it costs a lot to get elected, and people with money can affect election outcomes. In response, the federal government adopts laws that limit contributions to and spending by political candidates. The laws try to balance the right to support candidates and the need to avoid corruption of elections. Big money interests challenge the campaign finance laws in court. After decades of upholding similar laws, the U.S. Supreme Court strikes down a federal ban on certain political advertisements as unconstitutional. Writing in dissent, Justice David Souter argues, “The court (and, I think, the country) loses when important precedent is overruled without good reason.”

The following year, a federal district court relied heavily on prior Supreme Court decisions to uphold a law that prohibited a nonprofit organization from running advertisements and airing a film about then-presidential candidate Hillary Clinton. On appeal, the Supreme Court struck down the legal restrictions in *Citizens United v. Federal Election Commission*, unleashing unlimited corporate and union spending on elections and prompting uncertainty about the stability of the Court’s decisions. This chapter and the case excerpts that follow explore the relative constancy or uncertainty of the rule of law.

The ancient Greek philosopher Aristotle said people are basically self-interested; they pursue their own interests in preference to the collective good or the cause of justice. However, self-interest is ultimately shortsighted and self-destructive. A lumber company that seeks only to generate the greatest immediate profit ultimately deforesets the timberlands it depends on. Astute people therefore recognize that personal interests and short-term goals must sometimes
give way to broader or longer-term objectives. Everyone benefits when people adopt a system of rules to promote a balance between gain and loss, between cost and benefit and between personal and universal concerns. Aristotle called this balance the “golden mean.” Human interests are served and justice is best achieved when a society adopts a system of law to balance conflicting human objectives and allow people to live together successfully.\(^{11}\)

Belief in the power of law to promote this balance and restrain human injustice is the foundation of the U.S. Constitution and the rule of law. The U.S. Supreme Court said the notion that “our government is a government of laws, not of men” is central to our constitutional nature.\(^ {12}\) “Stripped of all technicalities, [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how [government] will use its coercive powers in given circumstances, and to plan ... on the basis of this knowledge.”\(^ {13}\)

In essence, laws establish a contract that governs interactions among residents and between the people and their government. Legal rules establish the boundaries of acceptable behavior and empower government to punish violations. The rule of law limits the power of government because it prohibits government from infringing on the rights and liberties of the people. This system constrains the actions of both the people and the government to enhance liberty, freedom and justice for all.
In 1964, as the United States expanded what many then believed was an illegal military action in Vietnam, Harvard legal scholar Lon Fuller articulated what would become a foundational understanding of the rule of law. In Fuller’s view, the rule of law was a set of standards that established norms and procedures to encourage consistent, neutral decision making equally for all. Fuller’s formal, conceptual definition has been criticized because it does not provide specific guidance to those drafting, interpreting or applying the law. As one legal scholar noted, the rule of law is created through its application. It “cannot be [understood] in the abstract.”

For Fuller, the rule of law established eight “desiderata,” or desired outcomes, to guide how laws should be created and employed. The rule of law requires laws to be (1) general and not discriminatory; (2) widely known and disseminated; (3) forward-looking in their application rather than retroactive; (4) clear and specific; (5) self-consistent and complementary of each other; (6) capable of being obeyed; (7) relatively stable over time; and (8) applied and enforced in ways that reflect their underlying intent.

As a mechanism for ordering human behavior, the law functions best when it makes clear, comprehensible and consistent distinctions between legal and illegal behavior. People can only obey laws that they know about and understand. Good laws must be publicly disseminated and sufficiently clear and precise to properly inform citizens of when and how the laws apply (as well as when they do not).
The Law of Journalism and Mass Communication

Vague laws fail to define their terms or are unclear. They are unacceptable because people may avoid participating in legal activities out of uncertainty over whether their actions are illegal. This tramples people’s freedom. In 2018, the U.S. Supreme Court by a vote of 5–4 struck down a provision of the Immigration and Nationality Act as unconstitutionally vague. The law practically required the deportation of any immigrant convicted of an “aggravated felony” or “crime of violence.” The Court reasoned that applying the provision’s imprecise language “necessarily devolves into guesswork and intuition, invites arbitrary enforcement, and fails to provide fair notice,” all of which violate the basic tenets of due process. These core elements of due process, Justice Neil M. Gorsuch wrote in concurrence, are foundational to the Constitution’s original meaning and basic to the rule of law.

INTERNATIONAL LAW
FOUR FOUNDATIONS OF THE RULE OF LAW

The World Justice Project has articulated four foundations of the rule of law based on internationally accepted universal standards. Accordingly, a system of the rule of law exists when:

1. All individuals and private entities are accountable under the law.
2. The laws are fair, clear, public and stable.
3. The processes by which the laws are enacted, administered and enforced are open, robust and timely for all.
4. Those who apply the law are competent, ethical, independent, neutral and diverse.

Many argue that any movement toward a universal rule of law is a form of imperialism that tramples the unique priorities of individual nations and limits the freedom of different peoples to create distinct, culturally appropriate systems of law.

Internation Law
U.S. RULE OF LAW DOES NOT RANK FIRST

An international index ranks the United States 19th among 113 countries in how citizens experience the rule of law. The World Justice Project report put the United States behind the Nordic countries, Estonia, the Czech Republic and Japan but well ahead of Afghanistan, Cambodia and Venezuela.

The study found relative weaknesses in the U.S. respect for core human rights, protection of personal and property security, cost of access to civil justice, and the timeliness and impartiality of criminal justice.
Clear laws define their terms and detail their application in order to limit government officials’ discretion. Clear laws advance the rule of law by reducing the ability of officials to apply legal rules differently to their friends and foes. “True freedom requires the rule of law and justice, and a judicial system in which the rights of some are not secured by the denial of rights to others,” one observer noted.20

Good laws accomplish their objectives with minimum infringement on the freedoms and liberties of the people. Well-tailored laws advance specific government interests or prevent particular harms without punishing activities that pose no risk to society. A law that sought to limit noisy disturbances of residential neighborhoods at night, for example, would be poorly tailored and overbroad if it prohibited all discussion out of doors, anywhere at any time.

The rule of law requires the law to be internally consistent, logical and relatively stable. To ensure slow evolution rather than rapid revolution of legal rules, judges in U.S. courts interpret and apply laws based upon the precedents established by other court rulings. Precedent, or stare decisis, is the legal principle that tells courts to stand by what courts have decided previously. As the U.S. Supreme Court has written, “[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”21 The principle holds that subsequent court decisions should adhere to the example and reasoning of earlier decisions in similar factual situations. Reliance on precedent is the heart of the common law (discussed later) and encourages predictable application of the law.

Although the application of prior rulings promotes the rule of law by increasing the consistency and uniformity of legal decision making,22 it does not always happen. Sometimes precedents are unclear or seem to conflict. Then the rule of law can be ambiguous.23 Especially where constitutional values are at issue, courts may “not allow principles of stare decisis to block correction of error,” the California Supreme Court said.24

In 2010, for example, a “bitterly divided” U.S. Supreme Court ruled 5–4 in Citizens United v. Federal Election Commission (the case mentioned at the beginning and excerpted at the end of this chapter) that certain federal limits on campaign finance violated the Constitution. Observers noted that the decision made “sweeping changes in federal election law”25 and “represented a sharp doctrinal shift.”26 Some said the Court had ignored binding precedent. Others argued that “the central principle which critics of this ruling find most offensive . . . has been affirmed by decades of Supreme Court jurisprudence.”27 Thus, the conflict centered less on whether to apply precedent and more on which precedents to apply.

Debate over the role that stare decisis plays in Supreme Court decision making arose again during the 2017–18 term, when many said the Court had overruled four well-established precedents.28 In Janus v. American Federation of State, County, and Municipal Employees,29 for example, the Court overturned its 30-year-old holding in Abood v. Detroit Board of Education30 when it held that laws forcing public employees to pay fees to their designated union violated their First Amendment right to freedom from compelled speech (see Chapter 2).
The laws of the United States have grown in number and complexity as American society has become increasingly diverse and complicated. Many forms of communication and the laws that govern them today did not exist in the 1800s. Technology has been a driving force for change in the law of journalism and mass communication. U.S. law also has developed in response to social, political, philosophical and economic changes. Employment and advertising laws, for example, emerged and multiplied as the nation’s workforce shifted and the power of corporations grew. Legislatures create new laws to reflect evolving understandings of individual rights, liberties and responsibilities. Even well-established legal concepts, such as libel—harm to another’s reputation—have evolved to reflect new realities of the role of communication in society and the power of mass media to harm individuals.

The laws of journalism and mass communication generally originate from six sources.  

**Constitutions**

**Statutes**

**Common Law**

**Equity Law**

**Administrative Law**

**Executive Orders**

**Constitutions**

Constitutional law establishes the nature, functions and limits of government. The U.S. Constitution, the fundamental law of the United States, was framed in 1787 and ratified in 1789. Each of the states also has a constitution. These constitutions define the structure of government and delegate and limit government power to protect certain fundamental human rights. “Constitutions are checks upon the hasty action of the majority,” said President William Howard Taft in 1911. “They are self-imposed restraints of a whole people upon a majority of them to secure sober action and a respect for the rights of the minority.”

Given the legacy of British religious oppression and the revolution against the Crown that formed this country, it should not be surprising that the U.S. Constitution protects individual liberties sometimes at the expense of much larger groups. The First Amendment, for example, generally protects an individual’s right to speak very offensively, while laws in other countries are far more likely to punish hate speech, name-calling, denial of the Holocaust, criticism of government officials, anti-religious speech and much more.

The U.S. Constitution establishes the character of government, organizes the federal government, and provides a minimum level of individual rights and privileges throughout the country. It creates three separate and coequal branches of government—the executive, the legislative and the judicial—and designates the functions and responsibilities of each. The executive branch oversees government and administers, or executes, laws. The legislative branch enacts laws, and the judicial branch interprets laws and resolves legal conflicts.

Separation of government into branches provides checks and balances within government to support the rule of law. For example, “restrictions derived from the separation of powers doctrine prevent the judicial branch from deciding political questions . . . that revolve
around policy choices and value determinations” because the Constitution gives the legislative and executive branches express authority to make political decisions.32

The **Supremacy Clause** of the Constitution establishes the Constitution as the supreme law of the land and resolves conflicts among laws by establishing that all state laws must give way to federal law, and state or federal laws that conflict with the Constitution are invalid. In a similar way, some federal laws preempt state laws, which in turn may preempt city statutes.

As the bedrock of the law, the Constitution is relatively difficult to change. There are two ways to amend the Constitution. The first and only method actually used is for both chambers of Congress to pass a proposed constitutional amendment by a two-thirds vote in each. The second method is for two-thirds of the state legislatures to vote for a Constitutional Convention, which then proposes one or more amendments. All amendments to the Constitution also must be ratified by three-fourths of the state legislatures. When Mississippi recently became the last state to ban slavery by ratifying the 13th Amendment to the Constitution, the vote was only symbolic. The needed three-fourths of states ratified the amendment in 1865.33

In many ways, state constitutions are distinct and independent from the U.S. Constitution they mirror. Under the principle of federalism, states are related to, yet independent of, the federal government and each other. Federalism encourages experimentation and variety in government. Each state has freedom to structure its unique form of government and to craft state constitutional protections that exceed the rights granted by the U.S. Constitution. For example, the U.S. Constitution says nothing about municipalities; states create and determine the authority of cities or towns. While the federal right to privacy exists only through the U.S. Supreme Court’s interpretation of the protections afforded by the First Amendment to the Constitution, Washington state’s constitution contains an explicit privacy clause that protects individuals from disturbances of their private affairs.34

Congress has approved only 33 of the thousands of proposed amendments to the U.S. Constitution, and the states have ratified only 27 of these. The first 10 amendments to the Constitution, which form the Bill of Rights, were ratified in 1791 after several states called for increased constitutional protection of individual liberties. In fewer than 500 words, the Bill of Rights expressly guarantees fundamental rights and limits government power. For example, the First Amendment (see Chapter 2) prevents government from abridging the people’s right to speak and worship freely. State constitutions are amended by a direct vote of the people.

**Statutes**

The U.S. Constitution explicitly delegates the power to enact statutory laws to the popularly elected legislative branch of government. City, county, state and federal legislative bodies enact statutory law. Like constitutions, statutes are written down; both types of law are called black-letter law.
It may seem strange, but U.S. courts do not have a certain and fixed method for dealing with international laws. Judges and academics have debated the topic for decades because the Constitution does not clearly establish how foreign laws should be applied in cases decided in the United States. Once a rather theoretical question, exploding global commerce and communications give this topic increased urgency and impact.

The Constitution delegates exclusive power over war and foreign relations to the Congress and the president. The Constitution’s Supremacy Clause establishes three sources of law: the Constitution itself, “laws made in pursuance” to the Constitution and “Treaties.” Because laws can be adopted only through action of the U.S. Senate or state legislatures, some argue that U.S. courts need not recognize the law of other nations. Others claim that the Constitution’s establishment of the courts implicitly conveys the responsibility to incorporate international law as enforceable common law when they generally and consistently rely upon it to guide decisions. Thus, if courts use international law, it binds. But what if some U.S. states do and others do not?

The resulting uncertainty can create inconsistency in the application of the law and undermine the rule of law.

Legislatures make laws to respond to—or predict and attempt to prevent—social problems. Statutory law may be very specific to define the legal limits of particular activities. All criminal laws are statutes, for example. Statutes also establish the rules of copyright, broadcasting, advertising and access to government meetings and information. Statutes are formally adopted through a public process and are meant to be clear and stable. They are written down in statute books and codified, which means they are compiled into topics by codes, and anyone can find and read them in public repository libraries.

Laws are not inflexible. Even the U.S. Constitution—the foundational contract between the U.S. government and the people—can be changed through amendment. Other laws—statutes, regulations and rules—may be repealed or amended by the federal, state and local bodies that adopted them, and they may be interpreted or invalidated by the courts. In its landmark 1803 ruling in *Marbury v. Madison* (excerpted at the end of this chapter), the Supreme Court established the courts’ power to interpret laws. The Court held that “[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule.”

When the language of a statute is unclear, imprecise or ambiguous, courts determine the law’s meaning and application through a process called statutory construction. Statutes may be difficult to interpret because they fail to define key terms. For example, if the word “meeting” is not defined in an open-meetings law, it is unclear whether the law applies to virtual meetings online. When a statute suggests more than one meaning, courts generally look to the law’s preamble, or statement of purpose, for guidance on how the legislature intended the law to apply. Courts may use legislative committee reports, debates and public statements to guide their statutory interpretation.

Courts tend to engage in strict construction, which narrowly defines laws to their literal meaning and clearly stated intent. The effort to interpret laws according to the “plain meaning” of the words—the facial meaning of the law—limits any tendency courts might have to
rewrite laws through creative or expansive interpretation. This deference to legislative intent reflects courts’ recognition that the power to write laws lies with the publicly elected legislature. The power of courts to engage in statutory construction is inherently nondemocratic because judges in many states are not elected.

FIGURE 1.1 ■ How a Bill Becomes a Law

1. Public opinion and/or legislative initiative
   - Member of either chamber introduces or re-introduces a bill
   - Committee considers the bill
   - Committee holds fact-finding hearings
   - The bill is rejected during current session and may be re-introduced next session
   - The bill is debated in either the House or the Senate
   - The bill is approved and sent to the other chamber of Congress
   - The bill is accepted by majority vote of both chambers
   - House and Senate versions of the bill are reconciled
   - The president signs the bill into law

2. Law is incorporated into U.S. Code
   - Law is published as a Statute at Large
   - Law directs action by a federal agency
   - Federal agency uses a similar process to adopt rule(s) to enact the statutory provisions

\textit{deference}  
The judicial practice of interpreting statutes and rules by relying heavily on the judgments and intentions of the administrative experts and legislative agencies that enacted the laws.
Courts may invalidate state statutes that conflict with federal laws, or city statutes that conflict with either state or federal law. However, courts try to interpret the plain meaning of a statute to avoid conflicts with other laws, including the Constitution. Courts review the constitutionality of a statute only as a last resort. When engaging in constitutional review, courts generally attempt to preserve any portions of the law that can be upheld without violating the general intent of the statute. For example, the U.S. Supreme Court struck down the Communications Decency Act without undermining the balance of the comprehensive Telecommunications Act of 1996 (see Chapter 9).

In what some call “one of the greatest legal events” in U.S. history, in Marbury v. Madison established the Court’s power of judicial review—that is, the power to strike down laws the Court finds to be in conflict with the Constitution. The Court said the constitutional system of checks and balances implicitly provided the judicial branch with authority to limit the power of the legislative branch and to bar it from enacting unconstitutional laws. The Court acknowledged that the Constitution gave the legislative branch the power to make laws, but Article III empowered the judicial branch to determine whether the actions of other branches of government were unconstitutional.

In Marbury, the Court gave itself the authority to limit the power of Congress to enact laws. As the final arbiters of law in the United States, the courts must ensure that actions of the legislative and executive branches conform to the U.S. Constitution, Marbury held. “Why courts should have this ultimate power . . . in a democratic order remains the largest and most difficult issue of constitutional law,” according to one scholar.

Judicial review allows all courts to examine government actions to determine their constitutionality. However, courts other than the U.S. Supreme Court rarely use this power. If
state supreme court determined that a statute was constitutional under its state constitution, the decision could be appealed to the U.S. Supreme Court, which could decide that the law did not meet the standards set by the U.S. Constitution.

Historically, the Supreme Court has used its power of judicial review sparingly and rarely struck down laws as unconstitutional. For more than half a century after *Marbury*, the Court did not use its power as chief interpreter of the Constitution. As a general rule, the Court will defer to the lawmaking authority of the executive and legislative branches of government by interpreting laws in ways that do not conflict with the Constitution. Nonetheless, it has invalidated numerous acts of Congress.

**Common Law**

The common law is judge-made law. Judges create the common law when they rely on legal custom, tradition and prior court decisions to guide their decisions in pending cases. Common law often arises in situations not covered expressly by statutes when judges base their ruling on precedent and legal doctrines established in similar cases. For example, under common law, judges may treat print publishers and online distributors of threatening communications differently (see Chapter 3).

The common law is not written down in one place. It consists of a vast body of legal principles created from hundreds of years of dispute resolution that reaches past the founding of this country back to England. For centuries prior to the settlement of the American colonies, English courts “discovered” the doctrines people had used throughout time to resolve disagreements. Judges then applied these “common” laws to guide court decisions. The resulting decisions, and the reasoning that supported them, was known as English common law. It became the foundation of U.S. common law.

Eventually, common law grew beyond the problem-solving principles of the common people. Today, U.S. common law rests on the presumption that prior court rulings, or precedent, should guide future courts. The essence of precedent, stare decisis, is that courts should follow each other’s guidance. Once a higher court has established a principle relevant to a certain set of facts, fairness requires lower courts to try to apply the same principle to similar facts. This establishes consistency and stability in the law.

Under the rule of stare decisis, the decision of a higher court, such as the U.S. Supreme Court, establishes a precedent that binds lower court rulings. A binding precedent of the U.S. Supreme Court constrains all lower federal courts throughout the country, and the decisions of

### REAL WORLD LAW

**PRECEDENT IS A CORNERSTONE OF THE RULE OF LAW**

In a 2018 dissenting opinion, Justice Elena Kagan wrote:

> The idea that today’s Court should stand by yesterday’s decisions is a foundation stone of the rule of law. It promotes the evenhanded, predictable and consistent development of legal doctrine. It fosters respect for and reliance on judicial decisions. And it contributes to the actual and perceived integrity of the judicial process by ensuring that decisions are founded in the law rather than in the proclivities of individuals."
The Law of Journalism and Mass Communication

each circuit court of appeals bind the district courts in that circuit. Similarly, lower state courts must follow the precedents of their own state appellate and supreme courts. However, courts from different and coequal jurisdictions do not establish binding precedent upon their peers. Courts in Rhode Island are not bound to follow precedents established in Wyoming, and federal district courts are not bound to apply precedents established by appellate courts in other federal circuits. In fact, different federal appellate courts sometimes hand down directly conflicting decisions. To avoid such conflicts, however, courts often look to each other’s decisions for guidance.

Applying precedent is not clear cut. After all, the common law must be discovered through research in the thousands of court decisions collected into centuries of volumes, called court reporters. Sometimes, multiple lines of precedent seem to converge and suggest different outcomes. To avoid such conflicts, however, courts often look to each other’s decisions for guidance.

Applying precedent is not clear cut. After all, the common law must be discovered through research in the thousands of court decisions collected into centuries of volumes, called court reporters. Sometimes, multiple lines of precedent seem to converge and suggest different outcomes. Then a court must choose.

Even when stare decisis is clear and its power most direct, lower courts may decide not to adhere to precedent. At the risk of the judges’ credibility, courts may simply ignore precedent. Courts also may depart from precedent with good reason. Courts examining a new but similar question may decide to modify precedent—that is, to alter the precedent to respond to changed realities. Thus, the U.S. Supreme Court might find that contemporary attitudes and practices no longer support a 20-year-old precedent permitting government to maintain the secrecy of computer compilations of public records.

Courts also may distinguish from precedent by asserting that factual differences between the current case and the precedent case outweigh similarities. For example, the Supreme Court 40-plus years ago distinguished between newspapers and broadcasters in terms of any right of public access. The Court said the public has a right to demand that broadcasters provide diverse content on issues of public importance because broadcasters use the public airwaves. The Court did not apply that reasoning when it later considered virtually the same question as applied to newspapers. Newspapers, the Court said, are independent members of the press with a protected right to control their content. The Supreme Court similarly has said “common-sense distinctions” differentiate advertising, which the courts call commercial speech, from other varieties of speech.

Finally, courts very occasionally will overturn precedent outright and reject the fundamental premise of an earlier decision. This is a radical step and generally occurs only to remedy past errors or to reflect a fundamental rethinking of the law. In the Supreme Court’s recent decision in Janus, the Court overruled a 30-year-old Court precedent that had required public employees to pay their “fair share” of union dues even if the employees chose not to join the union. The Court said Abood had been poorly reasoned, produced inconsistent outcomes and violated nonmembers’ right to be free from government-compelled subsidies of private speech on matters of public concern.

Equity Law

Equity law is a second form of law made by judges when they apply general principles of ethics and fairness to determine the proper remedy for a legal harm. When a court orders someone to stop using your trademark in addition to paying fines that cover the costs of actual damages caused, the order recognizes that continued use might force you out of business or associate
you with products of lesser quality. Such a ruling represents the application of equity law to achieve a just result.

Equity law is intended to provide fair remedies for various harms that are not addressed in other forms of law or because fairness will not be achieved fully or at all through the rigid application of strict rules. No specific, black-letter laws dictate equity. Rather, judges use their conscience and discretion to decide what is fair and issue decrees to ensure that justice is achieved. Thus, restraining orders that require paparazzi to stay a certain distance away from celebrities are a form of equity law. An injunction in 1971 that temporarily prevented The New York Times and The Washington Post from publishing stories based on the Pentagon Papers was another form of equity relief. While the law of equity is related to common law, the rules of equity law are more flexible and are not governed by precedent.

**Administrative Law**

Constitutions and legislatures delegate authority to executives and to specialized executive branch agencies to make the decisions and create the rules that form administrative law. Administrative agencies, such as the Federal Election Commission or the Federal Trade Commission, create the rules, regulations, orders and decisions that execute, or carry out, laws enacted by Congress.

Administrative law may represent the largest proportion of contemporary law in the United States. An alphabet soup of state and federal administrative agencies—such as the Federal Communications Commission, which oversees interstate electronic communication—provides both legislative and judicial functions. These agencies adopt orders, rules and regulations with the force of law to implement the laws enacted by Congress and signed by the president.

The authority, or even the existence, of administrative agencies can change. Legislatures may adopt or amend laws to revise the responsibilities of administrative agencies. Thus, when Congress adopted the Telecommunications Act of 1996, it substantially revised the responsibilities of the FCC, originally authorized by the Communications Act of 1934.

Administrative agencies enforce the administrative rules they adopt. They conduct hearings in which they interpret their rules, grant relief, resolve disputes and levy fines or penalties. Courts generally have the power to hear appeals to the decisions of administrative agencies after agency appeal procedures are exhausted. Then courts engage in regulatory construction and judicial review. Courts generally defer to the judgment of expert administrative agencies and void agency rules and actions only when the agency clearly has exceeded its authority, violated its rules and procedures, or provided no evidence to support its ruling.

In 2015, however, the U.S. Supreme Court refused to defer to administrative interpretations of the meaning of the Affordable Care Act’s precise terms. The Court said the “task to determine the correct reading” of the law fell to the Court itself when, as in this case, Congress did not intend to delegate the authority to “fill in the statutory gaps” to the administrative agency. Carefully parsing the meaning of the key phrases in the contested section of the law and “bearing in mind . . . that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme,” the Court affirmed the ruling of the Fourth Circuit Court of Appeals and found the law constitutional.
Many saw the Court’s reasoning in *King v. Burwell*, the Affordable Care Act case, as signaling a movement away from deference to administrative agency judgments. Some said the Court’s shift reinforced the rule of law by counterbalancing any tendency for the new administrative agency leaders appointed by each incoming president to alter the interpretation of administrative laws.\(^5\)

### Executive Orders

Government executives, such as the president, may issue **executive orders** to create another source of law. Both President Barack Obama and President Donald Trump have used executive orders to achieve policy objectives when Congress failed to act. Their executive orders prompted frequent outcry from political opponents and protests that each was circumventing the express authority of Congress, in violation of the rule of law.

<table>
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<tr>
<th>Executive Orders of Recent U.S. Presidents</th>
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<td><strong>Time Period</strong></td>
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<td>William J. Clinton</td>
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<td>George W. Bush</td>
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<td>Term II</td>
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<td>Donald J. Trump (2017–part 2018)</td>
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<td>Combined Annual AVERAGE</td>
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The president, governors and mayors do not have unlimited power to issue executive orders. The Supreme Court long has held that executive orders must fall within the inherent powers of the executive to have the force of law.\(^5\) The Court has said executive orders must arise from the president’s explicit power under Article II, Section 2 of the Constitution, his role as commander in chief, or his responsibility to ensure that laws are properly executed. If the delegation of power to the executive is not clear, the authority to issue executive orders falls into what Justice
Robert H. Jackson once called a “zone of twilight” ambiguity. However, the limits to the power to issue executive orders are largely informal and primarily a matter of self-restraint and tradition.

Early in 2019, for example, the American Civil Liberties Union and 16 states filed separate lawsuits in federal court in California challenging President Trump’s executive order declaring a national emergency to build a wall along the southern border. The ACLU argued that the executive order unconstitutionally usurped the authority of Congress to control spending. In announcing the executive order, President Trump predicted the lawsuits and said, “We’ll win in the Supreme Court.”

Some executive orders are routine. For example, each president of the United States issues orders that determine what types of records will be open and which classified as secret, how long they will remain secret and who has access to them. Changes in these rules not only affect the operations of the executive agencies that create the documents; they also affect the ability of citizens to oversee and review the actions of their government (see Chapter 7).

STRUCTURE OF THE JUDICIAL SYSTEM

A basic understanding of the structure of the court system in the United States is fundamental to an appreciation of the functioning of the law. Trial courts, or federal district courts, do fact-finding, apply the law and settle disputes. Courts of appeal, including federal circuit courts and supreme courts in each system, review how lower courts applied the law. Through their judgments, courts can hand down equitable remedies, reshape laws or even throw out laws as unconstitutional.

Court Jurisdiction

An independent court system operates in each state, the District of Columbia and the federal government. The military and the U.S. territories, such as Puerto Rico, also have court systems.

Each of these court systems operates under the authority of the relevant constitution. For example, the U.S. Constitution requires the establishment of the Supreme Court of the United States and authorizes Congress to establish other courts it deems necessary to the proper functioning of the federal judiciary. Jurisdiction refers to a court’s authority to hear a case. Every court has its own jurisdiction—that is, its own geographic or topical area of responsibility and authority.

In 2017, the U.S. Supreme Court reiterated its recognition of two types of court jurisdiction: general and specific. Typically, the site or location of general jurisdiction is an individual’s home or a corporation’s headquarters. Given general jurisdiction, a court may hear any claim against that defendant. To be heard in a forum of specific jurisdiction, a suit must relate to the defendant’s contacts with that forum. In libel, for example, the standard has been that any court in any locale where the alleged libel could be seen or heard would have jurisdiction. A court may dismiss a lawsuit outside of its jurisdiction.

New technologies present new challenges to the determination of jurisdiction. Consider online libel. Given that statements published online are potentially seen anywhere, any court might claim jurisdiction (see Chapter 5). Then the plaintiff might initiate the lawsuit in any court and would likely file the suit in the court expected to render a favorable decision.
In a broad ruling that could limit forum shopping, the practice of seeking the most favorable court to hear your case, the U.S. Supreme Court held that unless there is a substantial link between the forum of the court and the source of injury, a company may only be sued “at home.” Following a detailed discussion of jurisdiction, the Court unanimously held that a national newspaper’s “home” is in one of only two places: where the company is incorporated or the main location of its business.

As access to the internet becomes accepted as an essential public utility, nations struggle individually and collectively to determine who has legal jurisdiction over international online disputes. The U.S. Supreme Court test to establish specific jurisdiction often applies to such online disputes and requires courts to find that (1) the defendant intentionally acted inside the jurisdiction of the court, (2) the plaintiff’s claim arose from that activity, and (3) it is reasonable for the court to exercise jurisdiction.

The U.S. Constitution spells out the areas of jurisdiction of the federal courts. Within their geographic regions, federal courts exercise authority over cases that relate to interstate or international controversies or that interpret and apply federal laws, treaties or the U.S. Constitution. Thus, federal courts hear cases involving copyright laws. The federal courts also decide cases in which the federal government is a party, such as when the states bring suit against presidential directives extending protections for undocumented immigrants. Cases involving controversies between states, between citizens of different states or between a state and a citizen of another state also are heard in federal courts. Thus, a libel suit brought by a resident of Pennsylvania against a newspaper in California would be heard in federal court.

**Trial Courts**

The state, federal and specialized court systems in the United States are organized similarly; most court systems have three tiers. At the lowest level, trial courts are the courts where nearly all cases begin. Each state contains at least one of the nation’s 94 trial-level federal courts, which are called district courts. Trial courts reach decisions by finding facts and applying existing law to them. They are the only courts to use juries. They do not establish precedents. Some judges view the routine media coverage of legal actions taking place in trial courts as a threat to the fairness of trials (see Chapter 8). Some judges also fear that media coverage will cast their court in disrepute and reduce public trust in the judicial system.

**Courts of Appeal**

Anyone who loses a case at trial may appeal the decision. However, courts of appeal generally do not make findings of fact or receive new evidence in the case. Only in rare cases do courts of appeal review case facts de novo, a phrase meaning “new” or “over again.” Instead,
FIGURE 1.2 • Comparing the Federal and State Court Systems

The Federal Court System
- Supreme Court of the United States
- U.S. Circuit Courts of Appeals (13)
- U.S. District Courts (94)

The State Court System
- State Supreme Court hears appeals from court of appeals
- Court of Appeals hears appeals from lower courts
- Superior Court hears serious cases; most trials held here
- Special Court divorce, juvenile, family, housing cases heard
- County, municipal, traffic, magistrate, etc. minor cases, arraignments

Appellate courts review the legal process of the lower court. Courts of appeal examine the procedures and tests used by the lower court to determine whether due process was carried out—that is, whether the proper law was applied and whether the judicial process was fair and appropriate.

Decisions in appellate courts are based primarily on detailed written arguments, or briefs, and on short oral arguments from the attorneys representing each side of the case. Individuals and organizations that are not parties to the case, called amicus curiae (“friends of the court”), may receive court permission to submit a brief called an amicus brief.

Most court systems have two levels of appellate courts: the intermediate courts of appeal and the supreme court. In the federal court system, there are 13 intermediate-level appellate courts, called circuit courts. A panel of three judges hears all except the most important cases in the federal circuit courts of appeal. Only rarely do all the judges of the circuit court sit en banc to hear an appeal. En banc literally means “on the bench” but is used to mean “in full court.” Twelve of the federal circuits represent geographic regions. For example, the U.S. Court of Appeals for the Ninth Circuit bears responsibility for the entire West Coast, Hawaii and Alaska, and the U.S. Court of Appeals for the D.C. Circuit covers the District of Columbia. The 13th circuit, the U.S. Court of Appeals for the Federal Circuit, handles specialized appeals. In addition, separate, specialized federal courts handle cases dealing with the armed forces, international trade or veterans’ claims, among other things.

due process
Fair legal proceedings. Due process is guaranteed by the Fifth and 14th Amendments to the U.S. Constitution.

amicus brief
A submission to the court from amicus curiae, or “friends of the court,” which are interested individuals or organizations that are parties in the case.

en banc
Literally, “on the bench” but now meaning “in full court.” The judges of a circuit court of appeals will sit en banc to decide important or controversial cases.
Courts of appeal may **affirm** the decision of the lower court with a majority opinion, which means they ratify or uphold the prior ruling and leave it intact. They also may **overrule** the lower court, reversing the previous decision. Any single judge or minority of the court may write a **concurring opinion** agreeing with the result reached by the court opinion but presenting different reasoning, legal principles or issues. Judges who disagree with the opinion of the court may write a **dissenting opinion**, critiquing the majority’s reasoning or judgment and providing the basis for the divergent conclusion.

<table>
<thead>
<tr>
<th>Structure</th>
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<tbody>
<tr>
<td>Article III of the Constitution invests the judicial power of the United States in the federal court system. Article III, Section 1 creates the U.S. Supreme Court and gives Congress authority to create lower federal courts.</td>
</tr>
<tr>
<td>Congress has established 13 U.S. Courts of Appeals, 94 U.S. District Courts, the U.S. Court of Claims, and the U.S. Court of International Trade. U.S. Bankruptcy Courts handle bankruptcy cases. Magistrate Judges handle some District Court matters.</td>
</tr>
<tr>
<td>Parties may appeal a decision of a U.S. District Court, the U.S. Court of Claims, and/or the U.S. Court of Appeals.</td>
</tr>
<tr>
<td>A party may ask the U.S. Supreme Court to review a decision of the U.S. Court of Appeals, but the Supreme Court usually is under no obligation to do so.</td>
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<table>
<thead>
<tr>
<th>Selection of Judges</th>
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</thead>
<tbody>
<tr>
<td>The Constitution states that federal judges are to be nominated by the President and confirmed by the Senate. They hold office during good behavior, typically, for life. Congressional impeachment proceedings may remove federal judges for misbehavior.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Types of Cases Heard</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases that deal with the constitutionality of a law;</td>
</tr>
<tr>
<td>Cases involving the laws and treaties of the U.S.;</td>
</tr>
<tr>
<td>Legal issues related to ambassadors and public ministers;</td>
</tr>
<tr>
<td>Disputes between two or more states;</td>
</tr>
<tr>
<td>Admiralty law;</td>
</tr>
<tr>
<td>Bankruptcy; and</td>
</tr>
<tr>
<td>Habeas corpus issues.</td>
</tr>
</tbody>
</table>
### The Federal Court System (Continued)

**Article I Courts**

Congress created several Article I, or legislative courts, that do not have full judicial power. Article I courts are:

- U.S. Court of Appeals for Veterans Claims
- U.S. Court of Appeals for the Armed Forces
- U.S. Tax Court

### The State Court System

**Structure**

- The Constitution and laws of each state establish the state courts. Most states have a Supreme Court, an intermediate Court of Appeals, and state trial courts, sometimes referred to as Circuit or District Courts.
- States usually have courts that handle specific legal matters, e.g., probate court (wills and estates); juvenile court; family court; etc.
- Parties dissatisfied with the decision of the trial court may take their case to the intermediate Court of Appeals.
- Parties have the option to ask the highest state court to hear the case.
- Only certain cases are eligible for review by the U.S. Supreme Court.

**Selection of Judges**

State court judges are selected in a variety of ways, including:

- election,
- appointment for a given number of years,
- appointment for life, and
- combinations of these methods, e.g., appointment followed by election.

**Types of Cases Heard**

- Most criminal cases, probate (involving wills and estates)
- Most contract cases, tort cases (personal injuries), family law (marriages, divorces, adoptions), etc.

State courts are the final arbiters of state laws and constitutions. Their interpretation of federal law or the U.S. Constitution may be appealed to the U.S. Supreme Court.

**Article I Courts**

N/A

Majority decisions issued by courts of appeal establish precedent for lower courts within their jurisdiction. Their rulings also may be persuasive outside their jurisdiction. If only a plurality of the judges hearing a case supports the opinion of the lower court, the decision does not establish binding precedent. Similarly, dissenting and concurring opinions do not have the force of law, but they often influence subsequent court reasoning.
Courts of appeal also remand, or send back, decisions to the lower court to establish a more detailed record of facts or to reconsider the case. A decision to remand a case may not be appealed. Courts of appeal often remand cases when they believe that the lower court did not fully explore issues in the case and needs to develop a more complete record of evidence as the basis for its decision.

A circuit court of appeals decision must be signed by at least two of the three sitting judges and is final. The losing party may ask the court to reconsider the case or may request a rehearing en banc. Such requests are rarely granted. Losing parties also may appeal the verdict of any intermediate court of appeals to the highest court in the state or to the U.S. Supreme Court.

The U.S. Supreme Court

Established in 1789, the Supreme Court of the United States functions primarily as an appellate court, although the Constitution establishes the Court’s original jurisdiction in a few specific areas. In general, Congress has granted lower federal courts jurisdiction in these same areas, so almost no suits begin in the U.S. Supreme Court. Instead, the Court hears cases on appeal from all other federal courts, federal regulatory agencies and state supreme courts.

Cases come before the Court either on direct appeal from the lower court or through the Court’s grant of a writ of certiorari. Certain federal laws, such as the Bipartisan Campaign Reform Act, guarantee a direct right of appeal to the U.S. Supreme Court. More often, the Court grants a writ of certiorari for compelling reasons, such as when a case poses a novel or pressing legal question. The Court often grants certiorari to cases in which different U.S. circuit courts of appeal have issued conflicting opinions. The Court may consider whether an issue is ripe for consideration, meaning that the case presents a real and present controversy rather than a hypothetical concern. In addition, the Court may reject some petitions as moot because the controversy is no longer “live.” Mootness may be an issue, for example, when a student who has challenged school policy graduates before the case is resolved. The Court sometimes accepts cases that appear to be moot if it believes the problem is likely to arise again.

The Court’s Makeup. The chief justice of the United States and eight associate justices make up the Supreme Court. The president nominates and the Senate confirms the chief justice as well as the other eight members of the Court, who sit “during good behavior” for life or until retirement. This gives the president considerable influence over the Court’s political ideology.
## TABLE 1.2  ■ The U.S. Supreme Court at a Glance, 2019

<table>
<thead>
<tr>
<th>Justice</th>
<th>Born</th>
<th>Nominating President</th>
<th>Year Appointed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chief Justice</td>
<td>1955</td>
<td>George W. Bush</td>
<td>2005</td>
</tr>
<tr>
<td>John G. Roberts Jr.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Associate Justice</td>
<td>1948</td>
<td>George H. W. Bush</td>
<td>1991</td>
</tr>
<tr>
<td>Clarence Thomas</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Associate Justice</td>
<td>1938</td>
<td>Bill Clinton</td>
<td>1994</td>
</tr>
<tr>
<td>Stephen G. Breyer</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Associate Justice</td>
<td>1954</td>
<td>Barack Obama</td>
<td>2009</td>
</tr>
<tr>
<td>Sonia Sotomayor</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Associate Justice</td>
<td>1967</td>
<td>Donald Trump</td>
<td>2017</td>
</tr>
<tr>
<td>Neil M. Gorsuch</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Associate Justice</td>
<td>1933</td>
<td>Bill Clinton</td>
<td>1993</td>
</tr>
<tr>
<td>Ruth Bader Ginsburg</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Associate Justice</td>
<td>1950</td>
<td>George W. Bush</td>
<td>2006</td>
</tr>
<tr>
<td>Samuel A. Alito Jr.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Associate Justice</td>
<td>1960</td>
<td>Barack Obama</td>
<td>2010</td>
</tr>
<tr>
<td>Elena Kagan</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Associate Justice</td>
<td>1965</td>
<td>Donald Trump</td>
<td>2018</td>
</tr>
<tr>
<td>Brett M. Kavanaugh</td>
<td></td>
<td></td>
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</tbody>
</table>

*Photos source:* SupremeCourt.gov.
After the Senate failed to give President Obama’s Supreme Court nominee a confirmation vote, President Trump took office and conservative Neil Gorsuch took the vacant seat in 2017. Combined with Justice Anthony Kennedy’s retirement and the 2018 confirmation of Brett Kavanaugh, this shifted the Court toward the conservative end and made Chief Justice John Roberts the swing vote. Most observers argue this will change the direction of American jurisprudence for decades.

In 2019, Justice Sonia Sotomayor was the only true liberal among the sitting justices. She is the first Hispanic/Latina justice and one of the Court’s most public facing members. Liberal justices tend to believe that government should play an active role in ensuring individual liberties. They also tend to support regulation of large businesses and corporations and to reduce emphasis on property rights. Justice Sotomayor’s former experience as a prosecutor and trial judge often leads her to challenge lawyers on the facts of a case.

As the most senior justice on the court’s left wing, Justice Ruth Bader Ginsburg is often in charge of assigning dissents in highly controversial cases. Once at the center of the Court’s ideological spectrum, she now is the last civil rights lawyer on the Court.

Justices Elena Kagan and Stephen Breyer are seen as “center-left pragmatists.” Justice Kagan is the first justice in decades who did not serve previously as a judge. Her early terms on the Court displayed a willingness to inject a “critical voice that could make the case for liberals within the court and beyond” and an ability to draft unanimous decisions. Justice Breyer

![Changing Ideologies of the Supreme Court](source: Adapted from data collected by The Judicial Common Space.)
INTERNATIONAL LAW
JUDICIAL SELECTION PROCESSES NEED TO SUPPORT RULE OF LAW

The World Justice Project’s Rule of Law Index identified problematic trends in the judicial selection process in the United States over the last few years. Noting that judicial selection is an essential bulwark of the rule of law, particularly as related to judicial independence and accountability, the report highlighted significant differences in the U.S. process and that of most Western democratic nations.

While the United States allows almost anyone to become a judge, other countries require judges to meet certain standards for age, legal education and legal experience. In addition, most countries allow executives to appoint judges only from a list created by an independent body, which is not the case in the United States. This raises questions of judicial independence. Finally, very few countries allow public election of judges, while most states elect at least some judges. Elections make judges more accountable but also affect judicial outcomes, according to studies.

“Independence versus accountability is that tension that just runs throughout the judicial process. . . . But obviously the more independent you make the judges then in a certain sense the less accountable they can be.”

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“Independence versus accountability is that tension that just runs throughout the judicial process. . . . But obviously the more independent you make the judges then in a certain sense the less accountable they can be.”
Columbia Law School. While 24 percent of the U.S. population is Roman Catholic, four members of the Court (45 percent), including the chief justice, profess to this faith. Another third of the Court’s current justices are Jewish, which is more than 20 times the percentage of Jews in the U.S. population. No Supreme Court justice has self-identified as other than heterosexual and cisgender.

Granting Review. Petitioners may ask the Supreme Court for a writ of certiorari if the court of appeals or the highest state court denies them a hearing or issues a verdict against them. Writs are granted at the discretion of the Court. All seated justices consider a writ, which is granted only if at least four justices vote to hear the case. This is called the rule of four.

Neither the decision to grant nor the decision to deny a writ of certiorari indicates anything about the Court’s opinion regarding the merits of the lower court’s ruling. Denial of certiorari generally means that the justices do not think the issue is sufficiently important or timely to decide. In recent years, an average of 8,200 petitions have been filed with the Court, which grants fewer than 1 percent of them. Approximately one-fourth of the petitions filed are accompanied by the required fee of $150. The vast majority of petitions are filed without the fee—often by prisoners who cannot pay the required filing fee.

Reaching Decisions. Once the Court agrees to hear a case, the parties file written briefs outlining the facts and legal issues in the case and summarizing their legal arguments. The justices review the briefs prior to oral argument in the case, which generally lasts one hour. The justices may sit silently during oral argument, or they may pepper the attorneys with questions.
Following oral argument, the justices meet in a private, closed conference to take an initial vote on the outcome. Discussion begins with the chief justice and proceeds around the table in order of descending seniority of the associate justices. Then voting proceeds from the most junior member of the Court and ends with the chief justice. The chief justice or the most senior justice in the majority determines who will draft the majority opinion.

A majority of the justices must agree on a point of law for the Court to establish binding precedent. Draft opinions are circulated among the justices, and negotiations may attempt to shift votes. It may take months for the Court to achieve a final decision, which is then announced on decision day.

Two other options exist for the Supreme Court. It may issue a per curiam opinion, which is an unsigned opinion by the Court as a whole. Although a single justice may draft the opinion, that authorship is not made public. Per curiam opinions often do not include the same thorough discussion of the issues found in signed opinions. The Supreme Court also may resolve a case by issuing a memorandum order. A memorandum order simply announces the vote of the Court without providing an opinion. This quick and easy method to dispense with a case has become more common with the Court’s growing tendency to issue fewer signed opinions.

The ideological leanings of the individual justices, and of the Court as a whole, come into play in the choice of cases granted review and the ultimate decisions of the Court. The U.S. Supreme Court relies on a wide range of sources to guide its interpretation of the Constitution. Originalists and textualists seek the meaning of the Constitution primarily in its explicit text, the historical context in which the document developed and the recorded history of its deliberation and original meaning. Some justices look beyond the text to discover how best to apply the Constitution today. Their interpretation relies more expressly on deep-seated personal and societal values, ethical and legal concepts and the evolving interests of a shifting society. The Court’s reasoning at times also builds on international standards, treaties or conventions, such as the Universal Declaration of Human Rights, or the decisions of courts outside the United States as well as state and other federal courts. On occasion, such as when the Court discovered a right to privacy embedded in the First Amendment, the justices refer to the views and insights of legal scholars.

**PROCESSES OF THE LAW**

Although each court or case follows a somewhat idiosyncratic path, similar patterns of judicial process emerge. In a criminal matter, the case starts when a government agency investigates a
possible crime. After gathering evidence, the government arrests someone for a crime, such as distributing false and misleading advertising through the internet. The standard of evidence needed for an arrest or to issue a search warrant is known as **probable cause**, which is more than mere suspicion.

The case then goes before a **grand jury** or a judge. Unlike trial juries (also called petit juries), grand juries do not determine guilt. Grand juries hear the state's evidence and determine whether that evidence establishes probable cause to believe that a crime has been committed. A grand jury may be convened on the county, state, or federal level. If the case proceeds without a grand jury, the judge makes a probable cause determination at a preliminary hearing. If the state fails to establish probable cause, the case may not proceed. If probable cause is found, the person is indicted.

**FIGURE 1.5** ■ The Process of an Appeal

- **Civil judgment**
  - Notice of appeal filed
  - Written briefs and trial court record filed with court of appeals
  - Oral argument held or waived
  - Decision rendered by court of appeals (judgment affirmed, reversed, remanded, appeal dismissed)
  - Request for review filed with Supreme Court
    - Review denied by Supreme Court
    - Review granted by Supreme Court
      - Written briefs and trial court record filed with court of appeals
      - Oral argument held or waived
      - Appeal dismissed
      - Decision rendered by the Supreme Court (judgment affirmed, reversed, remanded)

- **Criminal conviction**
  - Notice of appeal filed
  - Written briefs and trial court record filed with court of appeals
  - Oral argument held or waived
  - Decision rendered by court of appeals (judgment affirmed, reversed, remanded, appeal dismissed)

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**probable cause**
The standard of evidence needed for an arrest or to issue a search warrant. More than mere suspicion, it is a showing through reasonably trustworthy information that a crime has been or is being committed.

**grand jury**
A group summoned to hear the state's evidence in criminal cases and decide whether a crime was committed and whether charges should be filed; grand juries do not determine guilt.
Then the case moves to a court arraignment, where the defendant is formally charged and pleads guilty or not guilty. A plea bargain may be arranged in which the defendant pleads guilty to reduced charges or an agreed-upon sentence. Plea bargains account for almost 95 percent of all felony convictions in the United States. If a not-guilty plea is entered, the case usually proceeds to trial. The judge may set bail.

Proof beyond a reasonable doubt is required to establish guilt in a criminal trial. A guilty verdict prompts a sentencing hearing. A criminal sentence may include jail or prison time and a fine or fines.

Civil Suits

Civil cases generally involve two private individuals or organizations asking the courts to settle a conflict. The person who files a civil complaint or sues is the plaintiff. The person responding to the suit is the defendant. The civil injury one person or organization inflicts on another is called a tort. Tort law provides the means for the injured party to establish fault and receive compensation.

Many communication lawsuits are civil suits in which the plaintiff must prove his or her case by the preponderance of evidence. This standard of proof is lower than in criminal cases.

Civil suits begin when the plaintiff files a pleading with the clerk of court. To receive a damage award, a plaintiff generally must show that the harm occurred, that the defendant caused the harm and that the defendant was at fault, meaning the defendant acted either negligently or with malicious intent. Under a strict liability standard, the plaintiff does not need to demonstrate fault on the part of the defendant in order to win the suit. Strict liability applies in cases involving inherently dangerous products or activities. Under strict liability, the individual who produced the product or took the action is liable for all resulting harms.

At a court hearing, the defendant may answer the complaint by filing a countersuit, by denying the charge, by filing a motion to dismiss or by filing a motion for summary judgment (see next page). A motion to dismiss, or demurrer, asks a court to reject a complaint because it is legally insufficient. For example, a defendant may admit that it distributed
a story but argue that the story did not cause any legally actionable harm to the plaintiff. If the court grants the motion to dismiss, the plaintiff may appeal.

Before a case goes to trial, the disputing parties may agree to an out-of-court settlement. When this occurs, there is no public record of the outcome of the case. Out-of-court resolutions often prohibit the parties from discussing the terms of the settlement. In the 2019 settlement of the lawsuit former San Francisco 49ers quarterback Colin Kaepernick brought against the NFL, for example, a confidentiality agreement prevented the disclosure of any settlement details.76

Sometimes a judge will settle a civil case through a court conference. Civil suits are settled by the parties before trial almost 97 percent of the time.77

If the two sides do not settle, they begin to gather evidence through a process called discovery. In trying to build a case, one or both parties may issue a subpoena, which is a legal command for someone, sometimes a media professional, to appear and testify in court or turn over evidence, such as outtakes or notes. Citizens are legally obligated to comply with subpoenas, and the judge may punish noncompliance with a contempt of court citation, fines or jail.

If the parties do not reach a settlement, the case may proceed to a jury trial, which is required if either party requests it. To form a jury, the court summons individuals from a local pool, called the venire, that is usually based on voters’ rolls. The locality where the court hears the suit is called the venue. The lawyers and judge select jurors through a process of questioning called voir dire, which literally means “to speak the truth.”

While the theoretical goal is to seat an impartial jury for the trial, attorneys on both sides hope to gain advantage through the juror selection process. Attorneys may challenge potential jurors “for cause,” such as when a prospective juror knows a party in the suit. They also may eliminate a limited number of potential jurors through peremptory challenges, in which they need not show a reason for the rejection. Expert consulting on jury selection, witness preparation, media interactions and the like help attorneys shape the jury and public messaging about the trial.

After evidence is presented at trial, the judge instructs the jury on how to apply the law to the case. Then the jury deliberates. If the jury cannot reach a verdict, the judge may order a new trial with a new jury. When a jury reaches a verdict, the judge generally enters it as the judgment of the court. However, the judge may overturn the verdict if it is contrary to the law. A successful plaintiff usually will be awarded damages.

Either party may appeal the judgment of the court. For example, if a party believes the jury was not properly instructed on the law, he or she may appeal on the basis of violation of due process. It can take years and cost hundreds of thousands of dollars to appeal a case. The person who challenges the decision of the court is called the petitioner or

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**discovery**
The pretrial process of gathering evidence and facts. The word also may refer to the specific items of evidence that are uncovered.

**subpoena**
A command for someone to appear or testify in court or to turn over evidence, such as notes or recordings, with penalties for noncompliance.

**venire**
Literally, “to come” or “to appear”; the term used for the location from which a court draws its pool of potential jurors, who must then appear in court for voir dire; a change of venire means a change of the location from which potential jurors are drawn.
The respondent to the appeal, or the appellee, wants the verdict to be affirmed.

Summary Judgment

When parties ask a court to dismiss a case, they file a motion for summary judgment asking the judge to decide the case on the basis of pretrial submissions when neither party disputes the underlying facts. A summary judgment results in a legal determination by a court without a full trial and avoids the cost of trial and the risk of loss to the moving party.

A court’s summary judgment may be issued based on the merits of the case as a whole or on specific issues critical to the case. In a libel case, this may occur when a plaintiff is clearly unable to meet one or more elements of the burden of proof, such as the falsity of the published material (see Chapter 4). If the judge determines evidence supports an uncontested conclusion that one party should win the case, the judge hands down a summary judgment in that party’s favor.

Summary judgment may be granted at several points in litigation, but usually prior to trial. The U.S. Supreme Court has said that courts considering motions for summary judgment “must view the facts and inferences to be drawn from them in the light most favorable to the opposing party.” In libel cases, this means that courts must take into account the burden the plaintiff is required to meet at trial. The Court created this obstacle to summary judgment because the nonmoving party loses the opportunity to present his or her case when a judge grants summary judgment to the opposing side.

In 2018, a California court of appeals affirmed summary judgment in favor of Simpson University, a religious institution that had been sued for libel and invasion of privacy when it terminated the employment of a former dean. The court’s judgment turned on specifics of the religious employment of the dean. Media defendants sometimes seek summary judgments to protect themselves from the high costs of frivolous lawsuits intended to harass, intimidate or affect content.

For decades, courts would dismiss a case only if “no set of facts” could support the plaintiff’s claim. But the U.S. Supreme Court changed this standard when it decided two cases, Bell Atlantic v. Twombly in 2007 and Ashcroft v. Iqbal in 2009. What is known as the Twombly/Iqbal test says a court will dismiss a case if the plaintiff cannot state a plausible claim. That requires a court to determine “exactly where plausibility falls in that gray area between possible and probable.” It is more difficult for plaintiffs to present plausible facts to support their claim than it is simply to show that no set of facts could prove the claim, which means that courts applying the Twombly/Iqbal test dismiss a case more readily. Courts continue to disagree what “plausible” means in this context.
EMERGING LAW

Early in 2019, Republican senators reintroduced a bill to reduce the number of executive agency regulations by requiring major administrative rules to be approved by both chambers of Congress.87 If enacted, the proposed law would allow Congress to bundle rules for a single up or down vote. If either chamber failed to act, the rule would die.88 No concurrent companion bill was introduced in the House, but an earlier version passed that chamber.89

For two decades, the Congressional Review Act has supported deference to executive agency rules by giving them legal force if not disapproved by Congress within 60 days.90 The 2019 bill and its precursor were intended to hamper overreaching by administrative agencies and to reduce proliferating rules that harm the economy, according to their sponsors.91 Opponents argue that the law would violate the separation of powers by usurping the independent authority of executive branch agencies to implement laws duly enacted by Congress.92 Critics say the law would also replace judicial review with congressional oversight of administrative rules.

Observers believe efforts in Congress and state legislatures to define or circumscribe the powers of the three branches of government will increase in response to growing public distrust of government and fear that the Constitution’s system of checks and balances is not functioning.93

FINDING THE LAW

This textbook provides an introduction and overview to key areas of the law of journalism and mass communication. Many students will wish, or their professors will require them, to supplement this text with research in primary legal sources. Primary sources are the actual documents that make up the law (e.g., statutes, case decisions, administrative rules and committee reports). Legal research often begins in secondary sources that analyze, interpret and discuss the primary documents. Perhaps the most useful secondary sources for beginning researchers in communication law are “American Jurisprudence 2d,” “Corpus Juris Secundum” and “Media Law Reporter.” The first two are legal encyclopedias that summarize legal subjects and reference relevant cases and legal articles. “Media Law Reporter” provides both topical summaries and excerpts of key media law cases organized by subject. However, “Media Law Reporter” is not comprehensive. It contains only the cases selected by the editors to highlight prominent issues in media law. Law review articles provide invaluable scholarship and references to contemporary legal topics. However, primary source research in administrative, legislative and court documents is necessary to thoroughly research a legal topic.

This text cannot provide a detailed explanation of how to navigate these complex and diverse legal materials. However, access to primary legal materials is available online and in databases such as Westlaw and Nexis Universe.

The notes at the end of this book contain citations to many of the important cases in the law of journalism and mass communication. These legal citations provide the names of the parties in the case, the number of the volume in which the case is reported, the abbreviated name of the official legal reporter (or book) in which the case appears, the page of the reporter on which the case begins and the year in which the case was decided. For example, one citation in note 5 of this chapter looks like this: “FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 534
(2007) (Souter, J., dissenting).” This citation shows that the first party, the Federal Election Commission, filed an appeal from a decision in favor of the second party, Wisconsin Right to Life, Inc. The decision in this case striking down a ban on issue advertising prior to elections or primaries can be found in the U.S. Reports collection, which contains U.S. Supreme Court opinions. The case appears in volume 551 (the number before the name of the reporter), beginning on page 449 (the number after the name of the reporter). The case was decided in 2007 (the number in parentheses). In addition, the page number following the comma tells you precisely what page of the decision is referenced, and the parentheses at the end indicate that the reference comes from a dissenting opinion by Justice David Souter.

READING CASE LAW

This chapter shows that the law of journalism and mass communication contains many terms and concepts that may be unfamiliar to the general reader. Key definitions in the margins and the glossary at the back of the book should help you navigate opinions for lawyers trained in legal terminology and doctrines. At first, it may be difficult to grasp the meaning and importance of a case. With practice, however, anyone can learn the language and read case law with relative ease.

The following steps will help you read the law more quickly and with better comprehension. You will understand the law far better and more easily if you give yourself sufficient time to use these three steps:

1. **Preread the case.** Prereading identifies the structure of the decision; the various rules or doctrines that underlie the court’s reasoning; and the outcome of the case. These three elements highlight the most important elements of the court’s reasoning. To preread, quickly skim

   a. The topic sentence of each paragraph to get the gist of the opinion and identify its most important sections

   b. The first few paragraphs of the opinion, which should establish the parties, the issues and the history of the case

   c. The last few paragraphs of the opinion to understand the **holding** (which is the legal principle taken from the decision of the court) or to get a summary of the outcome of the case

   **holding** The decision or ruling of a court.
2. **Skim the entire case.** Scan the entire case and mark the start of key sections of the case for more careful reading.

3. **Read carefully the sections you have identified as important.** Underline or highlight as you go. You may want to take note of the following:

   a. **The issue.** Knowing the issue in the case helps you know which elements of the history and facts are significant. In this text, the chapter titles generally signal the issue on which the case excerpt will focus. The case itself also often includes language that identifies the issue. Such language includes, “The question before the Court is whether . . .” and “The issue in this case is . . .”

   b. **The facts.** Identify which facts are central to the issue by asking yourself whether the dispute in the case is about a question of fact (e.g., what happened) or a question of law (e.g., which test, doctrine or category of speech is relevant). A libel decision that turns on the identity of the individual whose reputation was harmed would represent a question of fact, making related facts central to the holding.94

   c. **The case history.** The circumstances surrounding a decision often are pivotal to the issue before the court. Sometimes the relevant history is one of shifting legal doctrine, as when the court gradually affords commercial speech greater constitutional protection.95 Sometimes the important context is factual, as when the court protects defamatory comments situated within a generally accurate portrayal of the violent oppression of blacks during the civil rights movement.96

   d. **The common law rule.** The rule is the heart of the decision; it is the common law developed in this case. It relates to the holding but is the more general rule applied here and applicable to other cases. To identify the rule, ask whether the court has created a new test, engaged in balancing or applied an established doctrine in a new way. What are the elements of the rule, and what are its exceptions?

   e. **The analysis.** Here the court applies the rule to the facts. In libel law, for example, public officials must prove actual malice to win their suit. How does the court apply this element of the test?

Careful reading of the law is the first stage in conducting legal research and positions you well to write case briefs, which summarize the key elements of a court decision.

**Briefing Cases**

Case briefs simplify and clarify a court’s opinions by selecting the five most important elements of the decision. Briefs focus on key elements and set aside content that does not directly inform the court’s decision.
The five components of a case brief are often referred to as FIRAC. They are Facts, Issue, Rule of Law, Analysis and Conclusion (or holding).

1. **The Facts.** The facts summary should include all the information needed to understand the issue and the decision of the court. The facts statement consists of a brief but inclusive discussion of what happened in the legal dispute before it reached this court. It should include who the parties are, what happened in the trial court and the basis for appeal. What happened between the parties that gave rise to the case? Who initiated the lawsuit? What was the substance of the complaint, and what type of legal action was brought? What was the defense? What did other courts reviewing the case decide? What legal errors provide the basis for the appeal?

2. **The Issue.** Here, one sentence summarizes the specific question decided by the court in this case. The issue should be phrased as a single question that can be answered “yes” or “no.”

3. **The Rule of Law.** The rule of law states, preferably in one sentence, the precedent established by this decision that will bind lower courts.

4. **The Analysis.** This section, also called the *rationale*, details how and why the court reached its decision. In this section, it is important to discuss the details of the court’s reasoning and how it creates new law. Consider whether it establishes a new test, clarifies existing legal distinctions, defines a new category or highlights changing realities that affect the law. A thorough analysis must describe the reasoning for all the opinions in the decision and highlight the specific points on which concurring and dissenting opinions diverge from the opinion of the court.

5. **The Conclusion.** This is a simple declarative statement of the holding reached by the present court. What did the court decide, and did it affirm, remand or reverse? Provide the vote of the court if it is an appellate court.

**Analyzing Marbury v. Madison**

The following case brief previews the first case excerpted at the end of this chapter.

**FACTS:** William Marbury was one of President John Adams’ 42 “midnight appointments” on the eve of his departure from the White House. The necessary paperwork and procedures to secure his and several other appointments were completed, but Secretary of State John Marshall—himself a midnight appointee—failed to deliver Marbury’s commission. Upon assuming the presidency, Thomas Jefferson ordered his secretary of state—James Madison—not
to deliver the commission. Under authority of the Judiciary Act of 1789, Marbury sued to ask
the Supreme Court to order Madison, through a writ of mandamus, to deliver the commission.
A writ of mandamus is a court order requiring an individual or organization either to perform or
to stop a particular action.

ISSUE: Does the Supreme Court have the power to review acts of Congress and declare them
void if they violate the Constitution?

RULE of LAW: Under Article VI, Section 2 of the U.S. Constitution, the Supreme Court is
implicitly given the power to review acts of Congress and to strike them down as void if they are
"repugnant" to the Constitution.

ANALYSIS: A commission signed by the president and sealed by the secretary of state is
complete and legally binding. Denial of Marbury’s commission violates the law, creating a
governmental obligation to remedy the violation. A writ of mandamus is such a remedy. The
Constitution is the “supreme law of the land” (Art. VI). As such, it is “superior” and “fundamental and paramount.” It establishes “certain limits” on the power of the government it creates, including the power of Congress. The Constitution also establishes that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” The Supreme
Court, therefore, must determine the law that applies in a specific case and decide the case
according to the law. If the Court finds that “ordinary” statutory law conflicts with the dictates
of the Constitution, the “fundamental” constitutional law must govern. Accordingly, “a legis-
lative act contrary to the Constitution is not law,” and the Court must strike it down to give the
Constitution its due weight.

Under Article III of the Constitution, Congress has the power to regulate the appellate
jurisdiction, but not the original jurisdiction, of the Supreme Court. The Court’s original
jurisdiction is defined completely and exclusively by Article III and cannot be altered except
by amendment of the Constitution. Through the Judiciary Act of 1789, Congress added
to the original jurisdiction of the Court. Being outside the power given to Congress by the
Constitution, this act is illegitimate. Because the power of mandamus was not granted to the
Court by the Constitution either, the Court does not have the power to order mandamus on
behalf of Marbury.

The Court held the provision of the Judiciary Act unconstitutional and declared the man-
damus void.

CONCLUSION: Marshall, C.J. 6–0. Yes. Relying heavily on the inherent “logical reasoning”
of the Constitution, rather than on any explicit text, the Court dismissed the case for lack of
jurisdiction but found that Congress’ grant of original power of mandamus to the Court violated
the separation of power established in Article III of the Constitution.
Thinking About It
The first case excerpt is from *Marbury v. Madison*, the decision in which the Supreme Court established its own power of judicial review. A central question resolved by the Supreme Court in *Marbury v. Madison* was whether, under the Constitution, the Court had authority to void duly enacted laws that it deemed to violate the U.S. Constitution.

Critics of campaign finance regulations designed to prevent corruption in elections won several legal decisions in 2010 in the wake of the Supreme Court’s ruling in *Citizens United v. Federal Election Commission*. As one legal scholar noted, “The relevance of *Citizens United* has become an issue in every new campaign finance case” since the decision was handed down. This aspect of the Court’s decision is developed in Chapter 2 when the First Amendment implications of campaign finance laws are discussed.

Here we look instead at what *Citizens United* demonstrates about precedent and the rule of law. The debate raised in the Court’s opinions has spawned vibrant public discussion about whether the doctrine of stare decisis serves “as an agent of stability” or “to destabilize the rule of law.” The second case excerpt below begins with Chief Justice John Roberts’ concurring opinion in *Citizens United*, in which he “elaborated on when it is acceptable for the Court to overturn precedent.” Justice John Paul Stevens’ rather acerbic dissent forms the second part of this contemporary Court debate on the role of precedent.

As you read these case excerpts, keep the following questions in mind:

- How do the justices differ in their interpretation of the binding nature of Supreme Court precedent?
- In the case of *Citizens United*, which justices are exercising “restraint” or “activism”? How? For what reasons?
- What are the legal foundations of the different opinions?
- What do these decisions suggest about the stability or “transformation” of the rule of law under judicial review and stare decisis?

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**Marbury v. Madison**

SUPREME COURT OF THE UNITED STATES

5 U.S. 137 (1803)

CHIEF JUSTICE JOHN MARSHALL delivered the Court’s opinion:

... The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that “the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction.”
It has been insisted at the bar, that as the original grant of jurisdiction to the supreme and inferior courts is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it to the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is . . . entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance. . . .

It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it. . . .

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction, the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true; yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that case. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to enquire whether a jurisdiction, so conferred, can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.
This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void.

This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effective. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution, would of itself be sufficient, in America where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the
constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained. . . .

It is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on the subject. It is in these words, ”I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the constitution, and laws of the United States.”

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

Citizens United v. Federal Election Commission
SUPREME COURT OF THE UNITED STATES
558 U.S. 310 (2010)

JUSTICE ANTHONY KENNEDY delivered the Court’s opinion.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SAMUEL ALITO joined, concurring:

The Government urges us in this case to uphold a direct prohibition on political speech. It asks us to embrace a theory of the First Amendment that would allow censorship not only of television and radio broadcasts, but of pamphlets, posters, the internet, and virtually any other medium that corporations and unions might find useful in expressing their views on matters of public concern. Its theory, if accepted, would empower the Government to prohibit newspapers from running editorials or opinion pieces supporting or opposing candidates for office, so long as the newspapers were owned by corporations—as the major ones are. First Amendment rights could be confined to individuals, subverting the vibrant public discourse that is at the foundation of our democracy.

The Court properly rejects that theory, and I join its opinion in full. The First Amendment protects more
than just the individual on a soapbox and the lonely pamphleteer. I write separately to address the important principles of judicial restraint and *stare decisis* implicated in this case.

Judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called upon to perform." Because the stakes are so high, our standard practice is to refrain from addressing constitutional questions except when necessary to rule on particular claims before us. This policy underlies both our willingness to construe ambiguous statutes to avoid constitutional problems and our practice "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."

The majority and dissent are united in expressing allegiance to these principles. But I cannot agree with my dissenting colleagues on how these principles apply in this case.

The majority's step-by-step analysis accords with our standard practice of avoiding broad constitutional questions except when necessary to decide the case before us. The majority begins by addressing—and quite properly rejecting—Citizens United's statutory claim that [the Bipartisan Campaign Reform Act of 2002] does not actually cover its production and distribution of *Hillary: The Movie* (hereinafter *Hillary*). If there were a valid basis for deciding this statutory claim in Citizens United's favor (and thereby avoiding constitutional adjudication), it would be proper to do so.

It is only because the majority rejects Citizens United's statutory claim that it proceeds to consider the group's various constitutional arguments, beginning with its narrowest claim [that *Hillary* is not the functional equivalent of express advocacy] and proceeding to its broadest claim [that Citizens United has a First Amendment right to support a candidate].

The dissent advocates an approach to addressing Citizens United's claims that I find quite perplexing. It presumably agrees with the majority that Citizens United's narrower statutory and constitutional arguments lack merit—otherwise its conclusion that the group should lose this case would make no sense. Despite agreeing that these narrower arguments fail, however, the dissent argues that the majority should nonetheless latch on to one of them in order to avoid reaching the broader constitutional question of whether *Austin* remains good law. It even suggests that the Court's failure to adopt one of these concededly meritless arguments is a sign that the majority is not "serious about judicial restraint."

This approach is based on a false premise: that our practice of avoiding unnecessary (and unnecessarily broad) constitutional holdings somehow trumps our obligation faithfully to interpret the law. It should go without saying, however, that we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right. Thus while it is true that "[i]f it is not necessary to decide more, it is necessary not to decide more," sometimes it is necessary to decide more. There is a difference between judicial restraint and judicial abdication. When constitutional questions are "indispensably necessary" to resolving the case at hand, "the court must meet and decide them."

This is the first case in which we have been asked to overrule *Austin*, and thus it is also the first in which we have had reason to consider how much weight to give *stare decisis* in assessing its continued validity. The dissent erroneously declares that the Court "reaffirmed" *Austin*'s holding in subsequent cases. Not so. Not a single party in any of those cases asked us to overrule *Austin*, and as the dissent points out, the Court generally does not consider constitutional arguments that have not properly been raised. *Austin*'s validity was therefore not directly at issue in the cases the dissent cites. The Court's unwillingness to overturn *Austin* in those cases cannot be understood as a reaffirmation of that decision.

Fidelity to precedent—the policy of *stare decisis*—is vital to the proper exercise of the judicial function. "*Stare decisis* is the preferred course because it promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." For these reasons, we have long recognized that departures from precedent are inappropriate in the absence of a "special justification."
At the same time, *stare decisis* is neither an “inexorable command,” nor “a mechanical formula of adherence to the latest decision,” especially in constitutional cases. If it were, segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants. As the dissent properly notes, none of us has viewed *stare decisis* in such absolute terms.

*Stare decisis* is instead a “principle of policy.” When considering whether to reexamine a *prior erroneous* holding, we must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*. As Justice Jackson explained, this requires a “sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other.”

In conducting this balancing, we must keep in mind that *stare decisis* is not an end in itself. It is instead “the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion.” Its greatest purpose is to serve a constitutional ideal—the rule of law. It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent.

Thus, for example, if the precedent under consideration itself departed from the Court’s jurisprudence, returning to the “intrinsically sounder” doctrine established in prior cases may “better serv[e] the values of *stare decisis* than would following [the] more recently decided case inconsistent with the decisions that came before it.” Abrogating the errant precedent, rather than reaffirming or extending it, might better preserve the law’s coherence and curtail the precedent’s disruptive effects.

Likewise, if adherence to a precedent actually impedes the stable and orderly adjudication of future cases, its *stare decisis* effect is also diminished. This can happen in a number of circumstances, such as when the precedent’s validity is so hotly contested that it cannot reliably function as a basis for decision in future cases, when its rationale threatens to upend our settled jurisprudence in related areas of law, and when the precedent’s underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake.

These considerations weigh against retaining our decision in *Austin*. First, as the majority explains, that decision was an “aberration” insofar as it departed from the robust protections we had granted political speech in our earlier cases . . . [and] does not explain why corporations may be subject to prohibitions on speech in candidate elections when individuals may not.

Second, the validity of *Austin*’s rationale—itself adopted over two “spirited dissents”—has proved to be the consistent subject of dispute among Members of this Court ever since. The simple fact that one of our decisions remains controversial is, of course, insufficient to justify overruling it. But it does undermine the precedent’s ability to contribute to the stable and orderly development of the law. In such circumstances, it is entirely appropriate for the Court—which in this case is squarely asked to reconsider *Austin*’s validity for the first time—to address the matter with a greater willingness to consider new approaches capable of restoring our doctrine to sounder footing.

Third, the *Austin* decision is uniquely destabilizing because it threatens to subvert our Court’s decisions even outside the particular context of corporate express advocacy. The First Amendment theory underlying *Austin*’s holding is extraordinarily broad. *Austin*’s logic would authorize government prohibition of political speech by a category of speakers in the name of equality—a point that most scholars acknowledge (and many celebrate), but that the dissent denies.

It should not be surprising, then, that Members of the Court have relied on *Austin*’s expansive logic to justify greater incursions on the First Amendment, even outside the original context of corporate advocacy on behalf of candidates running for office. The dissent in this case succumbs to the same temptation, suggesting that *Austin* justifies prohibiting corporate speech because such speech might unduly influence “the market for legislation.” The dissent reads *Austin* to permit restrictions on corporate speech based on
nothing more than the fact that the corporate form may help individuals coordinate and present their views more effectively. A speaker’s ability to persuade, however, provides no basis for government regulation of free and open public debate on what the laws should be.

If taken seriously, Austin’s logic would apply most directly to newspapers and other media corporations. They have a more profound impact on public discourse than most other speakers. These corporate entities are, for the time being, not subject to [the statute’s] otherwise generally applicable prohibitions on corporate political speech. But this is simply a matter of legislative grace. The fact that the law currently grants a favored position to media corporations is no reason to overlook the danger inherent in accepting a theory that would allow government restrictions on their political speech.

These readings of Austin do no more than carry that decision’s reasoning to its logical endpoint. In doing so, they highlight the threat Austin poses to First Amendment rights generally, even outside its specific factual context of corporate express advocacy. Because Austin is so difficult to confine to its facts—and because its logic threatens to undermine our First Amendment jurisprudence and the nature of public discourse more broadly—the costs of giving it stare decisis effect are unusually high.

Finally and most importantly, the Government’s own effort to defend Austin—or, more accurately, to defend something that is not quite Austin—underscores its weakness as a precedent of the Court. The Government concedes that Austin “is not the most lucid opinion,” yet asks us to reaffirm its holding. But while invoking stare decisis to support this position, the Government never once mentions the compelling interest that Austin relied upon in the first place: the need to diminish “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.” Austin’s specific holding on the basis of two new and potentially expansive interests—the need to prevent actual or apparent quid pro quo corruption, and the need to protect corporate shareholders. Those interests may or may not support the result in Austin, but they were plainly not part of the reasoning on which Austin relied.

To its credit, the Government forthrightly concedes that Austin did not embrace either of the new rationales it now urges upon us. To be clear: The Court in Austin nowhere relied upon the only arguments the Government now raises to support that decision.

To the extent that the Government’s case for reaffirming Austin depends on radically reconceptualizing its reasoning, that argument is at odds with itself. Stare decisis is a doctrine of preservation, not transformation. It counsels deference to past mistakes, but provides no justification for making new ones. There is therefore no basis for the Court to give precedential sway to reasoning that it has never accepted, simply because that reasoning happens to support a conclusion reached on different grounds that have since been abandoned or discredited.

Doing so would undermine the rule-of-law values that justify stare decisis in the first place. It would effectively license the Court to invent and adopt new principles of constitutional law solely for the purpose of rationalizing its past errors, without a proper analysis of whether those principles have merit on their own. This approach would allow the Court’s past missteps to spawn future mistakes, undercutting the very rule-of-law values that stare decisis is designed to protect.

None of this is to say that the Government is barred from making new arguments to support the outcome in Austin. On the contrary, it is free to do so. And of course the Court is free to accept them. But the Government’s new arguments must stand or fall on their own; they are not entitled to receive the special deference we accord to precedent. They are, as grounds to support Austin, literally unprecedented. Moreover, to the extent the Government relies on new arguments—and declines to defend Austin on its own terms—we may reasonably infer that it lacks confidence in that decision’s original justification.

Because continued adherence to Austin threatens to subvert the “principled and intelligible” development of our First Amendment jurisprudence,
I support the Court’s determination to overrule that decision. . . .

JUSTICE JOHN PAUL STEVENS, with whom JUSTICE RUTH BADER GINSBURG, JUSTICE STEPHEN BREYER and JUSTICE SONIA SOTOMAYOR join, concurring in part and dissenting in part:

. . . The majority’s approach to corporate electioneering marks a dramatic break from our past. Congress has placed special limitations on campaign spending by corporations ever since the passage of the Tillman Act in 1907. We have unanimously concluded that this “reflects a permissible assessment of the dangers posed by those entities to the electoral process,” and have accepted the “legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.” The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of Austin v. Michigan Chamber of Commerce. Relying largely on individual dissenting opinions, the majority blazes through our precedents, overruling or disavowing a body of case law.

In his landmark concurrence in Ashwander v. TVA (1936), Justice Brandeis stressed the importance of adhering to rules the Court has “developed . . . for its own governance” when deciding constitutional questions. Because departures from those rules always enhance the risk of error, . . . I emphatically dissent from its principal holding.

The Court’s ruling threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution. Before turning to the question whether to overrule Austin and part of McConnell, it is important to explain why the Court should not be deciding that question.

The first reason is that the question was not properly brought before us. . . . [T]he majority decides this case on a basis relinquished below, not included in the questions presented to us by the litigants, and argued here only in response to the Court’s invitation. This procedure is unusual and inadvisable for a court. Our colleagues’ suggestion that “we are asked to reconsider Austin and, in effect, McConnell,” would be more accurate if rephrased to state that “we have asked ourselves” to reconsider those cases. . . .

It is all the more distressing that our colleagues have manufactured a facial challenge, because the parties have advanced numerous ways to resolve the case that would facilitate electioneering by nonprofit advocacy corporations such as Citizens United, without toppling statutes and precedents. Which is to say, the majority has transgressed yet another “cardinal” principle of the judicial process: “[I]f it is not necessary to decide more, it is necessary not to decide more.” . . .

The final principle of judicial process that the majority violates is the most transparent: stare decisis. I am not an absolutist when it comes to stare decisis, in the campaign finance area or in any other. No one is. But if this principle is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine. “[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.” No such justification exists in this case, and to the contrary there are powerful prudential reasons to keep faith with our precedents.

The Court’s central argument for why stare decisis ought to be trumped is that it does not like Austin. The opinion “was not well reasoned,” our colleagues assert, and it conflicts with First Amendment principles. This, of course, is the Court’s merits argument, the many defects in which we will soon consider. I am perfectly willing to concede that if one of our precedents were dead wrong in its reasoning or irrec- oncileable with the rest of our doctrine, there would be a compelling basis for revisiting it. But neither is true of Austin, and restating a merits argument with additional vigor does not give it extra weight in the stare decisis calculus.

Perhaps in recognition of this point, the Court supplements its merits case with a smattering of assertions. The Court proclaims that “Austin is undermined by experience since its announcement.” This is
a curious claim to make in a case that lacks a developed record. The majority has no empirical evidence with which to substantiate the claim; we just have its ipse dixit that the real world has not been kind to Austin. Nor does the majority bother to specify in what sense Austin has been “undermined.” Instead it treats the reader to a string of non sequiturs: “Our Nation’s speech dynamic is changing”; “[s]peakers have become adept at presenting citizens with sound bites, talking points, and scripted messages”; “[c]orporations . . . do not have monolithic views.” How any of these ruminations weakens the force of stare decisis, escapes my comprehension.

The majority also contends that the Government’s hesitation to rely on Austin’s anti-distortion rationale “diminish[es]” “the principle of adhering to that precedent.” Why it diminishes the value of stare decisis is left unexplained. We have never thought fit to overrule a precedent because a litigant has taken any particular tack. Nor should we. Our decisions can often be defended on multiple grounds, and a litigant may have strategic or case-specific reasons for emphasizing only a subset of them. Members of the public, moreover, often rely on our bottom-line holdings far more than our precise legal arguments; surely this is true for the legislatures that have been regulating corporate electioneering since Austin. The task of evaluating the continued viability of precedents falls to this Court, not to the parties.

Although the majority opinion spends several pages making these surprising arguments, it says almost nothing about the standard considerations we have used to determine stare decisis value, such as the antiquity of the precedent, the workability of its legal rule, and the reliance interests at stake. It is also conspicuously silent about McConnell, even though the McConnell Court’s decision to uphold [the Bipartisan Campaign Reform Act [BCRA]] relied not only on the anti-distortion logic of Austin but also on the statute’s historical pedigree, and the need to preserve the integrity of federal campaigns.

We have recognized that “[s]tare decisis has special force when legislators or citizens ‘have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.’” Stare decisis protects not only personal rights involving property or contract but also the ability of the elected branches to shape their laws in an effective and coherent fashion. Today’s decision takes away a power that we have long permitted these branches to exercise. State legislatures have relied on their authority to regulate corporate electioneering, confirmed in Austin, for more than a century. The Federal Congress has relied on this authority for a comparable stretch of time, and it specifically relied on Austin throughout the years it spent developing and debating BCRA. The total record it compiled was 100,000 pages long. Pulling out the rug beneath Congress after affirming the constitutionality of [the statutory provision] six years ago shows great disrespect for a coequal branch.

By removing one of its central components, today’s ruling makes a hash out of BCRA’s “delicate and interconnected regulatory scheme.” . . .

Beyond the reliance interests at stake, the other stare decisis factors also cut against the Court. Considerations of antiquity are significant for similar reasons. McConnell is only six years old, but Austin has been on the books for two decades, and many of the statutes called into question by today’s opinion have been on the books for a half-century or more. The Court points to no intervening change in circumstances that warrants revisiting Austin. Certainly nothing relevant has changed since we decided WRTL [Federal Election Commission v. Wisconsin Right to Life, Inc.] two Terms ago. And the Court gives no reason to think that Austin and McConnell are unworkable.

In fact, no one has argued to us that Austin’s rule has proved impracticable, and not a single for-profit corporation, union, or State has asked us to overrule it. Quite to the contrary, leading groups representing the business community, organized labor and the nonprofit sector, together with more than half of the States, urge that we preserve Austin. As for McConnell, the portions of BCRA it upheld may be prolix, but all three branches of Government have worked to make §203 as user-friendly as possible. For instance, Congress established a special mechanism for expedited review of constitutional challenges; the FEC has established a standardized
process, with clearly defined safe harbors, for corporations to claim that a particular electioneering communication is permissible under WRTL; and, as noted above, The Chief Justice crafted his controlling opinion in WRTL with the express goal of maximizing clarity and administrability. The case for *stare decisis* may be bolstered, we have said, when subsequent rulings “have reduced the impact” of a precedent “while reaffirming the decision’s core ruling.”

In the end, the Court’s rejection of *Austin* and *McConnell* comes down to nothing more than its disagreement with their results. Virtually every one of its arguments was made and rejected in those cases, and the majority opinion is essentially an amalgamation of resuscitated dissents. The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court. Today’s ruling thus strikes at the vitals of *stare decisis*, “the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion” that “permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals.”

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Freedom of expression is the matrix, the indispensable condition, of nearly every other form of freedom.

—U.S. Supreme Court Justice Benjamin N. Cardozo

In 2018, the U.S. Supreme Court held that a Minnesota state ban on wearing clothing like this at the polls violated the First Amendment.