received his Ph.D. from the University of New Orleans in 1995. He is currently Professor of Political Science at the University of North Carolina Wilmington.

His research has examined public perceptions of the litigation explosion, lawyers and their political party activity, and the relationship between the president and the solicitor general. Professor Meinhold's current research focuses on legal systems in South America, and emergency management. He has published articles in the *Political Research Quarterly*, *Non-profit and Voluntary Sector Quarterly*, the *Social Science Quarterly*, the *Justice System Journal*, and *PS: Political Science and Politics*. He is the author, with David Neubauer, of *Battle Supreme: The Confirmation of Chief Justice Roberts and the Future of the Supreme Court* (Wadsworth, 2006).

Law, Courts, and Politics

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

David Neubauer



“No longer may this liberty be denied.” (Justice Anthony M. Kennedy in *Obergefell v. Hodges*). On June 26, 2015 the U.S. Supreme Court, in a closely divided 5-4 decision, announced that the Fourteenth Amendment to the Constitution requires states to grant marriage licenses to same-sex couples and that marriages of same-sex couples performed in one state must be recognized by all others. The Court’s decision represents the perfect intersection of law, courts and politics. Same-sex couples, their attorneys, and their supporters had been arguing for decades that laws and state constitutional amendments prohibiting same-sex marriage were unconstitutional. Proponents of those laws (opponents of same-sex marriage) had been simultaneously arguing that the U.S. Constitution does not protect this right and that whom may get married should be defined by the states.

Opponents of same-sex marriage won in some courts, advocates won in others. All the while public opinion and politics were changing. The U.S. Supreme Court in 2013 (on the same day of the year, June 26) had overturned the Defense of Marriage Act (DOMA), passed by Congress and signed by President Clinton in 1996, which defined marriage as between a man and a woman. Public opinion during the same period of time was shifting rapidly to a pro same-sex marriage position. And by the summer of 2015, 11 states and the District of Columbia had democratically approved same-sex marriage and another 26 states allowed same-sex marriage because of court orders. The nation faced a patchwork of marriage laws; an issue that many once viewed as entirely political was now squarely legal, while for others an issue once viewed as entirely legal, was now squarely political.

Obergefell v. Hodges (2015) (covered in greater detail in Chapter 13) illustrates a broader point: in the U.S. questions about law usually become questions about politics. Supreme Court decisions on matters like same-sex marriage, abortion, gun control, and the display of religious items on public property often spark heated debates. But these are just a few of the issues heard by courts across the nation. Every day in courthouses across the nation judges and juries decide matters like the amount of damages after an automobile accident and how many years a convicted drug dealer must serve in prison. Collectively, decisions made in the courts determine the balance of law and politics and, ultimately, affect the way we live.

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

Courts and Government

Courts are distinct from the legislative and executive branches of government in several ways: Most of the principal actors have law degrees, procedures in court are formal, and the language used differs from ordinary English. But emphasizing how distinctive courts may be also gets in the way of thinking about the broader role of courts in American politics. In sometimes controversial ways, the courts are interconnected with every aspect of American politics, including the Constitution, federalism, the president, legislatures, elections, political parties, interest groups, public opinion, and the media. Let's look at each interaction in turn.

The Constitution The Constitution is one of the most powerful symbols of American government. Because the public associates courts, particularly the Supreme Court, with the Constitution, the judiciary in the United States is granted considerable respect. That grant of legitimacy, however, doesn't always mean that the public likes how the Supreme Court interprets the Constitution. For example, the landmark Supreme Court decision *Miranda v. Arizona* (1966), requiring police to warn suspects of their right to silence before interrogation, is opposed by many because it seems to unduly protect criminals. Similarly, the high

Court's decision in *Roe v. Wade* (1973), finding a constitutional right to privacy that includes abortion, continues to divide the nation. State supreme courts likewise interpret their own respective state constitutions, and those decisions at times also prove controversial. For example, decisions declaring legislatively passed tort reform unconstitutional produce strong condemnation from the business community.

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

Often, the U.S. Supreme Court has been called on to decide disputes over federal versus state power, and, not surprisingly, its decisions frequently provoke profound controversy. For example, how far may cities and states go in imposing gun control? Likewise, courts are faced with a series of lawsuits involving state attempts to enforce federal immigration law.

The Executive Branch In the modern era, presidents have viewed the courts as an important part of their political agenda. When running for office, presidential candidates often denounce court decisions they dislike and pledge to appoint justices who will reshape the judiciary. After election, they use the courts and lawsuits to seek policy changes that are to their liking. Most importantly, they seek to influence the future decisions of courts through their nominations to the bench.

State and local executives (governors and mayors) also use the courts to advance their policy objectives. Republican governors and state attorneys general have filed lawsuits attempting to block President Obama's health care laws. Meanwhile, Democratic attorneys general have filed lawsuits to protect consumers in disputes with big business. Moreover, in some jurisdictions, executives also have a great deal of control over who becomes a judge.

The Legislature At every level, the relationship between courts and legislatures is best viewed as a struggle for institutional balance (Geyh 2008; Campbell and Stack 2001). Legislatures sometimes find themselves unhappy with the interpretation of their laws made by courts. Sometimes they have power over the jurisdiction or the composition of courts, but at other times they share that power with the voters or the executive. Responsible for passing the laws that the courts will apply, legislatures often do so without regard for the unintended consequences for the legal system. For example, in most jurisdictions, legislatures have enacted wars on drugs or strict sentencing guidelines that swell court dockets and fill already overcrowded prisons.

Elections Over the years, courts have been called on to decide disputed elections. The best example is *Bush v. Gore* (2000), in which, for the first time in our nation's history, the high court actually selected the president. But lawsuits contesting elections are hardly unique. In virtually every state, candidates who have lost elections by a narrow margin have turned to the courts, alleging election irregularities or even voter fraud. On occasion, courts have even declared the election-night loser to be the eventual winner. Just as important, courts across the nation routinely consider election laws, even deciding such fundamental issues as who gets on the ballot, what they get to say, and who

gets to vote (Banks and Green 2001). Although *Bush v. Gore* (2000) is atypical because it selected the president of the United States, it is not atypical of judicial involvement in elections.

Not only do courts influence elections, but the opposite is also true—elections affect the judiciary. In many jurisdictions, judges are elected directly by voters. One of the questions we examine in Chapter 6 is whether popularly elected judges act differently than those selected in other ways, such as appointment.

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

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

At the state level, the political party that controls the governorship can influence the types of people selected to the bench. In turn, judicial reform has often focused on reducing the influence of political parties in judicial selection.

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

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

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

concern about public dissatisfaction with the judiciary and have sought ways to increase public trust and confidence.

The jury provides a direct link between the courts and public opinion. To some, the jury is the most democratic of institutions, allowing ordinary citizens to pass judgments on their peers. To others, it allows randomness into the decision-making process and, thus, erodes the rule of law. These are more than philosophical issues. Some people are concerned that juries are too prone to acquit the guilty. Other people are concerned that juries are all too likely to find businesses liable in civil matters and are too willing to award excessive damages to plaintiffs.

The Media The media play an important role in what we know about the courts and how we view the actions of judges, juries, lawyers, and litigants. Through their coverage of courts at the national and local level, the Internet, television, radio, and newspapers provide information about everything from gruesome crimes to Supreme Court decisions. Not all the coverage is so serious; the media also provide a regular diet of stories about dumb crooks and greedy plaintiffs. But the role of the media goes beyond just reporting the news. Sometimes, it affects the judiciary directly. For instance, it may be difficult to find a fair and impartial jury when a case has generated considerable pretrial publicity.

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

Courts as Legal Institutions

Courts provide a forum for resolving disputes through the application of legal rules. Although they are only one part of the U.S. legal system, in many ways the courts are the part most familiar to citizens.

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

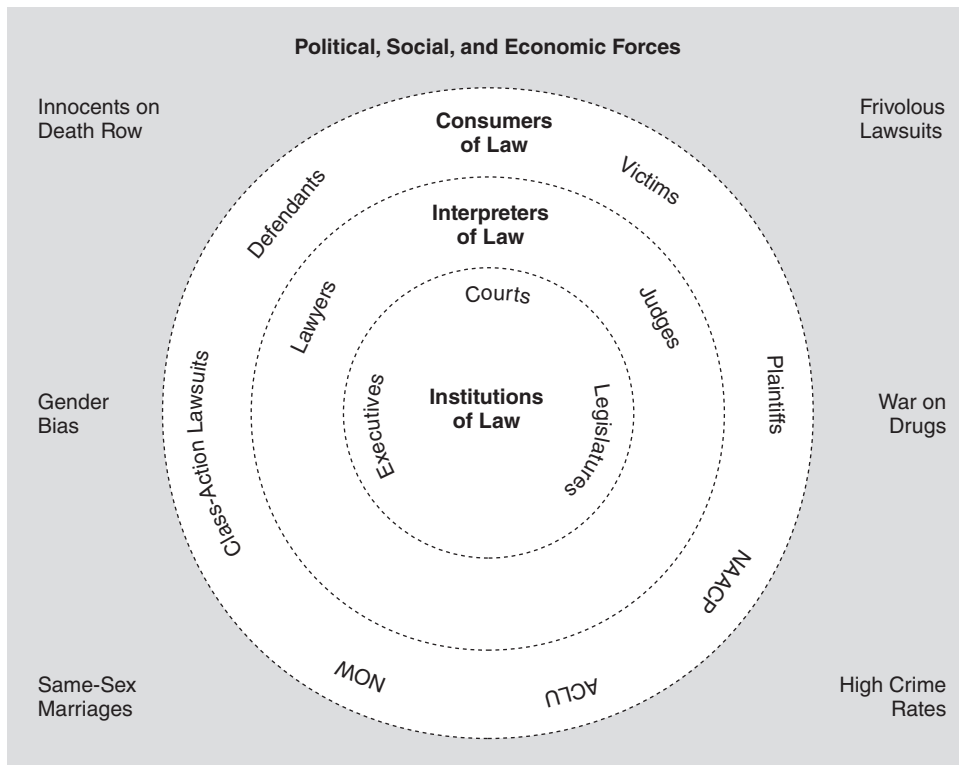
The Inner Ring: Institutions of Law

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

FIGURE

1.1

The Legal System



All three branches of government are active participants in deciding what the law is and how fast it changes. Today, legislatures are the principal lawgivers. They pass laws setting forth broad public policies. In implementing these general mandates, executive agencies make administrative law, rules, and regulations that likewise have the force of law. But these laws, whether passed by legislatures or implemented by executive agencies, may be ambiguous or contradictory. The judiciary, therefore, is the governmental institution entrusted with settling disputes on the basis of law. However, the doctrine of separation of powers oversimplifies a complicated reality. Courts in the United States do not just interpret the law enacted by the other two branches of government; the courts also make law. Courts, like legislative and executive bodies, are part of the political process of fitting law to the needs of a dynamic society. Court decisions have had a major impact on how the United States is governed. Often the Supreme Court is called upon to decide how quickly (or slowly) law should change. Consider, for example, the issue of executing juveniles. One side argued that the meaning of the prohibition against cruel and unusual punishment should be limited to its eighteenth-century meaning, while others countered that interpretations of this phrase should reflect contemporary understandings.

The more than 17,000 courts in the United States range from rural justice of the peace courts to the U.S. Supreme Court. Clearly, the most distinctive feature of the organization

of American courts is the **dual court system**—one national court structure and court structures in each of the 50 states. The consequences of this system for the judicial process lead to questions such as these: Are too many lawsuits filed in federal courts? When should federal courts limit the amount of money state juries award in punitive damages?

The Middle Ring: Interpreters of Law

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

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

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

Judges are society's authoritative interpreters of the law. People often disagree about the meaning of the law. Although their contrasting views deserve respect, ultimately judges have the final word in declaring the meaning of law. There is no agreement on how judges should be selected or what factors should be most important. Therefore, selection occurs in a variety of ways: election by the voters, appointment by the executive, or merit selection procedures that combine the two. Which judicial selection system produces the best judges is a topic of continual political debate in the United States.

The Outer Ring: Consumers of Law

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

Some of the consumers of law are individual citizens who sue because they have been injured in an automobile accident or the like. Others are businesses that file suit to recover

money owed by others. Increasingly, interest groups file lawsuits to promote public policies that favor their members. In this text we profile many interest groups, including the ACLU, NAACP, and NOW.

Political, Social, and Economic Forces

These three rings of the legal system operate within the larger society of which they are a part. The legal system is affected by political, social, and economic forces in a variety of ways. For example, as U.S. social attitudes toward marriage have changed over time, the number of divorce cases has increased. Moreover, the traditional view of limiting marriage to persons of different genders has been replaced by public support for same-sex marriage and equality.

Some social and economic forces take the form of political demands. Concern over drunk driving has prompted demands that legislatures pass stiffer laws. Similarly, calls to get tough on illegal drug use have led to a decades-long “War on Drugs”—yet some states have recently legalized the use of marijuana, which remains illegal under federal law. Concerns over the high price of medical and automobile insurance have prompted calls for tort reform. Courts are also involved in immigration issues, the War on Terror, and same-sex marriage.

Several decades of polling point to three somewhat contradictory sets of public assessments about the courts. The general public has a relatively shallow reservoir of knowledge about the courts. More citizens, for example, can identify by name persons who play judges on TV than can identify the chief justice of the U.S. Supreme Court. The general public is also critical of the overall operations of the courts. Ordinary citizens believe that judges don't deal harshly enough with criminals and that lawyers file too many frivolous lawsuits. Although citizens express widespread dissatisfaction with the courts' performance, the typical American citizen is highly supportive of courts and judges. Far more than legislators or executives, judges retain the public's respect and confidence. It is amid contradictions like these that public sentiments influence government policy. The judiciary is no exception. We can best assess the larger environment within which courts operate by focusing on courts as political institutions.

Courts as Political Institutions

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

Courts and Politics: How They Are the Same

Law and courts cannot be understood without understanding their roots in U.S. politics. Narrow definitions of politics that focus on partisan influences, popular elections, and

political parties cloud this vital process. A more comprehensive view is provided by David Easton, who defines **politics** as “the authoritative allocation of values for a society” (1965, 50).

Applying Easton’s definition to the judiciary’s activities highlights several political features of its operation. Certainly, a **court decision**—the determination that settles a controversy—is considered authoritative. Only courts have the legal power to sentence a convicted offender to prison, impose a monetary award in a civil case, or declare an act of Congress unconstitutional.

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

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

Courts and Politics: How They Differ

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

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

Courts also differ from other governmental institutions in how they make decisions. The legislative and executive branches are very responsive to elections, public opinion, and partisan pressure. Lobbying and direct contacts are of critical importance. By contrast, the judiciary is insulated from these standard practices of the political process. Writing letters, placing phone calls, or promising to deliver votes on election day are legitimate ways of