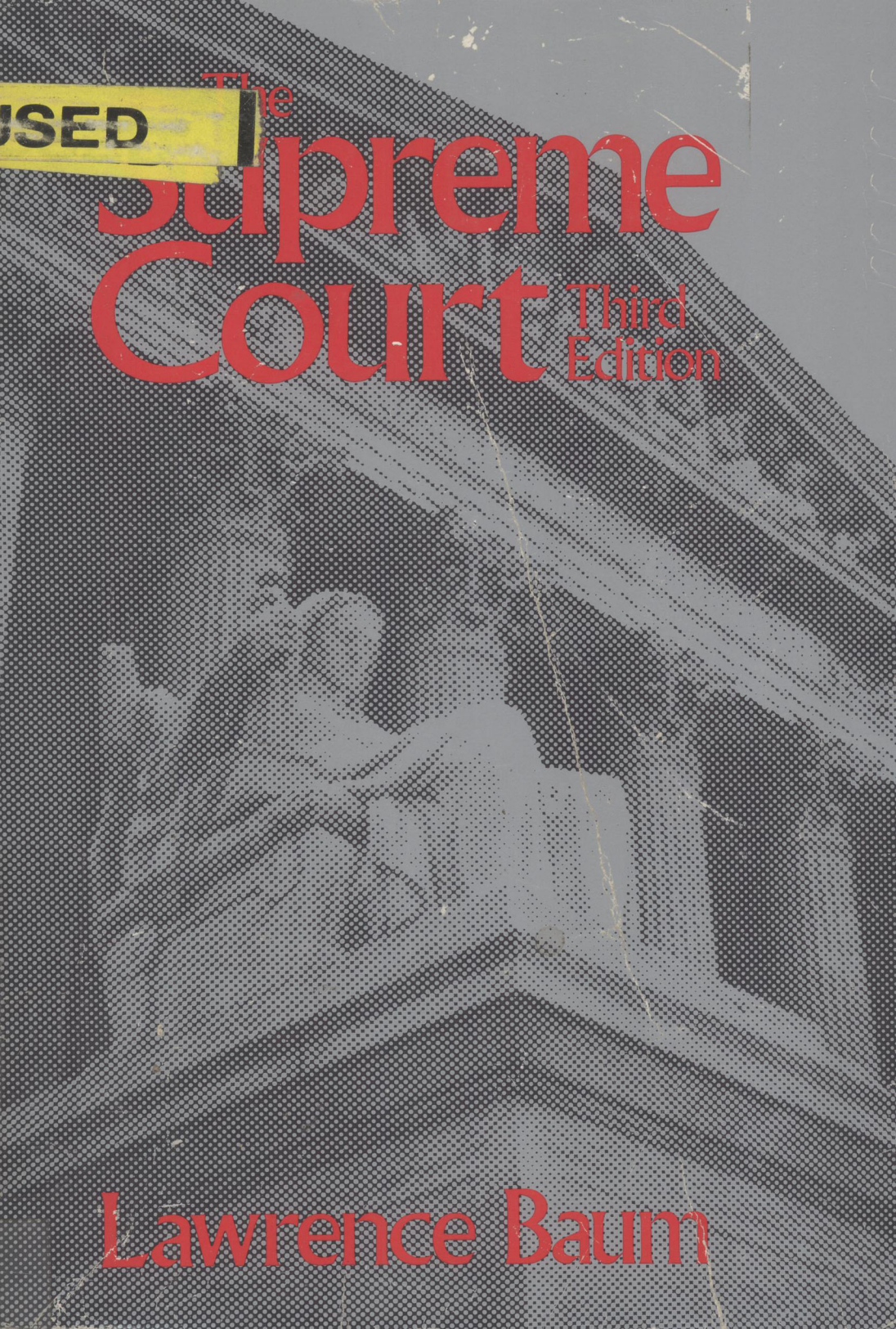
The Supreme Court

Third Edition



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Third Edition

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The Supreme Court

To my parents

Ruth Klein Baum and Irving Baum

Preface

In the preface of the first edition of this book, written in the early 1980s, I asserted that the Supreme Court stands at the center of American life. Now, at the end of that decade, the Court's importance is even more evident. The Court has been an issue in recent presidential elections, and national attention has focused on the appointments of new justices. This interest is justified because the Court continues to play a major role in resolving a wide range of policy questions and social issues.

In this third edition, like its predecessors, I attempt to provide an understanding of the Supreme Court as a political institution. The book is intended to serve students as a short but comprehensive guide to the Court. It also is meant as a general reference source for those who would like to learn more about the Court. I have sought to make this book useful to people with a wide range of backgrounds, from readers with little prior knowledge to experts on the Court. The book describes the Court's basic operation and offers explanations for the behavior of the Court and the people and institutions that affect it.

The basic approach of the third edition is similar to that of its predecessors. In building upon this structure, I have taken into account changes and developments that have influenced the work of the Court. Perhaps most important among these are President Reagan's appointments to the Court and how they have shifted its ideological balance and increased the potential for a strongly conservative Court in the future. This edition also makes use of new material on the Court from research by scholars and from other sources. Some of the new material included in this edition has come from the justices themselves, who in recent years have been unusually willing to speak openly about the Court.

The first chapter of the book serves as an introduction. It discusses the Supreme Court's role in general terms, examines the place of the

Court in the judicial system, takes a first look at the Court as an institution, and summarizes its history.

Each of the remaining five chapters deals with one important aspect of the Court. Chapter 2 examines the justices: their selection, their personal characteristics, and the circumstances under which they leave the Court. Chapter 3 discusses the processes by which cases reach the Court and are chosen for full decisions; the chapter also addresses the Court's caseload and efforts to deal with its growth.

Chapter 4 looks at the Court's decision-making process in the cases that it decides fully. After outlining the Court's decision-making procedures, I turn to the primary concern of the chapter: the factors that influence the Court's choices among alternative decisions and policies. Chapter 5 considers the kinds of issues on which the Court concentrates, the policies that it supports, and the extent of its activism in policy making. I examine these subjects as they stand today and as they have changed over time and suggest explanations for important patterns in Supreme Court policy.

The final chapter deals with the ways that other government policy makers respond to the Court's decisions and with the Court's impact on American society. This chapter is an appropriate conclusion to the book because the Court's significance ultimately depends on the effects of its decisions.

In previous editions I have thanked the many people who helped me. This edition continues to reflect their contributions. In addition, I have benefited from a great deal of new help in revising the book for this edition. Debra Gross, Anne N. Costain, Susan Lawrence, and Saul Brenner offered many useful suggestions for revision and improvement of this edition. Staci Rhine, John Kilwein, and Venita Martin provided valuable research assistance.

A number of people supplied information and ideas that were incorporated into the new edition: William Jenkins, John Kessel, Alfred Klein, Lynn Mather, Mark Miller, Richard Pacelle, Bradley Richardson, and Harold Spaeth. Toni House, the Supreme Court's public information officer, was very helpful in providing needed information. As in all my work, I appreciate the suggestions and encouragement of Gregory Caldeira and Elliot Slotnick, my fellow students of the courts in the Political Science Department at Ohio State University.

The people at CQ Press continue to provide extraordinary assistance in my efforts. I am especially grateful to Lys Ann Shore for her work as copy editor, to Kerry Kern for her tireless efforts as production editor, and to Joanne Daniels for her direction and encouragement.

All these people have my thanks for their help in making this book possible and in making it better.

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The Court

In July 1987, President Ronald Reagan nominated federal judge Robert Bork to the U.S. Supreme Court. Nearly four months later, the Senate refused to confirm Bork's nomination. During that time, his candidacy for the Court became a national issue. An array of interest groups took positions for and against Bork's nomination, one spending more than $1 million to defeat him. President Reagan worked hard to win Senate votes for him. One former president supported Bork, while another opposed him. A public march against him was held in Indiana, and 75,000 people sent telegrams to Congress urging votes for or against him. The Senate hearings on Bork's confirmation received extensive coverage from the mass media, and by the time they ended a fairly obscure scholar and judge had become a familiar figure to a great many people.

The attention given to the Bork nomination was a reminder of the significance of the Supreme Court. Many people perceived that Bork would move the Court toward more conservative policies. They cared about this possibility because they believed that the Court's policies make a great deal of difference. They were correct in this belief. The Supreme Court helps to resolve many of the most important and controversial issues in the United States, and in doing so it shapes government policy in areas as diverse as civil rights and environmental protection.

The role that the Supreme Court plays makes it important to understand this institution. Who are the people who serve on the Court, and how do they get there? How is it determined which cases and issues the Court decides? In resolving the cases before it, on what bases does the Court choose between alternative decisions? In what policy areas is it active, and what kinds of policies does it make in those areas? Finally, what happens to the Court's decisions after they are handed down, and what effects do those decisions actually have?

This book is an effort to provide an understanding of the Supreme Court by answering these questions. Each question will be the subject of one of the chapters that follow. This chapter introduces the book by taking a general look at the Court, supplying the necessary background for the remainder of the book.

A Perspective on the Court

The Court in Law and Politics

The Supreme Court as a Political Body. People often speak of courts as if they are, or at least ought to be, "nonpolitical." In a literal sense, this is impossible: as part of government, courts are political institutions by definition. But many people believe that courts are nonpolitical in the sense that they are uninvolved in the political process and that their decisions are unaffected by nonlegal considerations.

Popular though this view of the courts may be, it is simply inaccurate. The Supreme Court is "political" in a variety of ways. Appointments to the Court frequently are the subject of considerable political contention. Interest groups often help to bring cases to the Court. Most of the justices were active participants in politics before their selection. The justices' political values and their perceptions of public and congressional opinion affect the Court's decisions. The decisions themselves often lead to controversies in government and the nation at large, and the Court and its rulings sometimes become important election issues.

Thus it is impossible to understand the Supreme Court except in the context of politics, and that will be the perspective of this book.

The Court as a Legal Institution. As a political body, the Supreme Court is similar to other government institutions, such as Congress and administrative agencies. Yet it would be a mistake to view the Court as identical to those other, nonjudicial policy makers. The Court's behavior and its position in the political system are affected in fundamental ways by the fact that it is a *court*.

First of all, the Supreme Court makes decisions within the framework of the law. The policy choices that the Court faces are framed as matters of legal interpretation. In this respect the Court's task differs from that of Congress and of some administrative agencies, and the legal context in which the justices work provides a constraint from which legislators are free.

Furthermore, the widespread belief that the Court should be nonpolitical leads to a certain degree of actual insulation from the political process. Supreme Court justices are given lifetime appoint-

ments that allow some freedom from concerns about public approval. Most justices remain fairly aloof from partisan politics, chiefly because open involvement in partisan activity is perceived as illegitimate. Justice Sandra Day O'Connor, for instance, turned down an invitation to appear at a "Salute to Republican Women" at the 1984 Republican national convention. Because most people view direct contact between lobbyists and justices as unacceptable, interest group activity in the Court is restricted primarily to formal channels of legal argument.

For these reasons, the Supreme Court should be viewed as a legal institution as well as a political one. What it does and how it operates are influenced by both the political process and the legal system. Such an ambiguous position makes the Court more complex in some ways than most political institutions, and it also helps to make the Court an interesting case study in political behavior.

The Court as a Policy Maker

This book will be concerned with the Supreme Court in general, but it will give particular emphasis to the Court's role in the making of public policy—the authoritative rules by which government institutions seek to influence the operation of government and to shape society as a whole. Legislation to provide subsidies for wheat farmers, a trial judge's sentence of a convicted criminal, and a Supreme Court decision laying down rules of procedure for an administrative agency are all examples of public policy. Thus the Court may be viewed as part of a policy-making system that includes lower courts as well as the legislative and executive branches of government. It will be useful at this point to look at some important aspects of the Court's policy-making role.

Policy Through Legal Interpretation. As noted above, the Supreme Court makes public policy through the interpretation of provisions of law. Issues of public policy come to the Court in the form of legal questions that the Court is to resolve. In this respect the Court's policy making differs fundamentally in form from that of Congress.

The Court does not face legal questions in the abstract. Rather, the Court addresses these questions in the process of settling specific controversies between parties ("litigants") that bring cases to it. In a sense, then, every decision by the Court has three levels: a judgment about the specific dispute brought to it, an interpretation of the legal issues involved in that dispute, and a position on the policy questions that are connected to the legal issues.

In a specific dispute, the Court determines how the parties to the case should be treated. In a tax case it may decide whether a business must pay taxes claimed by the Internal Revenue Service. In a criminal

case it may choose to uphold a conviction, or it may overturn the conviction while allowing a retrial of the defendant. As this second example indicates, the Court often does not determine the final outcome of a case for the parties but instead directs a lower court in its further consideration of the case.

The Court's treatment of the parties is tied to its interpretation of the legal issues in the case. Some legal issues involve the interpretation of federal statutes, and statutory issues dominate many economic fields. The Court may rule in favor of a taxpayer on the basis of its reading of a section of the federal tax code. About half of the Court's decisions, including most of its decisions in civil liberties fields, rest on interpretations of the Constitution. In these cases the Court's task usually is to determine whether some government policy violates a provision of the Constitution. The Court may uphold the conviction of a criminal defendant on the ground that a disputed search for evidence in the case did not violate the Fourth Amendment.

Finally, the Court's legal interpretations also express policy positions, explicit or implicit. An interpretation of the Fourth Amendment may establish a position favorable to the search powers of law enforcement agencies. Often the Court's policy positions emerge most clearly from a series of decisions, such as a string of decisions in environmental law that support rigorous enforcement of environmental regulations. The positions that the Court establishes in a field such as tax law constitute part of the body of policy made by the various government institutions that work in that field.

The Court's Significance in Policy Making. Through its interpretation of law the Supreme Court plays a critical role in the policy-making system of the federal government. The significance of that role is illustrated by some of the Court's major decisions during the 1970s and 1980s:

—In *Roe v. Wade* (1973), the Court drastically limited the power of states to prohibit abortions.[1] In a long series of later decisions, the Court struck down a variety of state laws regulating abortions but upheld legislation that limited government funding of abortions.[2]

—In a line of decisions since 1978, the Court has ruled on the legality of affirmative action plans that provide preferential treatment to women and racial minority groups. By upholding most of the plans before it, the Court has allowed and encouraged the use of affirmative action.[3]

—In a 1983 decision the Court held unconstitutional a provision that allowed Congress to veto certain decisions of the Immigra-

tion and Naturalization Service. In doing so the Court called into question more than one hundred legislative veto provisions through which Congress had sought to exert control over the president and the bureaucracy.[4]

—In *Bowsher v. Synar* (1986), the Court ruled that one provision of the Gramm-Rudman-Hollings deficit reduction law was unconstitutional. Its decision effectively made the law inoperative, postponing the move toward a balanced budget.

—Most important in its immediate effect was the Court's decision in *United States v. Nixon* (1974), perhaps the pivotal event in the process that led to the resignation of President Richard Nixon.

The Court's development of this role has been based on a favorable conjunction of circumstances. As the French observer Alexis de Tocqueville noted more than a century ago, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[5] Policy disputes tend to reach the courts largely because of the existence of a written Constitution, whose provisions offer a basis for challenges to the legality of government actions. Because so many policy questions come to the courts, the Supreme Court has the chance to rule on a large number of significant policy questions. Moreover, for much of its history the Court has welcomed that opportunity, first insisting on its supremacy as legal arbiter in the early nineteenth century and later making frequent use of its chances to speak on major issues. By doing so, of course, the Court has encouraged people to bring major policy issues to it.

Reaction to the Court's Role: Activism vs. Restraint. Inevitably, the Court's involvement in deciding major issues of public policy has led to controversy. Some of this controversy concerns the substance of the Court's decisions. Legal scholars debate the merits of the Court's rulings in relatively genteel terms. Supreme Court policies also are subject to less genteel discussion in the political arena, as exemplified by criticism of Court decisions on school prayer and abortion.

More fundamentally, people disagree about the Court's general role as a policy maker. That disagreement has taken many forms, but frequently it centers on the dichotomy between judicial activism and judicial restraint. The term *judicial activism* is used in many ways; one key element of the concept is a court's willingness to make significant changes in public policy, particularly in policies established by other institutions.[6] The most visible element of judicial activism is the issuance of decisions that overturn legislative and executive policies, but activism can take other forms. Judicial restraint is simply the avoidance of activism.

Some commentators, such as Robert Bork and former attorney general Edwin Meese, argue strongly for restraint.[7] In their view, the Court should work to limit its role in policy making and particularly to minimize its interference with the policies of the other branches. Advocates of judicial restraint attack activism on several grounds, of which three are especially important: activism is illegitimate because the Court is a relatively undemocratic institution; it is risky because the Court is vulnerable to attack when it takes controversial positions; it is unwise because courts lack the capacity to make effective policy choices.

Others, such as federal judge J. Skelly Wright, defend and support judicial activism. Some proponents of activism see it as a duty under the Constitution. Perhaps most important, proponents of activism see an activist Court as protecting fundamental values, such as liberty, that may be ignored elsewhere in government. Largely for this reason, the supporters of activism applaud the Supreme Court's assertion of a major policy-making role in civil liberties in the last thirty years—a development that many advocates of judicial restraint have criticized.

As we would expect, views about activism and restraint often reflect evaluations of the Court's decisions. Liberals who argued for judicial restraint in the 1920s and 1930s when the Court attacked government regulation of the economy later approved the Court's activism in defense of civil liberties in the 1960s. Today judicial activism continues to be used primarily to support liberal policies, so it is not surprising that conservatives generally advocate judicial restraint. But the debate over judicial activism is more than a dispute about the Court's policies. The Supreme Court's involvement in the making of important public policies raises fundamental questions about the appropriate role of a court, questions that transcend the substance of the Court's decisions at a given time.

Limitations on the Court as a Policy Maker. The debate over activism and restraint underlines the importance of the Supreme Court's part in the policy-making process. But the Court's role in policy making is inherently limited by several factors. First, there is only so much that the Court can do with the rather small number of decisions that it makes each year. In the average year, the Court hands down decisions with full opinions in approximately 150 cases. In contrast, federal administrative agencies published about the same number of regulations in the first two weeks of 1988. In deciding such a small number of cases, the Court addresses only a select set of policy issues. Inevitably, there are whole fields of policy that it barely touches. Even in the fields in which the Court does act, it can deal only with a limited number of the issues that exist at a given time.

Second, even the most activist-minded justices support judicial

restraint in some situations. This support stems in part from judges' training in a legal tradition that emphasizes the value of restraint, and in part from practical considerations. Judicial self-restraint is reflected in the Court's refusal to hear some important and controversial cases, such as the legal challenges brought against American participation in the war in Vietnam.[8] Another reflection of judicial restraint is a set of guidelines that the Court frequently uses to avoid deciding constitutional issues where it is possible to decide or dispose of a case on another basis. These guidelines are listed in a frequently cited opinion by Justice Louis Brandeis in *Ashwander v. Tennessee Valley Authority* (1936).

Finally, even a highly activist Court is limited in its impact by the actions of other policy makers. The Court seldom is the final government institution to deal with the policy issues that it addresses. Its rulings usually must be implemented by lower court judges and administrators, who often retain considerable discretion as to how they will put a Supreme Court decision into effect. Congress and the president influence the ways in which the Court's decisions are carried out, and they can overcome its interpretations of federal statutes simply by amending those statutes. The difference between what the Court rules on an issue and the public policy that ultimately results from government action on that issue may be considerable.

For these reasons, those who see the Supreme Court as the dominant force in American government almost surely are wrong. But if not dominant, the Court does play a very important part in the policy-making process. Certainly the extent of its role in that process is extraordinary for a court.

The Court in the Judicial System

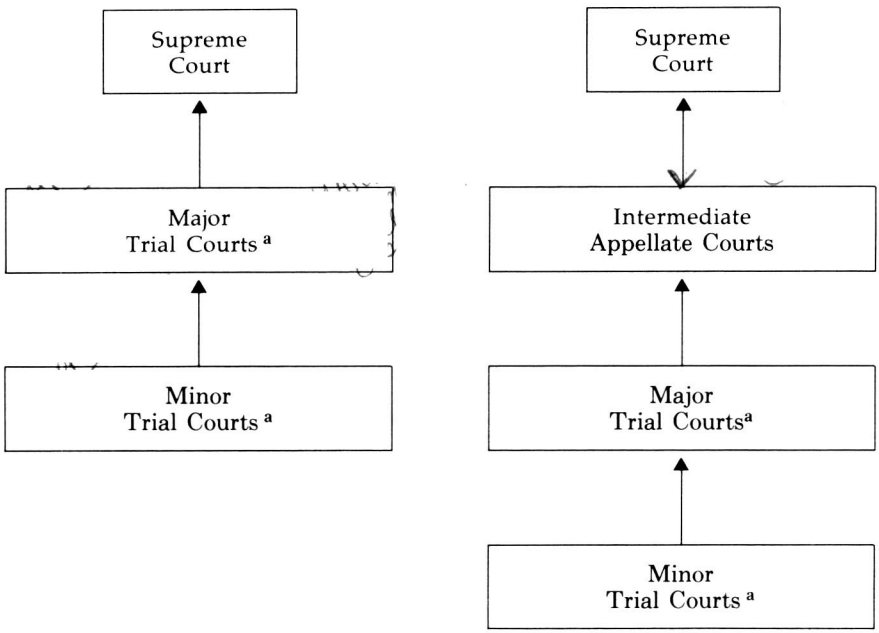
In some respects the Supreme Court is unique among the courts of the United States. But it is also part of a system of courts, and it cannot be understood except in the context of that system. Accordingly, it is important to examine the structure of courts and the Supreme Court's place in that structure.

Structure of the System

Strictly speaking, it is inaccurate to refer to a single court system in the United States. In reality, the courts are divided between the federal system and a separate system in each state.

The federal system may be distinguished from the state systems in terms of jurisdiction, the power to hear and to decide a class of cases. Most of the jurisdiction of the federal courts can be placed in three categories. First are criminal and civil cases that arise under federal laws, including the Constitution. Second are all cases to which the U.S.

Figure 1-1 Most Common Forms of State Court Structures



Note: Arrows indicate most common routes of appeals.

[a] In many states, major and/or minor trial courts are composed of two or more different sets of courts. For instance, minor trial courts in California include Municipal Courts and Justice Courts.

government is a party. Finally, in civil cases involving citizens of different states, if the amount in question is at least $10,000, either party may bring the case to federal court; otherwise, it will be heard in state court. Only a small minority of all cases fall into these categories. The trial courts of a single state as populous as California hear far more cases than do the federal trial courts. The average federal case, however, is more significant than the average state case.

State Court Structure. The states vary considerably in the structures of their court systems. But a few general patterns can be described, and these are illustrated in Figure 1-1. Each state system includes trial courts, which generally hear cases initially as they enter the court system, and appellate courts, which generally review lower court decisions that are appealed to them. Most states have two sets of trial courts, one to handle major criminal and civil cases and the other to deal with minor cases. Major cases on the criminal side usually are those