

JUDICIAL REVIEW

- **Judicial Review:** The process by which a court decides the constitutionality of legislative enactments and actions by the executive branch.

- While the U.S. Constitution makes no mention of the power of judicial review, Alexander Hamilton and James Madison (two of the three authors of the influential *Federalist Papers*) both advocated the concept of judicial review as a necessary part of the checks and balances that characterize our federal government.

- In *Marbury v. Madison* (1803), arguably the most significant case in American constitutional law, the U.S. Supreme Court opined:

It is emphatically the province and duty of the [courts] to say what the law is.... So if the law be in opposition to the Constitution ... [t]he Court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.

JURISDICTION

- **Jurisdiction:** The authority of a court to hear and decide a specific action. Jurisdiction has many dimensions, including:
 - **Personal Jurisdiction:** The authority of a court to hear and decide a dispute involving *the particular parties* before it.
 - **Subject Matter Jurisdiction:** The authority of a court to hear and decide *the particular dispute* before it.
 - **Original Jurisdiction:** The authority of a court to hear and decide a dispute in the first instance. Generally speaking, *trial courts* are courts of original jurisdiction, although the Supreme Court of the United States and the highest courts of many of the states have original jurisdiction over a few types of disputes.
 - **Appellate Jurisdiction:** The authority of a court to review a prior decision in the same case made by another court.

PERSONAL JURISDICTION

- Personal jurisdiction is generally a **geographic** concept.
- ***In Personam Jurisdiction:*** Courts have jurisdiction over **persons or entities residing or doing business** within a particular county, district, state, or in some cases, anywhere within the United States.
 - All states, as well as the United States, have one or more **long-arm statutes** which dictate under what terms a nonresident person or entity, who would otherwise not be subject to the court's jurisdiction, may nonetheless be required to appear before the court.
 - The key to whether a nonresident will be subject to a court's jurisdiction is the quantity and nature of the nonresident's **contacts** with the state within which the court sits.
- ***In Rem Jurisdiction:*** Courts also have personal jurisdiction over disputed **property located within** the county, district, or state.

SUBJECT MATTER JURISDICTION

- The constitution or statute creating a court usually defines a court's subject matter jurisdiction. In both the federal and state court systems, a trial court's subject matter jurisdiction may be limited by:
 - (1) the **amount** in controversy,
 - (2) the **nature** of the controversy,
 - (3) the basis for the **relief sought**, or
 - (4) in a criminal case, whether the crime alleged is a **felony** or a **misdemeanor** and the nature of the proceeding before the court (*e.g.*, arraignment vs. trial).
- **Limited vs. General:** A court whose jurisdiction one or more of these factors limits has *limited jurisdiction*; otherwise, a court has *general jurisdiction*.
- **Concurrent vs. Exclusive:** When two or more courts have subject matter jurisdiction over the same dispute, those courts are said to have *concurrent jurisdiction*. When a case may be tried only in state court or only in federal court, then the court in which jurisdiction lies is said to have *exclusive jurisdiction*.

SPECIALIZED COURTS

- In many U.S. court systems, particular kinds of disputes are referred to courts with **specialized subject matter jurisdiction**, including:
 - **Municipal Courts:** State courts that handle traffic and other offenses for which the typical penalty is a fine, the loss of a state-granted privilege, or both;
 - **Small Claims Courts:** State courts that handle civil disputes where the amount in controversy is less than a prescribed ceiling and in which the parties typically (or, in some jurisdictions, exclusively) represent themselves;
 - **Domestic Relations/Family Courts:** State courts that handle divorces, custodial disputes, juvenile status offenses, and, in some jurisdictions, juvenile crimes;
 - **Probate Courts:** State courts that handle matters relating to the transfer of a person's assets and obligations after her death, as well as, in some jurisdictions, the affairs of minors and of persons lacking legally sufficient mental capacity; and
 - **Bankruptcy Courts:** Federal courts that hear and decide matters relating to a person's or entity's bankruptcy.

FEDERAL COURT JURISDICTION

- **Federal Question** jurisdiction arises if a case involves an alleged violation of the U.S. Constitution, federal statute or regulation, or a treaty between the U.S. and one or more foreign countries.
- **Diversity** jurisdiction arises if:
 - (1) the amount in controversy **exceeds \$75,000**; and
 - (2) the lawsuit is between
 - (a) citizens of **different states**,
 - For purposes of diversity jurisdiction, a corporation is a citizen of both: (1) its state of incorporation, and (2) the state of its principal place of business, if the two are not the same.
 - (b) a **foreign country** and citizens of one or more states, or
 - (c) citizens of a state and citizens or subjects of a foreign country.

JURISDICTION IN CYBERSPACE

- Personal jurisdiction is traditionally a function of geography – where one or more party resides or where the alleged wrong occurred. The Internet makes geographic distinctions difficult and potentially meaningless.
- **Competing Views**
 - Even though a defendant is a resident of State Y, has never physically visited State X, and did not direct its Web site specifically to persons in State X, the defendant should be subject to suit anywhere its site can be accessed, including State X.
 - Because a defendant cannot create a web site that is unavailable to residents of State X, it is unfair to subject the defendant to jurisdiction in State X without it having other “minimum contacts” there.
- An increasing number of courts are resolving personal jurisdiction issues by applying a “**sliding scale**” that makes it more likely that a court will exercise jurisdiction over a distant defendant the more business that defendant conducts over the Internet.

VENUE AND STANDING

- **Venue:** Within a particular jurisdiction, the most appropriate location for a trial to be held and from which a jury will be selected.
- **Standing to Sue:** An individual or entity must have a **sufficient stake** in the controversy before he, she, or it may bring suit.
- Whether standing exists, in turn, will depend in part on whether there is a ***justiciable controversy*** – that is, a **real and substantial** controversy, not one that is moot, hypothetical, or academic.

STATE COURT SYSTEMS

- **Trial Courts:** Trial courts are where all litigation (other than that conducted through administrative agencies) begins. Trial courts have either **general jurisdiction** or **limited jurisdiction**.
- **Appellate Courts:** Every state has at least one appellate court, to which a litigant who was unsuccessful at the trial court may appeal for relief. Most states have *intermediate appellate courts* (akin to the U.S. Courts of Appeals) which are subject to review by the state's supreme court or "court of last resort." Other states have only a supreme court.
- Appellate courts (intermediate and supreme) typically limit their review to *questions of law*, rather than *questions of fact*, although this is not always the case.
- Most state supreme courts, like the U.S. Supreme Court, exercise *discretionary review* (i.e., they decide whether or not to consider the merits of a particular case); most state intermediate appellate courts, like the U.S. Courts of Appeals, do not have discretion whether to entertain cases appealed to them.

THE FEDERAL COURT SYSTEM

- **U.S. District Courts:** Trial courts of general jurisdiction, each state (as well as the District of Columbia and certain other U.S. territories and possessions) has at least one “district,” and some states have as many as four, with each district divided administratively among one to several judges.
- **U.S. Courts of Appeals:** Appellate courts to which litigants in the U.S. District Courts have an automatic right to appeal (*i.e.*, the court of appeal must consider each appeal on its merits). These courts also hear appeals from U.S. Bankruptcy Courts and other specialized courts and, in the case of the D.C. Circuit, from federal administrative agency decisions. These courts cover twelve geographic regions, with a thirteenth court, the Federal Circuit, empowered to hear appeals from any district court involving patent law, cases in which the United States is a defendant, and other specified types of cases.
- **U.S. Supreme Court:** The “highest court in the land,” the U.S. Supreme Court exercises discretionary review over all federal appellate courts, as well as, in some circumstances, state supreme and appellate courts.
- Most cases reach the U.S. Supreme Court on **writ of certiorari**, which requires that at least four justices agree the case merits the Court’s review.

NEGOTIATION AND MEDIATION

- **Negotiation:** Informal settlement talks between the parties, with or without counsel.
- **Mediation:** Non-binding procedure utilizing the services of a neutral third party to assist negotiations and recommend a resolution of the parties' dispute. Mediation is non-adversarial and tends to reduce antagonism.

ARBITRATION

- **Arbitration:** Dispute resolution utilizing a neutral third party or a panel of three persons chosen by the court, agreed to by the parties, or both, who will read and hear the parties' arguments and evidence and then render an **award** (decision).
- Arbitration can be either ***binding*** – in which case the arbitrator's decision is legally binding – or ***nonbinding*** – in which case the arbitrator's decision is merely advisory and one or both parties may appeal the award to a court of competent jurisdiction.
- Many contracts include an ***arbitration clause***, which provides that any dispute arising out the contract will be submitted first (in the case of nonbinding arbitration) or finally (in the case of binding arbitration) to arbitration, rather than to a court.
- **Arbitrability:** Despite the fact that a contract contains an arbitration clause, a party to the contract may claim that he is not bound by the arbitration clause, in which case a court will be asked to decide
 - whether the clause is **enforceable**; and, if so,
 - whether the dispute falls within the clause's **scope**.

OTHER FORMS OF ADR

- **Neutral Case Evaluation:** A third party upon whom the parties agree evaluates each side's position and informs the parties of their strengths and weaknesses.
- **Mini-Trial:** A short-form trial presented to a "judge" whose decision is not legally binding, but may assist the parties in evaluating their claims or defenses.
- **Summary Jury Trial:** A short-form trial presented to a "jury" whose decision is not legally binding, but may assist the parties in evaluating their claims or defenses.
- **Conciliation:** Settlement discussions moderated by a neutral third party.
- **Online Dispute Resolution:** An increasing number of companies and organizations offer dispute-resolution services online.

INTERNATIONAL DISPUTE RESOLUTION

- **Clauses:** Parties to international transactions often include forum-selection and choice of law clauses in their contracts.
- **Arbitration:** International treaties sometimes also stipulate arbitration for resolving disputes- a tactic that has been used to increase foreign investment. The International Chamber of Commerce often acts as an international arbitrator.