

11.1: State Courts

State Court Systems

Unlike other countries with a single, centralized judicial system the United States operates under a dual system of judicial power – one system of courts operates within each state’s constitution, and the other system of courts derives from the provisions of Article III of the United States Constitution. Thus, each state, as well as the federal government, are responsible for enforcing the laws, and state and local courts and federal courts adjudicate both civil and criminal case matters. It follows that Americans are dual citizens; not only are they citizens of the United States of America, but they are citizens of the state, which they reside as well.

With the exception of the appellate process, and possibly in the procedural realm of injunctive relief, the national and state courts are virtually separate and distinct entities. For example, since the U.S. Constitution gives the U.S. Congress authority to make uniform laws concerning bankruptcies, state courts largely lack jurisdiction in the matter. On the other hand, the U.S. Constitution does not give the federal government authority over the regulation of family life; in matters of family law (e.g., divorce, child custody, probate, division of property, etc.) a state court would have jurisdiction and a federal court would likely not hear cases. ⁴ While operating largely separately, the two systems can come together in the U.S. appellate courts (including the U.S. Supreme Court). The U.S. Supreme Court has final interpretative authority in the country with respect to disputes regarding the meaning of the U.S. Constitution and interpretation of its provisions by all “inferior” (i.e., subordinate) courts in the country. This situation of the coming together of the state and federal courts is a rather rare occurrence and only happens when there is a substantial federal question of law and all remedies at the state level are fully exhausted. Even then, it is entirely left up to the U.S. Supreme Court to decide if it wishes to hear the case. ⁵

State courts were in place after the American Revolution, but with fresh memories of the Colonial Courts controlled as an extension of English rule Americans generally distrusted these state courts. ⁶ Since most states were predominantly rural in the distribution of their populations, conflicts between people tended to be relatively simple and were typically settled informally without the need of court intervention. It wasn’t until the mid-19th century that modern unified state court systems emerged, with many of these “upgrades” in the procedures and practices of minor courts coming in response to the many new legal challenges arising from the industrial revolution. With industrialization, the American society was changing so rapidly in so many areas that state legislatures, most of which met for only brief periods of time, neither had the time nor the resources to develop statutes to cope with the rising problems. For example, with the advent of labor unions, patent rights and royalties associated with new technology, and complaints over growing corporate monopolies such as utilities and the railroads brought many disputes to the courts for resolution in the absence of governing statutes. ⁷ This set of circumstances resulted in many conflicts entering into state courts through parties asking the courts to use their common law “equity” powers to resolve contentious commercial, real estate, industrial insurance, and similar disputes born of a rapidly industrializing nation.

While general jurisdiction county courts were well established in American society and enjoyed growing legitimacy as the memories of colonial rule faded over time, these courts were neither adequately staffed nor properly organized to address the increasingly complicated problems of the day. When state and local courts became overwhelmed with litigation and lost faith in the legislative process to bring timely relief, the State Bar Associations (the professional licensing association of lawyers in a state) began to orchestrate reform in state court systems. This reformation depended on the separation of powers argument that empowered state supreme courts to create “unified” courts by mandate of the court as opposed to legislative action. More specifically, state supreme courts acted on their own authority as a separate branch of government, establishing a system of courts wherein the state supreme court sits atop a system of interconnected courts, all of which adhere to the same rules and procedures on how cases (criminal, civil and equity) are processed, and appeals are made. In due course, state legislatures codified the key elements of unified court operations into state statutory law. In virtually all of the states, this creation of unified court systems resulted in the addition of new jurisdictions, the development of uniform procedures, the common training of court personnel, and in many cases, the development of specialized courts such as small claims courts, juvenile courts, and family law courts.

Through the U.S. Constitution (Article III, Sec. 1) the U.S. Congress has the power to establish “inferior courts” for hearing cases arising from federal law. As previously noted, the interaction between the federal and state courts is relatively rare, with the most notable exception being in the area of Civil Rights. Federal statutes such as the Civil Rights Act and Voting Rights Act can, and have, brought federal and state court systems into close contact. As a general rule, state courts cannot interpret state constitutions in a way that undermines a U.S. Supreme Court ruling by condoning a less protective standard with respect to a civil right recognized to exist in the U.S. Constitution. On the other hand, state courts are permitted to interpret their state constitutions to require greater protections than those required by the federal courts.

Though federal and state court systems happily coexist in most respects, such mutual coexistence is not uniformly the case. For example, during the 1960s there was so much conflict between federal and state courts that a U.S. constitutional revision was proposed calling for the creation of the “Court of the Union,” a judicial tribunal which would have addressed the alleged encroachments upon state judicial power by the federal system. ⁸ Even though the “Court of the Union” idea ultimately failed to gain traction with either the public or the legal community, the conflict between the two systems that gave rise to the idea has not fully abated. An example of this conflict is the deep disagreement over capital punishment arising in late 2007.

While waiting for a U.S. Supreme Court decision as to whether the current method of lethal injection represents “cruel and unusual punishment,” a violation of the Eighth Amendment of the U.S. Constitution, many of the 36 states using lethal injection as a method of execution placed a de facto moratorium on executions. Other states boldly rebuked the U.S. Supreme Court and moved ahead with planned executions, despite the Supreme Court’s plea to await the outcome of its hearing of a key case. On November 2, 2007, barely a month after the U.S. Supreme Court agreed to hear the case [granted certiorari] on lethal injection, the Florida Supreme Court unanimously ruled that their state’s new method for carrying out lethal injections, after changes in the procedure were made which were prompted by a botched execution in December, do not violate the U.S. Constitution’s prohibition against cruel and unusual punishment.

How State Courts Work

Comparing one state court to another is like comparing apples to oranges in some respects. Some state court systems are extremely complex, while others are rather simple in their structure. For example, the state of New York, with a population of 19 million residents in the year 2000, are served by approximately 3,500 full-time judges working within 13 different layers of courts. In contrast, California, with almost double the population of New York, has only three layers of courts and employs only 1,600 judges. Even though both California and New York, and their respective local court systems, operate under the same general principles and under the structure of a unified court system, they do not operate in the same way. In order for attorneys to practice law in state courts, they must be able to demonstrate knowledge of that particular state’s legal system by either passing the state bar examination or otherwise demonstrating sufficient command of the particular state’s system of courts. The caseloads for state courts vary widely, and these workloads seem to have little to do with the size of the state’s population. Generally speaking, western states’ courts, which were formed later in the nation’s history, tend to be more modern and simplified when compared to those of longstanding operation in the eastern states.

The organization of state and local courts tends to reflect two major influences: 1) the organizational model set by the federal courts; and 2) each state’s judicial preferences as manifested in state constitutions and judiciary statutes. ⁹ The increased influence of states’ constitutions within their judicial system, particularly in regards to civil rights, is known as judicial federalism. As the chapter on State Constitutions noted, Judicial Federalism is at play when state courts address the state’s constitutional claims first, and only consider federal constitutional claims when extant cases cannot be resolved solely upon state grounds.

The legal terminology and structure of each state’s court are quite diverse, but they all follow a generic three-tiered structure. At the base is a system of general and limited jurisdiction trial courts of original jurisdiction, with an intermediate set of appellate courts in the middle, and, at the top, the Court of Last Resort (also an appellate court). In addition, many states are increasingly using specialized, sometimes known as problem-solving, courts as needed. The fundamental distinction between trial courts and appellate courts is that trial courts are those of the first instance that decide a dispute by examining the facts. Appellate courts review the trial court’s application of the law with respect to the facts as recorded in the official proceedings of the case in question. ¹⁰ Figure 8.1 reflects how a generic three-tiered court system with a specialized court may operate. Some states’ court structure, usually those with small populations, may be more simplified than the generic system, while in some cases the states’ structure is more complex than the diagram implies.



Figure 11.1 State Court Structures ^[123]

Trial Courts:

Trial courts often don't garner the attention of either states' higher courts or the federal courts, but they represent the veritable workhorses of the court system. Typically, each state has two types of trial courts of original jurisdiction, one of limited jurisdiction and one of general jurisdiction. Funding for trial courts of general jurisdiction generally comes from a combination of state and local sources. In most states, courts of limited jurisdiction are principally funded by local governments.

Trial courts of limited jurisdiction, as the name suggests, deal with specific types of cases and are often presided over by a single judge operating without a jury. Found in all but six states, courts of this type typically hold preliminary hearings in felony cases and exercise exclusive jurisdiction over misdemeanor and ordinance violation cases. ¹¹ Geographically, the jurisdiction of these courts varies across the states, but by-and-large they possess either a countywide jurisdiction or serve a specific local government such as a city or town. If there were an entity we could call a "community court," it would be these courts. They are located within or near a community and handle cases arising from misdemeanor offenses and ordinance violations. The courts of this type include, but are not limited to the following:

- Probate Court : Handles matters concerning administering the estate of a person who has died.
- Family Court : Handles matters concerning adoption, annulments, divorce, alimony, custody, child support, and other family matters.
- Traffic Court : Regarding cases involving minor traffic violations.
- Juvenile Court : Handles cases involving delinquent children under a certain age.
- Municipal Court : This court handles cases involving offenses against city ordinances.

General jurisdiction trial courts are the main trial courts in the state system, and in most cases, the highest trial court. These courts are generally divided into circuits or districts. In some cases, the county serves as the judicial district, but in most states, a judicial district embraces a number of counties, which is why they are often referred to as county courts. General jurisdiction trial courts hear cases outside the jurisdiction of the limited jurisdiction trial courts, such as felony criminal cases and high stakes civil suits. In most states cases are heard in front of a single judge, often with a jury.

Intermediate Appellate Court:

Intermediate Appellate Courts go by many names, including Superior Court, Appellate Division, Court of Appeals, and even Supreme Court. With the exception of 11 states, which usually have small populations, states have some form of intermediate appellate courts. The main role of these courts is to hear appeals from trial courts. Any party, except in a case where a defendant in a criminal trial has been found not guilty, who is not satisfied with the outcome from the trial court may appeal to an intermediate appellate court. States' intermediate appellate courts are structured in a variety of ways, but typically they are regionally based and divided into "divisions," "courts" or "districts." For example, Florida has five District Courts of Appeal while more sparsely

populated Idaho has a single Court of Appeals. The courts are usually set up with the judges working in panels of three or more (always an odd number), and the majority of judges decides the outcome of the cases brought to the court. The appellate courts do not have juries, do not hear from witnesses or review the facts of the case, but instead read briefs and hear arguments from the parties' attorneys to decide issues of law or process raised in the cases brought up on appeal. The majority of the time its decisions are final, but it is possible to appeal to the next appellate court level, often the Court of Last Resort.

Court of Last Resort:

All states have a Court of Last Resort, primarily referred to as the Supreme Court, which acts as the state's highest appellate court. In fact, two American states — Oklahoma and Texas — have two Courts of Last Resort; one represents a conventional Supreme Court and the second constitutes a Criminal Court of Appeals. The most common arrangement, found in 28 states, is a seven-judge court; 16 states have five Supreme Court justices, while five states have nine judges. [12](#)

With the exception of the 11 states that don't have an intermediate court of appeals, the Courts of Last Resort have discretion as to whether or not they will hear a case. As an appellate court, it hears cases without a jury, focusing on major questions of law and constitutional issues. Many Courts of Last Resort do have original jurisdiction in certain specific matters, such as the reapportioning of legislative districts. The decisions coming from these courts are final, with the extremely rare exception of when the U.S. Supreme Court decides to hear an appeal from a state.

There are two ways a case regarding a state can be heard in the U.S. Supreme Court. The first, and almost nonexistent, is with the U.S. Supreme Court's original jurisdiction, which involves cases between the United States and a state, between two or more states, and between a state and a foreign country. These cases typically go through the federal system, therefore rarely involve a decision from a state court. The second path for a state-based case is through the U.S. Supreme Court's appellate jurisdiction. In these instances, the U.S. Supreme Court can choose to hear a case appealed from a state's Court of Last Resort. In order for this to occur, there must be a substantial federal question involved and the case must be viewed as "ripe," meaning the petitioner has exhausted all potential remedies in the state court system and the resolution of the case can set a useful precedent for the future resolution of similar cases.

The Fifth Amendment case of *Dolan v. City of Tigard* serves as a good example of such a case. This case centered on zoning regulations and property rights. Dolan, an owner of a plumbing supplies store, appealed her claim though the Oregon court system where the Oregon Supreme Court found for the City and rejected the argument that an unconstitutional taking of private property by the government without just compensation occurred as a result of a zoning decision made by the city. As the case involved Fifth Amendment constitutional rights, the federal courts determined that this case raised a question of federal law. Given that essential determination, Dolan was able to appeal her case to the federal courts, and ultimately all the way to the U.S. Supreme Court. The U.S. Supreme Court found in favor of Dolan, causing local governments across the country to take notice of new requirements for determining just compensation in similar cases.

Problem-Solving Courts:

Problem-solving courts commonly referred to as "specialized courts" dispensing "therapeutic jurisprudence," have emerged in most American states over the past decade. Problem-solving courts relieve overwhelmed legal systems dealing with persons and families whose actions stem from problems better dealt with by "supervised treatment" rather than incarceration or similar forms of punitive governmental sanctions. These courts represent an attempt to craft new, adaptive responses to chronic social, human and legal problems that are resistant to conventional solutions associated with the adversarial process. [13](#)

Though lacking a precise definition or legal philosophy, problem-solving courts share a basic theme: a desire to improve the results that courts achieve for victims, litigants, defendants, and communities through a collaborative process rather than the conventional adversarial process. [14](#) Traditional courts tend to focus on the finding of guilt or innocence, entail looking backward in time, and are conducted in an adversarial way. In comparison, specialized courts focus on the identification of therapeutic interventions, seek to affect future outcomes, make use of a collaborative process, and involve a wide range of court-based and community-based services and stakeholders. [15](#)

There are a number of factors that have led to the rise of special courts, including prison (state facilities) and jail (county and city facilities) overcrowding, highly stressed social and community institutions, and increased awareness of social issues such as domestic violence. While increased social awareness has indeed played some role in the development of these specialized courts, the lack of resources available to state and local court systems has been the major driver behind the broadening use of such courts; the caseloads of the courts have increased substantially in recent decades while the resources available to the courts have not increased proportionately. For example, from 1984 to 1997 the number of domestic violence cases in state courts increased by 77

percent. ¹⁶ Commenting on rising caseloads, Minnesota Chief Justice Kathleen Blaze stated, “You just move ‘em, move ‘em, move ‘em. One of my colleagues on the bench said, ‘you know, I feel like I work for McJustice: We sure aren’t good for you, but we are fast.” ¹⁷

Problem-solving courts got their start in 1989 when Dade County, Florida experimented with a drug court. The drug court, in an attempt to address the problem of criminal recidivism (re-offense) among illegal drug use offenders, sentenced such repeat offenders to a long-term, judicially supervised drug treatment instead of incarceration. In reflection of Dade County’s success with this alternative to incarceration, drug courts taking a similar approach to drug use offenders began to crop up all over the United States. As of April 2007, the U.S. Department of Justice reported that there were 1,699 fully operational drug courts in the United States, and another 62 tribal drug courts. ¹⁸

Since this development in 1989, a variety of specialized courts have emerged, primarily designed to tackle difficult social issues. For example, New York City opened its Midtown Community Court in 1993 to target misdemeanor “quality-of-life” crimes, such as prostitution and shoplifting. Instead of relying upon traditional sentencing involving incarceration, offenders were required to pay back the community for the harm they caused by community service work such as cleaning local parks, sweeping streets and painting over graffiti. In addition, to address the underlying cause of the problem behavior, the offenders were mandated to receive “therapeutic” social services, such as counseling, anger management instruction, substance abuse treatment, and job training. ¹⁹ Typically, elements of the local community are also engaged in the work of the problem-solving courts by participating on advisory panels, providing volunteer services, and taking part in town hall meetings. The City of Portland, Oregon, for example, opened a number of “Community Courts” throughout the city, in many cases holding court at existing local community centers.

Evidence collected in evaluation studies conducted on many drug courts indicates that these problem-solving courts tend to achieve favorable results with regards to keeping offenders in treatment, reducing their drug use, reducing recidivism, and economizing on jail and prison costs. The rate of retention in drug abuse treatment ordered by drug courts is typically 60 percent, as compared to only 10 to 30 percent for voluntary programs. Moreover, drug court participants have far lower re-arrest rates than do persons taken into the traditional court process. ²⁰ Even after fully accounting for administrative and overhead costs, in a two-year period, the drug court in Multnomah County(Oregon) saved \$2.5 million in criminal justice system costs, with an additional savings being made in outside the court system costs such as reduced theft and reduced public assistance payments. Those associated costs were estimated at \$10 million. ²¹

The types of problem-solving courts are many, but the majority of them fall into the categories of limited or general jurisdiction trial courts (courts of original jurisdiction). The most common specialized courts are those that work on social issues, primarily substance abuse and family courts. Some examples of specialized courts include gun courts, gambling courts, homeless indigent courts, mental-health courts, teen courts, domestic violence courts, elder courts, and community courts involving lay citizens in the process of arranging for property crime offenders to engage in compensatory justice with respect to those whom they victimized.

Some states have taken it upon themselves to permit the establishment of specialized courts for the protection of the environment and for addressing the economic costs and benefits of pursuing sustainability. Such specialized courts have been created to deal with highly complex issues, which require extraordinary scientific and technical knowledge on the part of the court. For example, the State of Montana created a Water Court to expedite and facilitate the statewide adjudication of state water right claims; once the adjudication process is complete the state may dissolve the court. ²²

In addition to the difficult adjudication of rival water rights claims, Colorado’s version of the Water Court has jurisdiction over the use and administration of water and all water matters within its statewide jurisdiction. ²³ Vermont has established an Environmental Court to hear matters on municipal and regional planning and development, to hear disputes over state solid waste ordinances, and to handle cases arising from the enforcement actions of the Vermont Agency of Natural Resources. As matters relating to global climate change and the more rigorous regulation of greenhouse gases arise, it is likely that more specialized courts will be created in other states to deal with the disputes arising from the active pursuit of sustainability in our states and local governments.

States are also developing specialized courts to manage economic disputes that arise in the course of commercial activity (such as business formation, business transactions, and the sale/purchase of business assets). Five states have Tax Courts that deal exclusively with tax disputes. Montana, Nebraska, and Rhode Island developed specialized courts to deal exclusively with Workers’ Compensation cases. In many states, which do not have such specialized courts there has been a steady trend in the growth of the number and range of activities of administrative law judges . These “hearings officers” work within administrative agencies, which engage in regulatory actions that give rise to many disputes (environmental regulations, labor/management actions under collective bargaining agreements, compensation for damages incurred from state government action on one’s property, etc.).

These administrative law judges (ALJs) hold quasi-judicial hearings, carefully weigh the arguments of the agency and aggrieved citizens, and have the authority to mediate, arbitrate and ultimately decide upon an outcome to a case, which is binding on all parties. While such decisions made by ALJs can be appealed to the courts, state court judges seldom overturn their rulings.

Judicial Selection

The manifest aim of the judicial selection process in the American states is to select a judiciary that is as impartial as the Greek Goddess Themis, but one that is at the same time accountable to the will of the people of the state. Unlike the federal judiciary where lifetime appointments are made to the federal district, circuit and supreme courts, in the states nearly all judges serve for fixed terms of office and most are subject to some method of retention in office based upon a vote of the people. Each state uses a system of selecting judges they feel is best suited to accomplish the dual goals of impartiality and accountability to the people. In most cases, a state's judicial selection process does not catch the public's attention given the limited knowledge citizens typically command regarding the courts and the actions of their judges; some particularly cynical observers have characterized judicial selection processes as being "about as exciting as a game of checkers...played by the mail."

There is no simple way to describe states with respect to their form of judicial selection system, because judges in different (or even the same levels of courts) within one state may be selected through different methods. A system to select a judge for the intermediate appellate court, for example, may be different than the system used for the Court of Last Resort, and different again from the system used for recruitment to the trial courts. Making things even more complex, the selection process for subsequent terms may be different than the initial term of office.

No single selection process – such as gubernatorial appointment, merit commission screening for gubernatorial appointment, non-partisan election, partisan election, legislative appointment, nomination to vacancies by county commissioners – currently dominates over other processes, nor do these selection processes within each state remain static over time. For example, in 1980 it was the case that 45 percent of the states used partisan elections and 29 percent of the states used non-partisan elections as their respective methods for selecting judges to trial courts; by 2004, however, those figures were just about reversed; in 2004, 44 percent of the states were using non-partisan elections and 35 percent were using partisan elections for selecting their trial court judges.

While there are many types of selection processes, four principal processes are used in the U.S. for judicial selection within the states: partisan election, non-partisan election, appointment, and the Merit System (known as the Missouri Plan). No one process dominates the others in extent of use, or in the level of controversy associated with its use. There are some regional differences in evidence in where each type of judicial selection process tends to be concentrated. For example, some of the nation's most conservative states, including Texas and states in the "Deep South," use partisan elections principally, while many Midwest states tend to make use of the gubernatorial appointment process. Table 11.1 shows how each state selects its judiciary as of the present time

Table 11.1 State Judiciary Selection Process

State	Court of Last Resort Name/s	Method of Selection	Intermediate Appellate Court/s
Alabama	Supreme Court	Partisan Election	Court of Criminal Appeals / Court of Civil Appeals
Alaska***	Supreme Court	Appointment	Court of Appeals
Arizona***	Supreme Court	Appointment	Court of Appeals
Arkansas	Supreme Court	Nonpartisan Election	Court of Appeals
California	Supreme Court	Appointment	Court of Appeal
Colorado***	Supreme Court	Appointment	Court of Appeals
Connecticut	Supreme Court	Appointment	Appellate Court
Delaware	Supreme Court	Appointment	–
Florida	Supreme Court	Appointment	District Courts of Appeals
Georgia	Supreme Court	Nonpartisan Election	Court of Appeals

Hawaii	Supreme Court	Appointment	Intermediate Court of Appeals
Idaho	Supreme Court	Nonpartisan Election	Court of Appeals
Illinois	Supreme Court	Partisan Election	Appellate Court
Indiana***	Supreme Court	Appointment	Court of Appeals/Tax Court
Iowa***	Supreme Court	Appointment	Court of Appeals
Kansas***	Supreme Court	Appointment	Court of Appeals
Kentucky	Supreme Court	Nonpartisan Election	Court of Appeals
Louisiana	Supreme Court	Partisan Election	Court of Appeal
Maine	Supreme Judicial Court	Appointment	–
Maryland	Court of Appeals	Appointment	Court of Special Appeals
Massachusetts	Supreme Judicial Court	Appointment	Appeals Court
Michigan	Supreme Court	Nonpartisan Election	Court of Appeals
Minnesota	Supreme Court	Nonpartisan Election	Court of Appeals
Mississippi	Supreme Court	Nonpartisan Election	Court of Appeals
Missouri***	Supreme Court	Appointment	Court of Appeals
Montana	Supreme Court	Nonpartisan Election	–
Nebraska***	Supreme Court	Appointment	Court of Appeals
Nevada	Supreme Court	Nonpartisan Election	–
New Hampshire	Supreme Court	Appointment	–
New Jersey	Supreme Court	Appointment	Appellate Division of Superior Court
New Mexico	Supreme Court	Partisan Election	Court of Appeals
New York	Supreme Court	Appointment	Appellate Division of Supreme Court/Appellate Terms of Supreme Court
North Carolina	Supreme Court	Nonpartisan Election	–
North Dakota	Supreme Court	Nonpartisan Election	–
Ohio	Supreme Court	Partisan Election	Courts of Appeals
Oklahoma***	Supreme Court/Criminal Court of Appeals	Appointment/Appointment	Court of Appeals
Oregon	Supreme Court	Nonpartisan Election	Court of Appeals
Pennsylvania	Supreme Court	Partisan Election	Superior Court/Commonwealth Court
Rhode Island	Supreme Court	Appointment	–
South Carolina	Supreme Court	Appointment #	Court of Appeals
South Dakota	Supreme Court	Appointment	–
Tennessee	Supreme Court	Appointment	Court of Appeals/Court of Criminal Appeals

Texas	Supreme Court/Criminal Court of Appeals	Partisan Election	Election/Partisan Court of Appeal
Utah***	Supreme Court	Appointment	Court of Appeals
Vermont	Supreme Court	Appointment	–
Virginia	Supreme Court	–	Court of Appeals
Washington	Supreme Court	Appointment #	Court of Appeals
West Virginia	Supreme Court of Appeals	Nonpartisan Election	–
Wisconsin	Supreme Court	Partisan Election	Court of Appeals
Wyoming***	Supreme Court	Nonpartisan Election	–

Table 8.2 Judicial Selection Method by State (*=Justices chosen by district; **=Chief Justice chosen statewide, associate judges chosen by district; ***=Uses of the Merit System for Judicial Selection; #=Legislative Appointment)

State	Appellate Court Justices	General Trial Court/s	Method of Selection
Alabama	Partisan Election / Partisan Election	Circuit Court	Partisan Election
Alaska***	Appointment	Superior Court	Appointment
Arizona***	Appointment	Superior Court	Appointment
Arkansas	Nonpartisan Election	Chancery/Probate Court/Circuit Court	Nonpartisan Election
California	Appointment	Superior Court	Nonpartisan Election
Colorado***	Appointment	District Court	Appointment
Connecticut	Appointment	Superior Court	Appointment
Delaware	–	Superior Court/Court of Chancery	Appointment/Appointment
Florida	Appointment	Circuit Court	Nonpartisan Election
Georgia	Nonpartisan Election	Superior Court	Nonpartisan Election
Hawaii	Appointment	Circuit Court	Appointment
Idaho	Nonpartisan Election	District Court	Nonpartisan Election
Illinois	Partisan Election*	Circuit Court	Partisan Election
Indiana***	Appointment/Appointment/Appointment	Superior Court/Probate Court/Circuit Court	Partisan Election
Iowa***	Appointment	District Court	Appointment
Kansas***	Appointment	District Court	Appointment
Kentucky	Nonpartisan Election*	Circuit Court	Nonpartisan Election
Louisiana	Partisan Election*	District Court	Partisan Election
Maine	–	Superior Court	Appointment
Maryland	Appointment #	Circuit Court	Partisan Election
Massachusetts	Appointment	Supreme Court	Appointment

Michigan	Nonpartisan Election	Circuit Court	Nonpartisan Election
Minnesota	Nonpartisan Election	District Court	Nonpartisan Election
Mississippi	Nonpartisan Election*	Circuit Court	Nonpartisan Election
Missouri***	Appointment	Circuit Court	Partisan Election
Montana	–	District Court	Nonpartisan Election
Nebraska***	Appointment**	District Court	Appointment
Nevada	–	District Court	Nonpartisan Election
New Hampshire	–	Superior Court	Appointment
New Jersey	Appointment	Superior Court	Appointment
New Mexico	Partisan Election	District Court	Partisan Election
New York	Appointment/Appointment	Supreme Court/County Court	Partisan Election/Partisan Election
North Carolina	–	Superior Court	Nonpartisan Election
North Dakota	–	District Court	Nonpartisan Election
Ohio	Partisan Election	Court of Common Pleas	Partisan Election
Oklahoma***	Appointment*	District Court	Nonpartisan Election
Oregon	Nonpartisan Election	Circuit Court/Tax Court	Nonpartisan Election/Nonpartisan Election
Pennsylvania	Partisan Election/Partisan Election	Court of Common Pleas	Partisan Election
Rhode Island	–	Superior Court	Appointment
South Carolina	Appointment #	Circuit Court	Appointment
South Dakota	–	Circuit Court	Nonpartisan Election
Tennessee	Partisan Election/Partisan Election	Circuit, Criminal, Chancery, & Probate Court	Appointment
Texas	Partisan Election	District Court	Partisan Election
Utah***	Appointment	District Court	Appointment
Vermont	–	Superior Court/District Court	Appointment/Appointment
Virginia	Appointment #	Circuit Court	Appointment
Washington	Nonpartisan Election	Superior Court	Nonpartisan Election
West Virginia	–	Circuit Court	Partisan Election
Wisconsin	Nonpartisan Election	Circuit Court	Nonpartisan Election
Wyoming***	–	District Court	Appointment

Partisan and Non-Partisan Elections:

As of 2006, 39 states elect some or all of their judges; this represents nearly 90 percent of state judiciaries across the country. From this statistic alone it is clear that the goals of impartiality and public accountability are both important elements of state and local government judicial selection in the U.S. Alexander Hamilton (1788) spoke for the Founding Fathers in Federalist Paper No. 78 wherein he argued that if judges in federal courts were chosen by elected officials they would harbor “too great a disposition to

consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws.” In 1939, well over a century after Hamilton’s warning, President William Howard Taft described judicial elections in the U.S. as “disgraceful, and so shocking...that they ought to be condemned.”

Alexander Hamilton and former-President Taft may well be turning in their respective graves as the results of one national survey conducted in 2000 found that 78 percent of Americans believe their state and local judges are influenced (that is, their impartiality is compromised) by having to raise campaign funds. Even so, voter turnout for judicial elections is habitually low as many voters skip past these elections. At times the biases in the operation of courts associated with popular elections can be severe. For example, 1990 the U.S. Justice Department used federal anti-discrimination statutes to invalidate the State of Georgia’s system of electing judges because it was found to be discriminatory against African Americans.

Citizens are poorly informed about judges because, in most states, there are state supreme court-issued limits or guidelines, derived from the American Bar Association’s judicial canons, as to what a judicial candidate can say or do while campaigning for judicial office. These limitations tend to be especially strict in states with non-partisan elections. For example, the Minnesota Code of Judicial Conduct Canon 5(A)(3)(d)(i) prohibits judicial candidates from announcing their views on disputed legal or political issues. Yet there are a handful of states, such as Texas, where the judicial elections are highly partisan, extremely expensive, and vehemently contested.

According to Henry Glick and Kenneth Vines, in a great many cases judicial seats that are nominally up for election are vacated by sitting judges shortly prior to the end of their terms of office and filled by judges that are appointed by the sitting governor. The governor’s appointee then runs as an incumbent judge during the next election. The impact of such interim appointments has greatly shaped the composition of the nation’s state and local judiciary: between 1964-2004, more than half (52 percent) of the judges serving in partisan election states gained their position through an interim appointment, with the state-specific percentages ranging from 18 to 92 percent. These interim appointments more often than not become permanent due to the extremely high retention rate judicial incumbents enjoy in their elections once they get to the bench.

Partisan elections are those in which judicial candidates, including incumbents, run in party primaries and are listed on the ballot as a candidate of a political party. In contrast, non-partisan elections are those in which the judicial candidates run on a ballot without a political party designation. There are a few cases where candidates are chosen in a party primary and backed by the party, but they appear without the label on the ballot. The party affiliations of judges aren’t exactly the best-kept secrets; judicial candidates often list a party affiliation in their official biographies, and political parties will often endorse particular judicial candidates.

In comparing the two elective systems, each one has its own pros and cons. The proponents of partisan election tend to feel strongly that the party affiliation next to a judicial candidate’s name provides important information to voters with respect to the candidate’s likely political philosophy. The proponents counter that “justice is not partisan” – that is, there is no Democratic or Republican form of justice, only the impartial justice dispensed by the blindfolded Themis who is unaware of whether the parties coming before her are Democrats or Republicans. The proponents of partisan election counter that in the non-partisan judicial elections it is the voters who are blindfolded and unable to exercise popular accountability over judges as intended in the election process.

One additional drawback associated with partisan judicial elections is that they can lead to an imbalance among a state’s judiciary in cases where a state features strong one-party dominance. The State of Texas encountered this problem during the indictment of former House Majority Leader Tom Delay for corruption charges. Since Texas judges are elected on a partisan ticket, and often contribute openly to partisan causes, quite a scramble was necessary to identify an impartial trial judge who was acceptable to both the prosecution and defense in the Delay case.

Judicial Appointments and the Merit System:

There are two common methods of judicial appointment, “simple” gubernatorial appointment and the “Merit System” of appointment. The simple gubernatorial appointment is much like that for federal judges, where the highest elected official (the President in the federal government and the Governor in the states) fill vacancies on the bench. How judges are selected by state governors depends on the governor in question and traditions in the state. Generally speaking, the background of the judge (former prosecutors, defense attorneys, type of pro bono work done, level of activity in local bar associations, etc.), the political needs of the governor (someone from a particular area of the state is needed to balance out an appellate bench), presence or absence of advocacy for particular persons by interest groups (women attorneys, minority attorneys, etc.), the views of leaders of the State Bar Association, and the preferences of the political parties are all more or less in play when state governors make their judicial appointments.

The Merit System or Missouri Plan system for judicial appointment was designed to “take politics out of judicial selection” by combining the methods of appointment with election in a very particular way. Featuring three distinct components, it is the most complex of the judicial selection processes. Fourteen states use some version of the Missouri plan, with some additional states using a modified version of this type of selection process. Under the provision of the Missouri Plan, candidates for judicial vacancies are first reviewed by an independent, bipartisan commission of both lawyers and prominent lay citizens. From a list of nominees submitted to the commission, three names are provided to the governor from which one person is selected to fill the vacancy on the bench in question. If the governor doesn’t pick one of the three persons put forward by the commission within sixty days, the commission is empowered to make the selection.

Once the judge selected by this process has been in office for one year or more, they must stand in a “retention election” during the next scheduled general election period. In such an election there is no opponent – voters are either voting to retain the judge in office or remove him or her from the judicial post in question. If there is a majority vote to remove the judge from office, the judge must step down and the process starts anew (Missouri Judicial Branch). By making the appointed judge stand for a retention election, the people over whom the judge exercises judicial authority have the ability to remove a judge they feel does not perform his or her duties well. Whether or not this was intentional on the plan of Missouri Plan designers, judicial removal is exceedingly rare; in the first 179 elections held under the Missouri Plan only one judge did not retain his position, and this was a case in which extraordinary circumstances were present.

The term “merit” in the Missouri Plan judicial selection process implies that nominating commissions are disengaged from party politics, but the extent to which this disengagement is achieved depends in large measure on who selects the commissioners and how they carry out their duties. These two factors vary considerably across the states using the Missouri Plan. In a number of states, the governor has a major role in picking members of the commission, and in other states, interest groups play a significant role, thereby to some extent circumventing of the “de-politicization” goal of the merit selection system.

The geographic basis for the selection of trial court and appellate judges is somewhat different for each state, and for each type of court within the state’s unified court system. For trial courts, a useful general rule of thumb is that judges are elected from within the jurisdiction over which they preside. For example, Montana’s Municipal courts are elected in a nonpartisan election within the city wherein the court operates, while the Water Court, which exercises statewide jurisdiction, is elected in a nonpartisan election from throughout the state. In the majority of states, thirty in all, levels of the state’s appellate courts are either elected or appointed statewide, while six states select all of their appellate justices by district or region.

When it comes to discussions concerning how judges should be selected, the most contentious debates occur on the question of how judges on the Courts of Last Resort should be selected. Even though they are appellate courts, and often use the same process for selecting the immediate appellate court judiciary, there are nonetheless noteworthy differences. The geographic basis for selecting a judge is usually statewide, although in eight states the Courts of Last Resort select judges via districts. This difference between district and statewide selection can be a source of considerable contention within states, particularly in those states with liberal urban centers and conservative rural areas. Terms of office for a judge on the Court of Last Resort ranges from a low of five years to a high of 14 years. There are three exceptions to the fixed-term system of judicial appointment; Massachusetts, New Jersey, and Rhode Island all appoint their justices until they reach the age of 70 or die in office. Judicial terms offices are eight years or less in 29 states, and more than eight years in 18 states. Naturally, the shorter the term of service, the more often a justice has to run in a retention election and must rely upon supporters to organize and finance their campaign. Whenever anyone runs for public office, whether they are a governor, a legislator, or a judge, they’ll need to raise campaign funds and ask citizens and interest groups for their endorsements and “get out the vote” efforts for their candidacy. This type of “politics” carried out by judicial candidates and their challengers, raises the questions of “from whom and how much money was raised,” and how much influence will that citizen or group have when the judge decides cases brought to his or her court?

An overarching question on judicial selection is this — does the method of selection really matter or affect the way courts operate? Evidence suggests that different selection processes produce different results in terms both of who tends to make it to the bench and in terms of rulings made. For example, Nicholas Lovrich and Charles Sheldon found that judicial selection systems that require judicial candidates to campaign actively in competitive elections result in judicial electorates (voters who participate in elections for judges) who are better informed than judicial selection systems which feature only retention elections. Similarly, it has been reported that appointed judges are likely to respond to a wider variety of groups and interests, and support individual rights more strongly in their rulings than elected judges.

Current and Future Challenges Facing State and Local Courts

State court systems are facing many challenges, both with respect to their workload and their resource limitations. The civil and criminal caseloads of state and local courts are rising appreciatively, but their resources are not growing to match demands being placed upon a “stressed” system of justice in America. The threat to physical safety in the courts and its judiciary is a serious one in many places and a quite justifiable concern in some urban areas in particular. Rural courts, with their broad geographic reaches, face challenges not contemplated in America’s urban centers. The rapidly rising costs of judicial elections in many states reflect an attempt to politicize the courts on the part of some interests, and in the minds of some observers, this movement toward high-cost judicial elections represents a threat to our independent judiciary. In the state of North Carolina the state legislature grew so concerned about this particular danger that they enacted a law setting up a system of publicly financed judicial elections as an experiment.

The demand upon state court systems is rising in all sectors, and at a more rapid rate than the increase of the general population. Between 1993-2002 trial courts across the country saw a 12 percent increase in civil case filings, an increase in criminal case filings by 19 percent, an increase in domestic relations case filings by 14 percent, an increase in juvenile case filings of 16 percent, and an increase in traffic cases by 2 percent. Though traffic cases account for about 60 percent of all cases filed in trial courts, the increase in the number of complicated and time-intensive cases such as civil, criminal and domestic relations case filings place a far greater strain on the courts than the more routine traffic cases. The number of judges and courtrooms in operation has not kept pace with the growth in caseloads; in the period 1993 to 2002, state court system judiciaries increased by only 5 percent.

Court-related violence and courtroom safety is a chronic, costly preoccupation for those professionals working inside the criminal justice system, but it is not one that gets much public attention. Although this is an ongoing issue throughout the country, a number of high profile incidents occurred in 2005 which served to highlight the serious threats state and local courts must plan for on a regular basis. In February of 2005, a Federal judge arrived at her Chicago residence to find her husband and mother murdered by Bart Ross, a 57-year-old electrician whose medical malpractice claim was dismissed in a court hearing. A mere two weeks later in Atlanta, Georgia four people, including a state judge and court reporter, were murdered when a defendant on trial for rape overpowered the sheriff’s deputy escorting him to the courtroom and took the deputy’s gun. In a less violent, but more commonly occurring case of threatening behavior toward judges, the Florida state court trial judge who ordered the feeding tube removed from Terri Schiavo, who was severely brain-damaged, was harassed and received death threats from people who disagreed with his ruling.

In reaction to such events, a study on courtroom safety provisions present in California courts found that two-thirds of the state’s courthouses lacked adequate security, and a companion survey found that 40 percent of California’s state and local prosecutors felt threatened in their jobs. Areas with the poorest security provisions were rural and local courts, which usually rely on local funding for their operations. As an appellate court judge noted, “In a society as litigious as ours, the courtroom has become the theater for emotional catharsis.”

Heavy caseloads, the lack of resources and inadequate courtroom security are real concerns for professionals working in the criminal justice system, but it is the increased politicization of the courts and judiciary that is considered the greatest long-term threat to the state and local court systems. This term applies to attempts made to provide one political party or major interest group an unfair advantage to promote their interests at the likely expense of the public interest. While all Americans have an interest in the existence of impartial, efficient and legally competent court services, narrow interests sometimes seek to “plant” judges on the bench to gain an advantage in cases involving the adjudication of their affairs. The independence and impartiality of the judiciary, as well as the effective operation of the checks and balances between the three branches of government, are compromised when excessive politicization occurs. The two means used most frequently to politicize the courts are “Court Stripping” and judicial selection.

According to the editors of the Oxford American Dictionary, “Court stripping is when legislatures try to remove power from the courts, usually federal but often state, so that the courts can’t rule on laws they passed.” The most blatant instance of this method of politicization of the judiciary occurred in 2005 when the Republican majority in the United States Congress attempted to strip Florida state courts of their jurisdiction over a state matter – in this case, the regulation of medical practice – by imposing federal jurisdiction and ordering the federal courts to consider the claims of Teri Schiavo’s parents. The Florida Court ordered that Teri Schiavo’s feeding tube be removed, an action which would ultimately end her life; her parents wanted the tube to remain in hopes she would one day recover from her injuries. Ultimately, the Florida state court decision stood as a consequence of the reaffirmation of state authority to regulate medical practice within their jurisdictions. There are, and will continue to be, further attempts at court stripping. Upset with some court rulings, some Arizona legislators tried, without success, to enact legislation that

would have shifted the power to write court rules from the Arizona Supreme Court, their court of last resort, to the legislature. Court stripping can sometimes happen after a court ruling; for example, although clearly an unconstitutional action in violation of the separation of powers, the Delaware Legislature recently enacted legislation overturning its Supreme Court's interpretation of "life imprisonment with the possibility of parole."

Often veiled as "judicial reform," political parties and interest groups in some states are trying to alter the process of how judges are selected and retained in order to change the political makeup of the judiciary. Usually, the techniques used appear to be politically neutral "improvements," such as changing the geographic location of selection, the process of selection, and the term lengths. However, underlying the proposed changes are plans for "stacking the deck" with judges more friendly to their interests. For example, in 2006 Oregon Ballot Measure 40 was introduced to amend the Oregon State Constitution to require judges for the Supreme Court and the Appellate Court to be elected by district rather than statewide. The candidate would have to be a resident of the newly formed district for at least a year before the election. The ballot measure failed with 56 percent of the voters opposing. Had the measure passed and been enacted, the political makeup of the Oregon courts could have been altered as the state's sparsely populated rural areas are typically conservative and the heavily populated urban centers are generally liberal. This type of politicization of courts is nothing new, of course. In 1997 the Illinois General Assembly changed the state's Supreme Court districts to make it more difficult for Democrats to dominate the judiciary. In an attempt at politicization, a 2006 initiative in Montana was circulated permitting the recall of a judge "for any reason acknowledging electoral dissatisfaction." Due to fraud uncovered in the collection of signatures, the measure was removed from the ballot prior to the election.

In yet another case, state legislators, unhappy with some court decisions made in Missouri, introduced legislation to reduce the initial term of service for appellate judges from 12 to five years, and require a two-thirds voter majority rather than a simple majority for retention. Clearly, in the balance between judicial independence and popular accountability, it is likely that parties that disagree strongly with the decisions of their state courts will in some cases seek to limit the independence of the courts and create a judicial selection process more likely to put judges of their own liking on to state and local benches.

Nowhere has the politicizing of courts and the judiciary been more apparent than in judicial elections, especially in partisan elections. It was the 2002 U.S. Supreme Court decision in *Republican Party of Minnesota v. White* that accelerated the politicizing of judicial elections. Prior to *White*, judicial candidates in Minnesota, which used the nonpartisan election process for judicial selection, were forbidden by Canon 5 of the Minnesota Code of Judicial Conduct from announcing their views on disputed legal or political issues, from affiliating themselves with political parties, or from personally soliciting or accepting campaign contributions. In the *White* case, the U.S. Supreme Court ruled that the three clauses of Canon 5 violated the First Amendment rights of judicial candidates, and in so ruling invalidated them and all comparable limitations in place to other states.

The decision of the U.S. Supreme Court in the *White* case made nonpartisan judicial election processes nonpartisan in name only. Judicial candidates in states featuring judicial elections can now personally solicit campaign funds from lawyers or litigants, they can engage in partisan political activities, and they can declare their views on virtually any matter of public concern – whether or not the matter may be the subject of current or future litigation brought to the court. While Canons of Judicial Conduct continue to exist in all states, the ability of a state Supreme Court or state Bar Association to sanction a judicial candidate for violating such professional and ethical standards has been undermined by the *White* decision.

Partisan elections, as noted previously, are increasingly becoming more like those of the other two branches of government – namely, expensive, mass media oriented, and rancorous. Surprisingly, in recent years the most expensive elections have been "retention-only" elections where voters only need to decide whether or not to keep a judge in office. In 1986 almost \$12 million was spent in California to remove the state Supreme Court's Chief Justice and two of her colleagues because of their opposition to the death penalty and because of the claim that they were "soft on crime." In an obvious case of conflict of interest, plaintiffs in a \$25 million punitive damages suit made contributions to two of the state's Supreme Court Justices who were up for re-election and scheduled to hear the case; the justices refused to recuse themselves — or refrain from participating because of a conflict in interest — and ruled in the favor of the plaintiffs.

Special interests are more visible in judicial elections today than ever before; the most visible and active are those with the financial resources to "contribute" and with the most to win or lose in decisions made by courts. For example, the Ohio Chamber of Commerce spent \$3 million to defeat a judge who had overturned a tort reform law worth many times as much for business; trial lawyers and unions spent about \$1 million in a counteroffensive to retain the judge in question on the Ohio court. Large amounts of funding, and tides of negative advertising can be attributed to efforts by special interest groups to pursue their policy agenda. The ongoing fight between large corporations and plaintiffs' attorneys over tort reform is a current source of potential politicization.

Despite the presence of strong pressures to further politicize the courts and the judiciary, the public's general perception of the courts is still generally one of presumed independence and impartiality. A national public opinion survey conducted in 2005 found that while the public's knowledge of the judiciary is rather poor, its belief in their courts' adherence to the original principles of Themis are strong. Americans believe that their courts represent fairness, due process, impartiality, and play a key role in the preservation of citizen rights. Furthermore, 61 percent of the respondents to the 2005 survey believe that "politicians should not prevent the courts from hearing cases, even on controversial issues such as on gay marriage, because the purpose of the courts is to provide access to justice to everyone, even those with unpopular beliefs."



Act it Out – Courts: What Can I do?

- Visit NCSC's states homepage to learn more about your own state's court system: <https://www.ncsc.org/>
- Consider visiting your local county or city court and watch the proceedings. Many court activities and trials are open to the public. Locate your local county or city court through the National Association of Counties website (<http://www.naco.org/>), the International City Managers Association (<http://icma.org/>), or the U.S. Courts website (<http://www.uscourts.gov/courtlinks/>).

State and Local Courts and Sustainability

The judicial branch may not "hold the sword" as does the executive branch, nor "command the purse" as does the legislative branch, but contrary to Alexander Hamilton's view, it does have great influence over American society. In many areas of American life, the courts have fostered needed change when the "political branches" could not do so. In the areas of freedom of speech, racial equality, business regulation, the rights of the accused, and environmental protection, the victories made along the way were often seen not in legislation, but rather in the American courts. State and local courts may be somewhat reluctant participants in the public policy process, but they do have an important role as policymakers nonetheless. Judges are called upon to exercise judicial review of both the legislative and executive branches, interpret laws and constitutions, and make judicial policy. While unified state courts ensure a high level of consistency in the operation of courts, the decentralized operations of local courts make it possible for judges to become key actors in local political life by dealing with litigation reflecting local social, economic, environmental and political conflicts in impartial and constructive ways. Many of the decisions trial court judges make have the potential of establishing important policies affecting local practices in such important areas as zoning, public access to information, the provision of legal services to indigents, permissible policing practices, and equal access to education.

Cases heard in local trial courts can have an important impact on sustainable development throughout the nation; the most recent such case is that of *Kelo v. City of New London, Connecticut*. The case in question, as with the *Dolan* case from Oregon discussed above, concerned Fifth Amendment rights set forth in the U.S. Constitution. The controversial issue arose when the City of New London chose to use its power of eminent domain to condemn some private homes so that the property on which they sat could be used as part of the city's economic development plan; a plan would result in this private property being condemned for use by another private party working in concert with the City of New London. The homeowners on the property in question filed a lawsuit in which they challenged the right of the City of New London to exercise its power of eminent domain for this purpose, and their case moved all the way from Connecticut trial and appellate courts to the U.S. Supreme Court. A majority of justices on the U.S. Supreme Court found that the benefits to the community involved justified the condemnation and that the City of New London had provided just compensation for the loss of property suffered by the affected homeowners.

In reaction to this decision, many state legislatures viewed the U.S. Supreme Court's decision as too greatly benefiting large corporations at the expense of families and neighborhood communities. As a result, legislation was introduced in several states and ballot measures were placed on the ballot in other states aimed at amending state constitutions to provide greater protection of private property rights from this type of use (i.e., economic development) of the municipal power of eminent domain. That power is typically employed when there is some pressing need for public ownership of some private land to serve clearly public purposes (for example, creating a roadway for traffic control).

Some could say the City of New London's action condemning some private land for the economic benefit of the entire community represents an action in line with the philosophy of sustainability since economic vitality is one of the pillars upon which sustainability rests. Others might argue that such actions threaten sustainability because they displace neighborhoods and promote

social inequity in the form of privileged access to large, outside corporate interests. Such varied interpretations are clearly possible, and it is certain that more court cases such as this will be filed and heard as a consequence of municipal actions taken to promote economic viability coming into conflict with property owners seeking to preserve the current use being made of the land in question.

The Kelo case has caused the strengthening of private property rights in many states because this is a politically popular (and apparently cost-free) action for elected officials to take. However, by strengthening private property rights, states enacting greater protections to homeowners may make it more difficult to promote sustainable development. For example, should a municipality seek to use its power of eminent domain to locate solar collectors to provide cheaper and renewable energy to its utility subscribers, should private property owners adversely affected by the location of those collectors be allowed to prevent such a use of eminent domain? Should the pursuit of sustainability goals be one of the “reasonable grounds” justifying the use of eminent domain in the states where laws more protective of homeowners’ rights were enacted in the wake of the Kelo case? One thing is for certain, state court and the judges sitting on trial court and appellate court benches in our states will be hearing just such cases in the years ahead.

State and local courts have impacted sustainability in the past, and they will most certainly do so in the future. Generally speaking, the higher the level of the court, the larger the swath of impact its actions have on sustainability. If a state’s Court of Last Resort makes a precedential ruling, then the state’s lower courts must follow the dictates of that ruling. This is not to say trial courts are unimportant, as they are most often the first to hear a case that could lead to a change in the law, good or bad, around the rest of the state. Illustrative of the importance of courts in the area of sustainability promotion in state and local government, the case of the widowed grandmother in Orem, Utah stands out. This elderly woman was arrested and taken away in handcuffs for refusing to give a policeman her name so he could issue her a ticket for failing to water her lawn on a regular basis, a violation of an Orem zoning ordinance. If the case goes to trial, it would be heard in the Orem Municipal Court. The reason the grandmother provided for not watering her lawn was that of inability to afford the expense associated with maintaining a green lawn. However, the national attention generated from the case has led to question as to why someone should have to defend themselves in court for a practice that is both uneconomical and wasteful of a precious natural resource – particularly since Utah is the second driest state in the nation.

Conclusion

There are two clear areas within the purview of state and local courts which can impact sustainability in a major way; these are Judicial Federalism and the maintenance of judicial impartiality. Judicial Federalism is a legal term referenced earlier which characterizes situations in which state courts give priority of a state question addressed in state constitutional law over a federal question addressed in federal constitutional law. In the recent past, Judicial Federalism has focused on enhancing the civil rights of a state’s vulnerable minorities (e.g., racial and ethnic minorities, the criminally accused) beyond the rights provided in the U.S. Constitution. Today, in the context of the need to address global climate change and actively pursue sustainability, Judicial Federalism could expand its purview to include the protection of other vulnerable environmental minority interests such as wildlife, water resources, ecosystem services, and rural communities. The wellbeing of these interests coincide with the economic and social vitality of local communities, and their interests could be served more flexibly in state law than in federal rules and regulations. In order for Judicial Federalism to be able to work in this area, the state legislatures must refine their constitutions and statutes to reflect the states’ desire to pursue sustainable development so that judges in state and local courts can do their part to support public and private actions intended to promote sustainability.

The second area of particular concern, that of the maintenance of judicial impartiality, requires judges and their courts to be independent from outside influences, making decisions based on legal principles, fairness, and equity as opposed to the provision of special consideration based on political party or privileged interest. As much as Americans would love to maintain their current belief in the ideal of blind justice, human fallibility will always be present. The recent trends toward a politicization of the courts and the judicial selection process bought on in the wake of the White decision open the door to the possibility that private interests that benefit from unsustainable practices – such as urban sprawl, sole reliance upon automobile travel for transportation, over-harvesting of forests and excessive extraction of natural resources – will seek to “plant” judges friendly to their interests on state trial and appellate court benches. Efforts are needed by those who support the goals of sustainability to promote both the independence of their state and local courts and to stem the rising tide of the politicization of courts and the judiciary.

Discussion Questions

- Of the two common methods of judicial appointment — gubernatorial appointment and the merit system (Missouri Plan) — which do you think is the best method and why? Is it really possible to remove “politics” out of judicial appointments?
- What are the various types of state and local courts and what functions do they serve? How about problem solving courts — do they increase the institutional sustainability of communities?
- What are some of the current and potentially future challenges facing state and local court systems? Do you think the politicization of judicial processes will increase or decrease in the future? Why?

Federal Courts ^[124]

Learning Objectives

- Describe the differences between the U.S. district courts, circuit courts, and the Supreme Court
- Explain the significance of precedent in the courts’ operations
- Describe how judges are selected for their positions

Congress has made numerous changes to the federal judicial system throughout the years, but the three-tiered structure of the system is quite clear-cut today. Federal cases typically begin at the lowest federal level, the district (or trial) court. Losing parties may appeal their case to the higher courts—first to the circuit courts, or U.S. courts of appeals, and then, if chosen by the justices, to the U.S. Supreme Court. Decisions of the higher courts are binding on the lower courts. The precedent set by each ruling, particularly by the Supreme Court’s decisions, both builds on principles and guidelines set by earlier cases and frames the ongoing operation of the courts, steering the direction of the entire system. Reliance on precedent has enabled the federal courts to operate with logic and consistency that has helped validate their role as the key interpreters of the Constitution and the law—a legitimacy particularly vital in the United States where citizens do not elect federal judges and justices but are still subject to their rulings.

The Three Tiers of Federal Courts

There are ninety-four U.S. district courts in the fifty states and U.S. territories, of which eighty-nine are in the states (at least one in each state). The others are in Washington, DC; Puerto Rico; Guam; the U.S. Virgin Islands; and the Northern Mariana Islands. These are the trial courts of the national system, in which federal cases are tried, witness testimony is heard, and evidence is presented. No district court crosses state lines, and a single judge oversees each one. Some cases are heard by a jury, and some are not.

There are thirteen U.S. courts of appeals, or circuit courts, eleven across the nation and two in Washington, DC (the DC circuit and the federal circuit courts). Each court is overseen by a rotating panel of three judges who do not hold trials but instead review the rulings of the trial (district) courts within their geographic circuit. As authorized by Congress, there are currently 179 judges. The circuit courts are often referred to as the intermediate appellate courts of the federal system, since their rulings can be appealed to the U.S. Supreme Court. Moreover, different circuits can hold legal and cultural views, which can lead to differing outcomes on similar legal questions. In such scenarios, clarification from the U.S. Supreme Court might be needed.

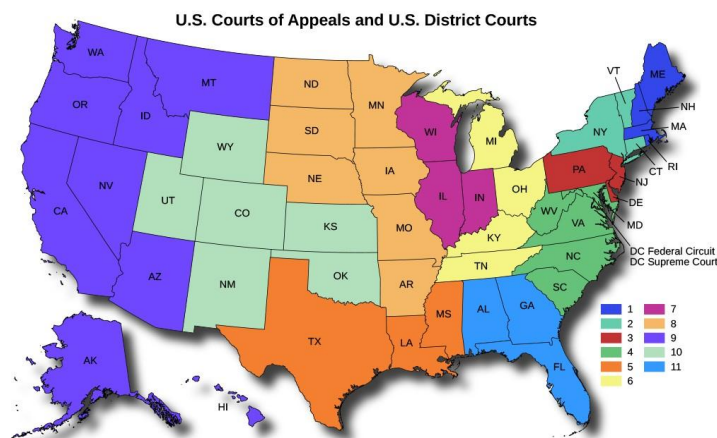


Figure 11.2 There are thirteen judicial circuits: eleven in the geographical areas marked on the map and two in Washington, DC. ^[125]

Today's federal court system was not an overnight creation; it has been changing and transitioning for more than two hundred years through various acts of Congress. Since district courts are not called for in Article III of the Constitution, Congress established them and narrowly defined their jurisdiction, at first limiting them to handling only cases that arose within the district. Beginning in 1789 when there were just thirteen, the district courts became the basic organizational units of the federal judicial system. Gradually over the next hundred years, Congress expanded their jurisdiction, in particular over federal questions, which enables them to review constitutional issues and matters of federal law. In the Judicial Code of 1911, Congress made the U.S. district courts the sole general-jurisdiction trial courts of the federal judiciary, a role they had previously shared with the circuit courts.

The circuit courts started out as the trial courts for most federal criminal cases and for some civil suits, including those initiated by the United States and those involving citizens of different states. But early on, they did not have their own judges; the local district judge and two Supreme Court justices formed each circuit court panel. (That is how the name "circuit" arose—judges in the early circuit courts traveled from town to town to hear cases, following prescribed paths or circuits to arrive at destinations where they were needed.) Circuit courts also exercised appellate jurisdiction (meaning they receive appeals on federal district court cases) over most civil suits that originated in the district courts; however, that role ended in 1891, and their appellate jurisdiction was turned over to the newly created circuit courts, or U.S. courts of appeals. The original circuit courts—the ones that did not have "of appeals" added to their name—were abolished in 1911, fully replaced by these new circuit courts of appeals.

While we often focus primarily on the district and circuit courts of the federal system, other federal trial courts exist that have more specialized jurisdictions, such as the Court of International Trade, Court of Federal Claims, and U.S. Tax Court. Specialized federal appeals courts include the Court of Appeals for the Armed Forces and the Court of Appeals for Veterans Claims. Cases from any of these courts may also be appealed to the Supreme Court, although that result is very rare.

On the U.S. Supreme Court, there are nine justices—one chief justice and eight associate justices. Circuit courts each contain three justices, whereas federal district courts have just one judge each. As the national court of last resort for all other courts in the system, the Supreme Court plays a vital role in setting the standards of interpretation that the lower courts follow. The Supreme Court's decisions are binding across the nation and establish the precedent by which future cases are resolved in all the system's tiers.

The U.S. court system operates on the principle of *stare decisis* (Latin for stand by things decided), which means that today's decisions are based largely on rulings from the past, and tomorrow's rulings rely on what is decided today. *Stare decisis* is especially important in the U.S. common law system, in which the consistency of precedent ensures greater certainty and stability in law and constitutional interpretation, and it also contributes to the solidity and legitimacy of the court system itself. As former Supreme Court justice Benjamin Cardozo summarized it years ago, "Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts."

With a focus on federal courts and the public, this website reveals the [different ways](#) the federal courts affect the lives of U.S. citizens and how those citizens interact with the courts.

When the legal facts of one case are the same as the legal facts of another, *stare decisis* dictates that they should be decided the same way, and judges are reluctant to disregard precedent without justification. However, that does not mean there is no flexibility or that new precedents or rulings can never be created. They often are. Certainly, court interpretations can change as times and circumstances change—and as the courts themselves change when new judges are selected and take their place on the bench. For example, the membership of the Supreme Court had changed entirely between *Plessey v. Ferguson* (1896), which brought the doctrine of "separate but equal" and *Brown v. Board of Education* (1954), which required integration.

The Selection of Judges

Judges fulfill a vital role in the U.S. judicial system and are carefully selected. At the federal level, the president nominates a candidate to a judgeship or justice position, and the nominee must be confirmed by a majority vote in the U.S. Senate, a function of the Senate's "advice and consent" role. All judges and justices in the national courts serve lifetime terms of office.

The president sometimes chooses nominees from a list of candidates maintained by the American Bar Association, a national professional organization of lawyers. The president's nominee is then discussed (and sometimes hotly debated) in the Senate Judiciary Committee. After a committee vote, the candidate must be confirmed by a majority vote of the full Senate. He or she is then sworn in, taking an oath of office to uphold the Constitution and the laws of the United States.

When a vacancy occurs in a lower federal court, by custom, the president consults with that state's U.S. senators before making a nomination. Through such senatorial courtesy, senators exert considerable influence on the selection of judges in their state,

especially those senators who share a party affiliation with the president. In many cases, a senator can block a proposed nominee just by voicing his or her opposition. Thus, a presidential nominee typically does not get far without the support of the senators from the nominee's home state.

Most presidential appointments to the federal judiciary go unnoticed by the public, but when a president has the rarer opportunity to make a Supreme Court appointment, it draws more attention. That is particularly true now, when many people get their news primarily from the Internet and social media. It was not surprising to see not only television news coverage but also blogs and tweets about President Obama's most recent nominees to the high court, Sonia Sotomayor and Elena Kagan.

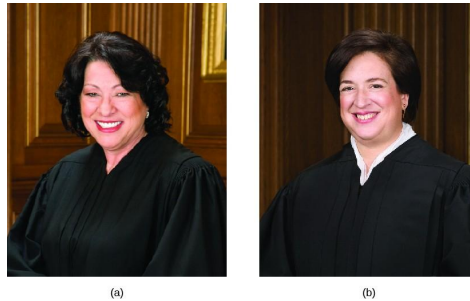


Figure 11.3 President Obama has made two appointments to the U.S. Supreme Court, Justices Sonia Sotomayor (a) in 2009 and Elena Kagan (b) in 2010. Since their appointments, both justices have made rulings consistent with a more liberal ideology. The death of Justice Antonin Scalia in February 2016 has prompted the most recent discussion of appointing a new justice, with Obama nominating Merrick Garland to fill the vacant seat. ^[126]

Presidential nominees for the courts typically reflect the chief executive's own ideological position. With a confirmed nominee serving a lifetime appointment, a president's ideological legacy has the potential to live on long after the end of his or her term. President Obama surely considered the ideological leanings of his two Supreme Court appointees, and both Sotomayor and Kagan have consistently ruled in a more liberal ideological direction. The timing of the two nominations also dovetailed nicely with the Democratic Party's gaining control of the Senate in the 111th Congress of 2009–2011, which helped guarantee their confirmations.

But some nominees turn out to be surprises or end up ruling in ways that the president who nominated them did not anticipate. Democratic-appointed judges sometimes side with conservatives, just as Republican-appointed judges sometimes side with liberals. Republican Dwight D. Eisenhower reportedly called his nomination of Earl Warren as chief justice—in an era that saw substantial broadening of civil and criminal rights—"the biggest damn fool mistake" he had ever made. Sandra Day O'Connor, nominated by Republican president Ronald Reagan, often became a champion for women's rights. David Souter, nominated by Republican George H. W. Bush, more often than not sided with the Court's liberal wing. And even on the present-day court, Anthony Kennedy, a Reagan appointee, has become notorious as the Court's swing vote, sometimes siding with the more conservative justices but sometimes not. Current chief justice John Roberts, though most typically an ardent member of the Court's more conservative wing, has twice voted to uphold provisions of the Affordable Care Act.

Once a justice has started his or her lifetime tenure on the Court and years begin to pass, many people simply forget which president nominated him or her. For better or worse, sometimes it is only a controversial nominee who leaves a president's legacy behind. For example, the Reagan presidency is often remembered for two controversial nominees to the Supreme Court—Robert Bork and Douglas Ginsburg, the former accused of taking an overly conservative and "extremist view of the Constitution" and the latter of having used marijuana while a student and then a professor at Harvard University. President George W. Bush's nomination of Harriet Miers was withdrawn in the face of criticism from both sides of the political spectrum, questioning her ideological leanings and especially her qualifications, suggesting she was not ready for the job.

After Miers' withdrawal, the Senate went on to confirm Bush's subsequent nomination of Samuel Alito, who remains on the Court today. The 2016 presidential election is especially important because the next president is likely to choose three justices.

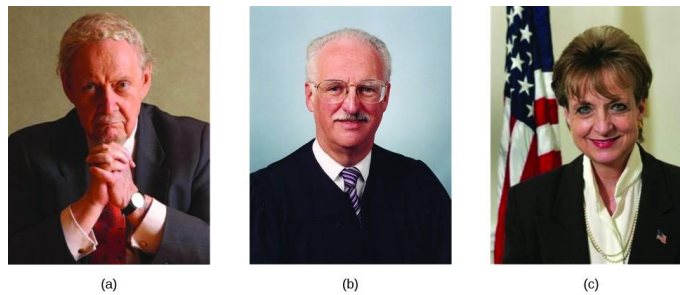


Figure 11.4 Presidential nominations to the Supreme Court sometimes go awry, as illustrated by the failed nominations of Robert Bork (a), Douglas Ginsburg (b), and Harriet Miers (c).

Presidential legacy and controversial nominations notwithstanding, there is one certainty about the overall look of the federal court system: What was once a predominately white, male, Protestant institution is today much more diverse. As a look at the table reveals, the membership of the Supreme Court has changed with the passing years.

Table 11.3 Supreme Court Justice Firsts

Supreme Court Justice Firsts	Justice
First Catholic	Roger B. Taney (nominated in 1836)
First Jewish person	Louis J. Brandeis (1916)
First (and only) former U.S. President	William Howard Taft (1921)
First African American	Thurgood Marshall (1967)
First Woman	Sandra Day O'Connor (1981)
First Hispanic American	Sonia Sotomayor (2009)

The lower courts are also more diverse today. In the past few decades, the U.S. judiciary has expanded to include more women and minorities at both the federal and state levels. However, the number of women and people of color on the courts still lags behind the overall number of white men. As of 2009, the federal judiciary consists of 70 percent white men, 15 percent white women, and between 1 and 8 percent African American, Hispanic American, and Asian American men and women.

Summary

The structure of today's three-tiered federal court system, largely established by Congress, is quite clear-cut. The system's reliance on precedent ensures a consistent and stable institution that is still capable of slowly evolving over the years—such as by increasingly reflecting the diverse population it serves. Presidents hope their judicial nominees will make rulings consistent with the chief executive's own ideological leanings. But the lifetime tenure of federal court members gives them the flexibility to act in ways that may or may not reflect what their nominating president intended. Perfect alignment between nominating president and justice is not expected; a judge might be liberal on most issues but conservative on others, or vice versa. However, presidents have sometimes been surprised by the decisions made by their nominees, such as President Eisenhower was by Justice Earl Warren and President Reagan by Justice Anthony Kennedy.

Chapter 12 – Key Players in the Courtroom

Key Players in the Courtroom ^[127]

Now that we have familiarized ourselves with structure of the court system, we will learn about the positions within the system. In their 1977 book, *Felony Justice: An organizational analysis of criminal courts*, James Eisenstein and Herbert Jacob, coined the term “courtroom workgroup.” They specifically referred to the cooperative working relationship between prosecutors, defense attorneys, and judges in working together (as opposed to an adversarial relationship that the public might expect) to efficiently resolve most of the cases in the criminal courts. This chapter more generally uses the term to include all the individuals working in the criminal courts—judges, attorneys, and the variety of court staff.

The accusatory phase (the pre-trial phase) and adjudicatory phase (the trial phase) of the criminal justice process include individuals who regularly work together in the trial courts. The prosecutor files the accusatory instrument called either an

information or an indictment, and represents the state in plea bargaining, on pretrial motions, during the trial, and in the sentencing phase. The defense attorney represents the defendant after charges have been filed, through the pre-trial process, in a trial, and during sentencing, and maybe on the appeal as well. Judges, aided by several court personnel, conduct the pretrial, trial, and sentencing hearings. Prosecutors, defense counsel, and judges perform different roles, but all are concerned with the judicial process and the interpretation of the law. These law professionals are graduates of law schools and have passed the bar examination establishing their knowledge of the law and their ability to do legal analysis. As persons admitted by the state or federal bar associations to the practice of law, they are subject to the same legal codes of professional responsibility, disciplinary rules, and ethical rules and opinions for lawyers. Although the American criminal justice system is said to represent the adversarial model, the reality is that prosecutors, defense attorneys, judges and court staff work with cooperation and consensus rather than conflict. This is understandable when considering the common goal of efficient and expedition case processing and prescribed and agreed upon rules for achieving those goals.

Trial Judges: Misperceptions and Realities

Trial court judges are responsible for presiding over pre-trial, trial and sentencing hearings, as well as probation and parole revocation hearings. They issue search and arrest warrants, set bail or authorize release, sentence offenders, engage in pre-sentence conferences with attorneys, work with court clerks, bailiffs, jail staff, etc. Trial judges have considerable, but not unlimited, discretion. In addition to the ethical and disciplinary rules governing all attorneys in the state, trial judges are subject to judicial codes of conduct. Judges are bound by the applicable rules of law when deciding cases and writing their legal opinions. Some rules governing judges are flexible guidelines while other rules are very precise requirements.

During the pretrial phase, judges make rulings on the parties' motions, such as motions to exclude certain physical or testimonial evidence, motions to compel discovery, and motions to change venue. Because most cases are resolved prior to trial through plea-bargaining, one important judicial function is taking the defendant's guilty plea.

At trial, if the defendant elects to waive a jury, there is a bench trial, and the judge sits as the "trier of fact." Like jurors in a jury trial, the judge has considerable discretion when deciding what facts were proven (or not) by the parties and what witnesses he or she finds credible. When the defendant elects for a jury trial, the jury decides what the facts are. In either a bench or jury trial, the trial judge rules on the admissibility of evidence (whether a jury is entitled to hear certain testimony or look at physical evidence), whether witnesses are competent, whether privileges exist, whether witnesses qualify as experts, whether jurors will be excused from jury service, etc. At the end of the jury trial, the judge gives a set of jury instructions to the jurors which informs them on the law that applies to the case they are deciding.

If the defendant is convicted, then the judge will impose the sentence. Except for death penalty cases, jurors are generally not involved with sentencing the defendant. Judges have perhaps the broadest discretion in their role imposing sentences. However, with more states enacting mandatory minimums and sentence guidelines, judicial discretion has been severely curtailed.

"In the eyes of most Americans, the judge is the key player in the courtroom workgroup. The symbolism and ceremony of a criminal trial reinforce this view. The judge is seated on a raised bench, robed in black, and wields a gavel to maintain order in the courtroom. Moreover, the participants and spectators—including the defense attorney and the prosecutor—are commanded to 'all rise' when the judge enters or leaves the courtroom. It is no wonder, then that the judge is seen as the most influential person in court.

This view of the judge, though accurate to some degree, is misleading for at least two reasons. First, although the judge clearly plays an important role—in many cases, the lead role—in state and federal criminal courts, other actors play significant supporting roles. This is particularly the case in the majority of criminal cases that are settled by plea, not trial. In these cases, the key player may be the prosecutor rather than the judge. A second reason why the traditional view of the judge is misleading is that it is based on an inaccurate assessment of the role of the judge. Judging involves more than presiding at trials. In fact, most of what judges do during a typical day or week is something other than presiding at trials—reading case files, conducting hearings, accepting guilty pleas, pronouncing sentences, and managing court dockets."

The role played by the judge, in other words, is both less influential and more varied than the traditional view would have people believe.

Trial Judge Selection and Qualifications

The sole qualification to be a judge in most jurisdictions is graduating from a law school and membership in the state's bar association. Although the trend is for judges to be lawyers prior, a few jurisdictions do not require justices of the peace or

municipal judges to be attorneys.

States procedures in selecting judges vary tremendously. “Almost no two states are alike and many states employ different methods of selection depending on the different levels of the judiciary creating ‘hybrid’ systems of selection.” Nevertheless, the primary differences surround whether judges are elected or appointed, or selected based on merit. There are four primary methods used to select judges in the United States: appointment, with or without confirmation by another agency; partisan political election; non-partisan election; and a combination of nomination by a commission, appointment and periodic reelection (the Missouri Plan).

There are variations within these four primary methods. As noted above, states may use different methods to select judges based on the level in the judicial hierarchy. For example, municipal judges may be appointed, while supreme court judges are elected. Each selection method has its critics and advocates, and the relative merits of each are generally judged by the selection methods ability to achieve judicial independence and accountability. Notwithstanding the critiques of each of the methods, there has been little empirical evidence that the quality of judges, in terms of competency, effectiveness, or honesty, varies depending on the methods used to select the judge.

The length of time a judge will “sit”, called a term in office or tenure, varies greatly, generally from four to sixteen years. Frequently, the term for a trial judge is less than a term for an appellate judge. At the appellate level, six years is the shortest term, and many states use terms of ten years or more for their appellate judges. Only a few states have lifetime tenure for their judges.

In the federal system, the President appoints Article III judges (U.S. District Court, U.S. Circuit Court, and U.S. Supreme Court judges) with the advice and consent of the Senate. In Article III, U.S. Constitution states that federal judges are appointed to “hold their Offices during Good Behavior.” On February 25, 2019, the Court in *Rizo v. Yovino*, ___ U.S. ___ (2019) refused to address the merits of the case (an important employment wage discrimination case) because the judge who wrote the Ninth Circuit opinion died eleven days before its release. What will likely become an oft-quoted sentiment, “Federal judges are appointed for life, not for eternity.”

The district courts appoint federal magistrate judges to either four or eight-year terms. Though it would seem that politics has played an increasing role in the selection of judges in the federal system, perceptions are influenced by what we currently hear and read. The reality is that complaints of political overreaching in selecting federal judges have been with us since the federal courts were first staffed.

Judicial Clerk, Law Clerk, and Judicial Assistants

Generally, judges have one or two main assistants. These individuals are known as “judicial clerk”, “clerk of court”, “law clerk”, or “judicial assistant”. Of course, there may be several court clerks who interact each day with all the judges in the courthouse, but generally, judges have only one or two judicial assistants who work directly with them. The clerk of court works directly with the trial judge and is responsible for court records and paperwork both before and after the trial. Usually, each judge has his or her own clerk. The clerk prepares all case files that a judge will need for the day. During hearings and the trial, these clerks record and mark physical evidence introduced in the trial, swear in the witnesses, or administer the oath to the witness, take notes cataloging the recordings, etc. In some jurisdictions, the law clerks are lawyers who have just completed law school and may have already passed the bar exam. In other jurisdictions, the law clerks are not legally trained but may have specialized paralegal training or legal assistant training.

Local and State Trial Court Administrators

Local and state trial court administrators oversee the administration of the courts. These administrators’ responsibilities include hiring and training court personnel (clerks, judicial assistants, bailiffs), ensuring that the court caseloads are efficiently processed, keeping records, sending case files to reviewing courts, ensuring that local court rules are being implemented, and working with the local and state bar associations to establish effective communications to promote the expedient resolutions of civil and criminal cases.

Indigency Verification Officers

The Indigency Verification Officer (IVO) is a court employee who investigates defendants’ financial status and determines whether they meet the criteria for court-appointed counsel. More than 75% of all individuals accused of a crime qualify as indigent. How poor a defendant must be to qualify for a court-appointed attorney varies from place to place, and each IVO uses a screening device that takes into consideration the cost of defense in the locality as well as defendant’s financial circumstances. One difficulty in qualifying for a court-appointed attorney is having equity in a home that cannot be easily sold quickly enough to provide resources

for the defendant to hire an attorney. Another difficulty for indigency verification officers is getting the information needed from defendants who may be suffering from mental health issues.

Bailiffs

Bailiffs are the court staff responsible for courtroom security. Bailiffs are often local sheriff deputies or other law enforcement officers (or sometimes former officers), but they can also be civilians hired by the court. Sometimes, courts will use volunteer bailiffs. Bailiffs work under the supervision of the trial court administrator. During court proceedings, bailiffs or clerks call the session to order, announce the entry of the judge, make sure that public spectators remain orderly, keep out witnesses who might testify later (if the judge orders them excluded upon request of either party), and attend to the jurors. As courtroom security becomes a bigger concern, law enforcement officers are increasingly used as bailiffs, and they are responsible for the safety of the court personnel, spectators, witnesses, and any of the parties. In some communities, law enforcement bailiffs may transport in-custody defendants from the jail to the courthouse and back. In most jurisdictions today, bailiffs screen people for weapons and require them to silence cell phones before allowing them to enter the courtroom.

Jury Clerk

The jury clerk sends out jury summons to potential jurors, works with jurors requests for postponements of jury service, coordinates with the scheduling clerk to make sure enough potential jurors show up at the courthouse each day there is a trial, schedules enough grand jurors to fill all the necessary grand jury panels, arranges payment to jurors for their jury service, and arranges lodging and meals for jurors in the rare event of jury sequestration.

Court Clerks and Staff

Court structure varies from the courthouse to courthouse, but frequently court staff is divided into units. For example, staff may be assigned to work in the criminal unit, the civil unit, the traffic unit, the small claims unit, the juvenile unit, the family unit, or the probate unit. In smaller communities, there may be just a few court clerks who “do it all”. With the trend towards specialized courts (drug courts, mental health courts, domestic violence courts, and veteran courts), staff may specialize in and/or rotate in and out of the various units. Court staff are expected to have a vast knowledge of myriad local court rules and protocols, statutes, and administrative rules that govern filing processes, filing fees, filing timelines, accounting, record maintenance, as well as a knowledge of general office practices such as ordering supplies, mastering office machinery, and ensuring that safety protocol is established and followed. Recently, many courts have transitioned to electronic filing of all documents, usually managed through a centralized state court system. This transition presents challenges to court staff as they learn the new filing software, keep up with new filings, and archive the past court documents.

Release Assistance Officers

Release assistance officers (RAO) are court employees who meet with defendants at the jail to gather information to pass on to the judge who makes release decisions. Release assistance officers make their recommendations based on the defendant’s likelihood of reappearance and other considerations specified by statute or local rules. In determining whether the defendant is likely to reappear, the RAO considers: the defendant’s ties to the community, the defendant’s prior record of failures to appear, the defendant’s employment history, whether the defendant lives in the community, the nature and seriousness of the charges, and any potential threat the defendant may present to the community.

The availability of space at the jail may also play a role in whether an individual is released. Court and jail staff may need to work together to establish release protocols when space is limited. The RAO should have a significant voice in drafting those protocols. Whether the RAO recommends security (bail) or conditional release, the RAO will generally suggest to the judge the conditions that the defendant should abide by if he or she makes bail or is conditionally released. Defendants released prior to trial will sign release agreements indicating the conditions of release recommended by the RAO and imposed by the judge. RAOs may also investigate the defendant’s proposed living conditions upon release to make sure that they promote lawful activity and the ability for reappearance for all scheduled court appearances.

Scheduling Clerk

The scheduling clerk, or docketing clerk, set all hearings and trials on the court docket. The scheduling clerk notes the anticipated duration of trials (most trials are concluded within one day), speedy trial constraints, statutory and local court rules time frames, etc. The role of the scheduling clerk is extremely important, and an experienced scheduling clerk contributes to the overall efficiency of the legal process. Ineffective or inefficient scheduling causes delay, frustration, and may impede the justice process. Part of scheduling, or docketing, is keeping track of law enforcement officers’ and defense attorneys’ scheduled vacations. In

addition, the scheduling clerk must be mindful of the judges' calendars which should track scheduled vacation time and training days, and also needed desk time, the time necessary for resolving cases they have taken under advisement. (Note that trial judges can either decide "from the bench", meaning they will rule immediately on the issues before them during the hearing, or after taking the case under advisement, meaning they will rule through a written decision/opinion letter after spending time researching the law, reviewing the parties written pleadings, and considering the oral arguments).

Supreme Court Decisions

Roe v. Wade ^[128]

A pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. A licensed physician (Hallford), who had two state abortion prosecutions pending against him, was permitted to intervene. A childless married couple (the Does), the wife not being pregnant, separately attacked the laws, basing alleged injury on the future possibilities of contraceptive failure, pregnancy, unpreparedness for parenthood, and impairment of the wife's health.

A three-judge District Court, which consolidated the actions, held that Roe and Hallford, and members of their classes, had standing to sue and presented justiciable controversies. Ruling that declaratory, though not injunctive, relief was warranted, the court declared the abortion statutes void as vague and over broadly infringing those plaintiffs' Ninth and Fourteenth Amendment rights. The court ruled the Does' complaint not justiciable. Appellants directly appealed to this Court on the injunctive rulings, and appellee cross-appealed from the District Court's grant of declaratory relief to Roe and Hallford.

Held:

1. While 28 U.S.C. § 1253 authorizes no direct appeal to this Court from the grant or denial of declaratory relief alone, review is not foreclosed when the case is properly before the Court on appeal from specific denial of injunctive relief and the arguments as to both injunctive and declaratory relief are necessarily identical.
2. Roe has standing to sue; the Does and Hallford do not.
 - Contrary to appellee's contention, the natural termination of Roe's pregnancy did not moot her suit. Litigation involving pregnancy, which is "capable of repetition, yet evading review," is an exception to the usual federal rule that an actual controversy must exist at review stages, and not simply when the action is initiated.
 - The District Court correctly refused injunctive, but erred in granting declaratory, relief to Hallford, who alleged no federally protected right not assertible as a defense against the good faith state prosecutions pending against him. *Samuels v. Mackell*, 401 U. S. 66.
 - The Does' complaint, based as it is on contingencies, any one or more of which may not occur, is too speculative to present an actual case or controversy.
3. State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term.
 - For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
 - For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
 - For the stage subsequent to viability, the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.
4. The State may define the term "physician" to mean only a physician currently licensed by the State and may proscribe any abortion by a person who is not a physician as so defined.
5. It is unnecessary to decide the injunctive relief issue, since the Texas authorities will doubtless fully recognize the Court's ruling that the Texas criminal abortion statutes are unconstitutional.

Brown v Board of Education ^[129]

Consolidated action brought to challenge racial segregation in public schools; Right to equal protection under the 14th Amendment; Judicial review of the “separate but equal” doctrine; Equality / Non-discrimination; Racial Discrimination; Right to Education.

Date of the Ruling:

May 17, 1954

Forum:

U.S. Supreme Court

Type of Forum:

Domestic

Summary:

This class action consolidated a number of cases brought on behalf of black schoolchildren denied admission to segregated public schools, under state law. Public facilities were previously racially segregated in the United States, particularly in the South. The case sought to challenge the “separate but equal” doctrine set forth in [Plessy v. Ferguson](#), 163 U.S. 537 (1896), that governed racial segregation at the time. This doctrine held that substantially equal but separate facilities amounted to equal treatment of the races. The plaintiffs argued that racially segregated public schools are not and cannot be made equal and therefore such a system deprived them of their right to equal protection under the law, in violation of the Fourteenth Amendment of the Constitution of the United States.

The Court, emphasizing the importance of education as a government function and the principal instrument to a child’s progression and ultimate success, struck down the legality of racial segregation in public schools. Furthermore, the Court held that when the state undertakes to provide public education it must be made available to all on equal terms, pursuant to the Fourteenth Amendment. The Court concluded that state sanctioned segregation, on the sole basis of race, generates a feeling of inferiority among black children that is likely to undermine their educational and mental development. The Court noted that “separate educational facilities are inherently unequal.” Segregated schools deprive minority children of equal educational opportunities, regardless of whether they have access to facilities and other “tangible” factors that are otherwise equal.

Enforcement of the Decision and Outcomes:

After the decision in this landmark case, a number of school districts across the country desegregated peacefully. However, resistance to school desegregation at times resulted in open defiance and violent confrontations, including race riots, civil disturbances, and general resistance to integration in many states. The federal government in some instances deployed federal troops to assist in the integration of public schools; such was the case in Little Rock, Arkansas, in 1957. Cases involving racial segregation in schools still continue. Although racial segregation is no longer legal, in reality, due to economic and other factors, racial segregation in practice continues. Several cases have developed to respond to these issues including: [Guey Heung Lee v. Johnson](#), 404 U.S. 1215 (1971) – desegregation of Asian schools despite opposition of the Asian students’ parents; [Milliken v. Bradley](#), 418 U.S. 717 (1974) — rejected bussing students across school district lines as an effort to facilitate racially diverse schools; [Parents Involved in Community Schools v. Seattle School District No. 1](#) 551 U.S. 701, 127 S. Ct. 2738 (2007) — rejected assigning students to schools solely on the basis of race; and the [Edgewood](#) decisions which have allowed funding for schools to be generated by property taxes regardless of the disparate funding following racial and economic lines that results.

Groups involved in the case:

- National Association for the Advancement of Colored People (NAACP): <http://www.naACP.org/content/main/>

Significance of the Case:

Brown v. Board of Education was one of many cases launched by the National Association for the Advancement of Colored People (NAACP) to contest Jim Crow laws – state laws which allowed for or mandated racial segregation or discrimination. This landmark case effectively brought an end to state sanctioned racial segregation and discrimination in the United States. The case not only began an era of racial integration, but also served as an important steppingstone in the Civil Rights Movement and human rights movement in the United States.



Pin It! Gideon v. Wainwright

Follow the link to learn more about [Gideon v. Wainwright](#) through the Oyez project.

[Loving v. Virginia](#) ^[130]

Argued April 10, 1967. Decided June 12, 1967. APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA. Bernard S. Cohen and Philip J. Hirschkop argued the cause and filed a brief for appellants. Mr. Hirschkop argued pro hac vice, by special leave of Court.

R. D. McIlwaine III, Assistant Attorney General of Virginia, argued the cause for appellee. With him on the brief were Robert Y. Button, Attorney General, and Kenneth C. Patty, Assistant Attorney General.

William M. Marutani, by special leave of Court, argued the cause for the Japanese American Citizens League, as amicus curiae, urging reversal.

Briefs of amici curiae, urging reversal, were filed by William M. Lewers and William B. Ball for the National Catholic Conference for Interracial Justice et al.; by Robert L. Carter and Andrew D. Weinberger for the National Association for the Advancement of Colored People, and by Jack Greenberg, James M. Nabrit III and Michael Meltsner for the N. A. A. C. P. Legal Defense & Educational Fund, Inc.

T. W. Bruton, Attorney General, and Ralph Moody, Deputy Attorney General, filed a brief for the State of North Carolina, as amicus curiae, urging affirmance.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. For reasons which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment.

In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. At the October Term, 1958, of the Circuit Court of Caroline County, a grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. On January 6, 1959, the Lovings pleaded guilty to the charge and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years. He stated in an opinion that:

"Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

After their convictions, the Lovings took up residence in the District of Columbia. On November 6, 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence on the ground that the statutes which they had violated were repugnant to the Fourteenth Amendment. The motion not having been decided by October 28, 1964, the Lovings instituted a class action in the United States District Court for the Eastern District of Virginia requesting that a three-judge court be convened to declare the Virginia anti-miscegenation statutes unconstitutional and to enjoin state officials from enforcing their convictions. On January 22, 1965, the state trial judge denied the motion to vacate the sentences, and the Lovings perfected an appeal to the Supreme Court of Appeals of Virginia. On February 11, 1965, the three-judge District Court continued the case to allow the Lovings to present their constitutional claims to the highest state court.

The Supreme Court of Appeals upheld the constitutionality of the anti-miscegenation statutes and, after modifying the sentence, affirmed the convictions. The Lovings appealed this decision, and we noted probable jurisdiction on December 12, 1966, 385 U. S. 986.

The two statutes under which appellants were convicted and sentenced are part of a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. The Lovings were convicted of violating § 20-58 of the Virginia Code:

“Leaving State to evade law. —If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.”

Section 20-59, which defines the penalty for miscegenation, provides:

“Punishment for marriage. —If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.”

Other central provisions in the Virginia statutory scheme are § 20-57, which automatically voids all marriages between “a white person and a colored person” without any judicial proceeding, and §§ 20-54 and 1-14 which, respectively, define “white persons” and “colored persons and Indians” for purposes of the statutory prohibitions. The Lovings have never disputed in the course of this litigation that Mrs. Loving is a “colored person” or that Mr. Loving is a “white person” within the meanings given those terms by the Virginia statutes.

Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications. Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period. The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War. The central features of this Act, and current Virginia law, are the absolute prohibition of a “white person” marrying other than another “white person,” a prohibition against issuing marriage licenses until the issuing official is satisfied that the applicants’ statements as to their race are correct, certificates of “racial composition” to be kept by both local and state registrars, and the carrying forward of earlier prohibitions against racial intermarriage.

I.

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1955 decision in [Naim v. Naim](#), 197 Va. 80, 87 S. E. 2d 749, as stating the reasons supporting the validity of these laws. In *Naim*, the state court concluded that the State’s legitimate purposes were “to preserve the racial integrity of its citizens,” and to prevent “the corruption of blood,” “a mongrel breed of citizens,” and “the obliteration of racial pride,” obviously an endorsement of the doctrine of White Supremacy. *Id.*, at 90, 87 S. E. 2d, at 756. The court also reasoned that marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment.

While the state court is no doubt correct in asserting that marriage is a social relation subject to the State’s police power, [Maynard v. Hill](#), 125 U. S. 190 (1888), the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so in light of [Meyer v. Nebraska](#), 262 U. S. 390 (1923), and [Skinner v. Oklahoma](#), 316 U. S. 535 (1942). Instead, the State argues that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element 8*8 as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race. The second argument advanced by the State assumes the validity of its equal application theory. The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.

Because we reject the notion that the mere “equal application” of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations, we do not accept the State’s contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. The mere fact of equal application does not mean that our analysis of these statutes should follow the approach we have taken in cases involving no racial discrimination where the Equal Protection Clause has been arrayed against a statute discriminating between the

kinds of advertising which may be displayed on trucks in New York City, [Railway Express Agency, Inc. v. New York](#), 336 U. S. 106 (1949), or an exemption in Ohio's ad valorem tax for merchandise owned by a nonresident in a storage warehouse, [Allied Stores of Ohio, 9*9 Inc. v. Bowers](#), 358 U. S. 522 (1959) . In these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

The State argues that statements in the Thirty-ninth Congress about the time of the passage of the Fourteenth Amendment indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws. Many of the statements alluded to by the State concern the debates over the Freedmen's Bureau Bill, which President Johnson vetoed, and the Civil Rights Act of 1866, 14 Stat. 27, enacted over his veto. While these statements have some relevance to the intention of Congress in submitting the Fourteenth Amendment, it must be understood that they pertained to the passage of specific statutes and not to the broader, organic purpose of a constitutional amendment. As for the various statements directly concerning the Fourteenth Amendment, we have said in connection with a related problem, that although these historical sources "cast some light" they are not sufficient to resolve the problem; "[a]t best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect." [Brown v. Board of Education](#), 347 U. S. 483, 489 (1954) . See also [Strauder 10*10 v. West Virginia](#), 100 U. S. 303, 310 (1880) . We have rejected the proposition that the debates in the Thirty-ninth Congress or in the state legislatures which ratified the Fourteenth Amendment supported the theory advanced by the State, that the requirement of equal protection of the laws is satisfied by penal laws defining offenses based on racial classifications so long as white and Negro participants in the offense were similarly punished. [McLaughlin v. Florida](#), 379 U. S. 184 (1964) .

The State finds support for its "equal application" theory in the decision of the Court in [Pace v. Alabama](#), 106 U. S. 583 (1883) . In that case, the Court upheld a conviction under an Alabama statute forbidding adultery or fornication between a white person and a Negro which imposed a greater penalty than that of a statute proscribing similar conduct by members of the same race. The Court reasoned that the statute could not be said to discriminate against Negroes because the punishment for each participant in the offense was the same. However, as recently as the 1964 Term, in rejecting the reasoning of that case, we stated "Pace represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." [McLaughlin v. Florida, supra, at 188](#) . As we there demonstrated, the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States. [Slaughter-House Cases](#), 16 Wall. 36, 71 (1873) ; [Strauder v. West Virginia](#), 100 U. S. 303, 307-308 (1880) ; [Ex parte Virginia](#), 100 U. S. 339, 344-345 (1880) ; [Shelley v. Kraemer](#), 334 U. S. 1 (1948) ; [Burton v. Wilmington Parking Authority](#), 365 U. S. 715 (1961) .

Unquestionably, Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." [Hirabayashi v. United States](#), 320 U. S. 81, 100 (1943) . At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," [Korematsu v. United States](#), 323 U. S. 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they "cannot conceive of a valid legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense." [McLaughlin v. Florida, supra, at 198](#) (STEWART, J., joined by DOUGLAS, J., concurring).

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

II.

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the “basic civil rights of man,” fundamental to our very existence and survival. [Skinner v. Oklahoma, 316 U. S. 535, 541 \(1942\)](#) . See also [Maynard v. Hill, 125 U. S. 190 \(1888\)](#) . To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

These convictions must be reversed.

It is so ordered.

MR. JUSTICE STEWART, concurring.

I have previously expressed the belief that “it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor.” [McLaughlin v. Florida, 379 U. S. 184, 198 \(concurring opinion\)](#) . Because I adhere to that belief, I concur in the judgment of the Court.

Section 1 of the Fourteenth Amendment provides:

“All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

206 Va. 924, 147 S. E. 2d 78 (1966).

Section 20-57 of the Virginia Code provides:

“ Marriages void without decree. —All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process.” Va. Code Ann. § 20-57 (1960 Repl. Vol.).

Section 20-54 of the Virginia Code provides:

“ Intermarriage prohibited; meaning of term ‘white persons.’ —It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term ‘white person’ shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter.” Va. Code Ann. § 20-54 (1960 Repl. Vol.).

The exception for persons with less than one-sixteenth “of the blood of the American Indian” is apparently accounted for, in the words of a tract issued by the Registrar of the State Bureau of Vital Statistics, by “the desire of all to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas...” Plecker, *The New Family and Race Improvement*, 17 Va. Health Bull., Extra No. 12, at 25-26 (New Family Series No. 5, 1925), cited in Wadlington, *The Loving Case: Virginia’s Anti-Miscegenation Statute in Historical Perspective*, 52 Va. L. Rev. 1189, 1202, n. 93 (1966).

Section 1-14 of the Virginia Code provides:

“ Colored persons and Indians defined. —Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one fourth or more of Indian blood and less than one sixteenth of Negro blood shall be deemed tribal Indians.” Va. Code Ann. § 1-14 (1960 Repl. Vol.).

After the initiation of this litigation, Maryland repealed its prohibitions against interracial marriage, Md. Laws 1967, c. 6, leaving Virginia and 15 other States with statutes outlawing interracial marriage: Alabama, Ala. Const., Art. 4, § 102, Ala. Code, Tit. 14, § 360 (1958); Arkansas, Ark. Stat. Ann. § 55-104 (1947); Delaware, Del. Code Ann., Tit. 13, § 101 (1953); Florida, Fla. Const., Art. 16, § 24, Fla. Stat. § 741.11 (1965); Georgia, Ga. Code Ann. § 53-106 (1961); Kentucky, Ky. Rev. Stat. Ann. § 402.020 (Supp.

1966); Louisiana, La. Rev. Stat. § 14:79 (1950); Mississippi, Miss. Const., Art. 14, § 263, Miss. Code Ann. § 459 (1956); Missouri, Mo. Rev. Stat. § 451.020 (Supp. 1966); North Carolina, N. C. Const., Art. XIV, § 8, N. C. Gen. Stat. § 14-181 (1953); Oklahoma, Okla. Stat., Tit. 43, § 12 (Supp. 1965); South Carolina, S. C. Const., Art. 3, § 33, S. C. Code Ann. § 20-7 (1962); Tennessee, Tenn. Const., Art. 11, § 14, Tenn. Code Ann. § 36-402 (1955); Texas, Tex. Pen. Code, Art. 492 (1952); West Virginia, W. Va. Code Ann. § 4697 (1961).

Over the past 15 years, 14 States have repealed laws outlawing interracial marriages: Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming.

The first state court to recognize that miscegenation statutes violate the Equal Protection Clause was the Supreme Court of California. [Perez v. Sharp, 32 Cal. 2d 711, 198 P. 2d 17 \(1948\)](#) .

Appellants point out that the State’s concern in these statutes, as expressed in the words of the 1924 Act’s title, “An Act to Preserve Racial Integrity,” extends only to the integrity of the white race. While Virginia prohibits whites from marrying any nonwhite (subject to the exception for the descendants of Pocahontas), Negroes, Orientals, and any other racial class may intermarry without statutory interference. Appellants contend that this distinction renders Virginia’s miscegenation statutes arbitrary and unreasonable even assuming the constitutional validity of an official purpose to preserve “racial integrity.” We need not reach this contention because we find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the “integrity” of all races.

[Marbury v. Madison](#)



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