SECTION I

Courts in America

In many ways, the American courts reflect American society. From its founding, American society has had a shared belief that the best society is a just society and that individual citizens are entitled to have their grievances heard and resolved in a fair manner. As the country has grown and developed, so too has the institution to which citizens ultimately turn for the protection and accomplishment of justice in society—the American courts.

This section, consisting of the first three chapters of the book, examines the foundations on which all courts in America are built: justice, law, and government. These concepts are interrelated by their function and importance in society. The three chapters in this section separately address these foundations by exploring the basis for the operation of American courts.

The first chapter introduces the meaning of justice in the United States and the justice "system" that has developed to achieve it. As a concept, the word justice has many meanings that vary depending on the perspective of the person using it. For example, when a crime is committed, the victim's view of bringing a perpetrator to justice will depend on the extent of the victim's loss. A central purpose of American courts is to determine what justice requires in the myriad cases that come before them. These issues are the focus of Chapter 1.

In Chapter 2, the question of what constitutes law is examined. Law is the primary tool, subject matter, and mechanism used by courts to achieve justice. Law is central to American society; without it, there would be no need for courts and no principled way of achieving justice for individuals or the larger society. Thus, Chapter 2 discusses law as a necessary concept for achieving justice and producing a just society. A lawless society is not a society at all, and only when people choose to live and govern themselves "under law" can people's perceptions of justice be realized.

American society has developed comprehensive and often complex laws that are sometimes bewildering to citizens. Chapter 2 begins to examine the structure of this legal system and the ways in which it is interpreted and applied by the courts. The distinction between criminal law and civil is discussed. Although each of these forms the basis for the criminal justice system and the civil justice system, these seemingly distinct "systems" of justice are parts of a single justice system that the courts administer.

Chapter 3 discusses the American courts and the manner in which they operate as a unified system of justice. This occurs as a result of the place that courts occupy within the American "dual" system of government, in which federal authority and state authority operate within distinct spheres. Thus, the chapter focuses on the distinction between state and federal courts and examines the concept of jurisdiction as an organizing principle. In addition, the chapter considers the goals shared by courts in the administration of justice and the need for legal procedures used to achieve fairness in the operation of courts.

Section I provides a foundation for understanding the need for courts in America, their role in society, and the manner in which they operate. In subsequent sections, this foundation is used to examine the work of specific types of courts in specific types of cases. In particular, the organization, processes, and procedures of the various courts found in America are examined, but the context for these aspects of court functioning has as its basis individual justice and its relationship to law. Section I explores that context.

American Justice

1

What Is This Chapter About?

This chapter introduces concepts relating to the justice system in the United States. For our purposes, the "justice system" means the institutions and procedures used in this country to settle disputes, whether those disputes are between individuals or between the government and one or more of its citizens. Apart from informal settlement of such disputes, the primary institution for resolving them is the courts. Thus, this chapter begins our discussion of the topic that is the focus of this book: the courts in America and the ways in which they operate.

We first consider the meaning of "justice," its role in society, and its relationship to the law. Next, we explore the nature of disputes in America and the ways in which they may be resolved. Finally, we will begin to consider the courts as an American institution, their role in society, and our need for them. This chapter concludes with an orientation to judge-made law and the structure of written court decisions.

Learning Objectives

After reading this chapter, you should be able to

1. Understand what is meant by "justice" and the different forms it may take.
2. Distinguish between formal and informal ways of resolving disputes.
3. Understand the need for a justice system and what it accomplishes.
4. Describe the role of the courts within the justice system.
5. Understand the primary characteristics of courts.

Justice in the United States

In 2006, socialite and celebrity Paris Hilton was charged with reckless driving and driving under the influence of drugs and alcohol. She pleaded no contest to the charges and was sentenced to 3 years of probation, fined $1,500, and ordered to attend an alcohol education program. She later violated the terms of her probation by failing to enroll in the alcohol education program, by being charged with two more traffic offenses (including driving her new Bentley 70 mph in a 35-mph zone at night without headlights on a suspended license), and failing to obey the court's original orders. As a result, the judge revoked her probation and ordered her to serve 45 days in jail (Johnson & Parker, 2007).

After 3 days of imprisonment, the county sheriff in charge of the jail allowed her to leave and serve the remainder of her sentence confined in her mansion home "for health reasons" (Waxman, 2007). Hearing of this, the judge who sentenced her ordered that she immediately appear before him to explain why his order (that she be imprisoned for violating her probation) was not being carried out. He then made it clear that she was to be imprisoned in jail, not at her palatial home. When Hilton was led from the courtroom, she hysterically called for her mother crying, "It isn't fair!" To what was she referring? That she was returning to jail? That the judge had treated her differently than other offenders? That "justice" for celebrities like her should be something different than it is for others? That she did not deserve to be imprisoned to begin with?

Duke lacrosse players David Evans, Colin Finnerty, and Reade Seligmann were indicted on sexual assault, and false imprisonment charges were brought by District Attorney Mike Nifong in Durham, North Carolina. Despite evidence of the students' innocence, Nifong refused to dismiss the case, lied to the court about the exonerating evidence, and was found in contempt of court (Wilson, 2007). The state's Attorney General Roy Cooper ultimately took over the case, found the students to be innocent of the charges, and dismissed the case, calling it a "tragic rush to accuse." Nifong was later disbarred as a result of his actions in the wrongful prosecution and served 24 hours in jail for contempt of court. The students subsequently sued Nifong and the District Attorney's office, claiming harm to their reputations, lost opportunities, attorneys' fees, and expenses required in defending against the false charges (Aldridge, 2008). Was this a case of justice "gone wild," or did justice ultimately prevail, despite the harm caused along the way?

Although the Paris Hilton and Duke cases, even though prominent, may not represent either justice or the justice

system at its best, they do represent society's response to perceived wrongdoing and the attempt of the courts to "do justice." They also show that different individuals, whether parties to a case, participants in the justice system, or the public looking on, have varied responses and perceptions about what justice requires, but the idea of justice in American society is not just a matter involving the perspective of who is getting or giving it. Justice depends to a great extent on the system that has developed for making decisions about what constitutes justice. It also depends on the perspectives of members of society to determine what a "just" society requires of its citizens and how the procedures for achieving it should operate. This book is about that system of justice. More specifically, it is about the processes and framework through which American society seeks to achieve justice.

What Is Justice?

"Justice" is a commonly used term that defies easy definition (Arrigo, 1999; Robinson, 2002). It is a concept that relates to our ideas about what is right and wrong, what is moral, what is fair, how people should treat each other, how government should treat citizens, or the ideal for which humans should strive. One dictionary broadly defines justice as "upholding what is just, especially fair treatment and due reward in accordance with honor, standards, or law" (Pickett et al., 2000). Consistent with this definition, most Americans associate justice with words such as *fairness*, *equality*, and *goodness* and believe that they and others are entitled to and should be treated with justice.

How is justice achieved, however? When we speak of justice in America, we may be referring to formal or informal ways of accomplishing it, including, for example, our personal notions of fairness and equality, treatment of ourselves and others, and methods for resolving disputes. We expect justice in our private lives, in our relationships with others, and in the society in which we live. Social policies are used by their advocates to achieve particular conceptions of justice. Political parties have as their foundation notions of what makes a just society. Government itself expands or contracts based on the views of elected or appointed leaders about justice.

The law itself reflects society's beliefs about how justice ought to be accomplished. Justice may therefore also be defined in terms of law: "A moral ideal that the law seeks to uphold in the protection of rights and punishment of wrongs" (Martin & Law, 2009). As a "moral ideal," justice may be difficult or impossible to achieve in every case, but it is nonetheless a foundation of American society and a concept in which those in society share a belief, even if they disagree about its meaning or application.

The Preamble to the United States Constitution refers to the importance of justice in America: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." Thus, one of the goals of our form of constitutional government and laws made under it is to "establish justice." The law operates in the interests of justice; it is designed to help people as they govern themselves, interact with each other in their business and personal affairs, and resolve their disputes.

Justice, to a large extent, however, is subjective; what rights should be protected and what wrongs should be punished may differ from person to person. The thoughts, feelings, background, and experiences of a person affect their understanding of justice, and individual views of justice may therefore vary considerably. This is problematic. Can justice have a consistent meaning and application when its definition varies from person to person? It is through the law that justice becomes meaningful. Thus, justice and law are necessarily intertwined—the law seeks to accomplish justice, and justice is defined in terms of law.

As a result, the primary method in American society for achieving justice is through reliance on the court system to make decisions that apply to individuals and society as a whole. Those who seek justice in America rely to a great extent on the courts to implement the law and see that justice is done in a wide range of cases and disputes. An understanding of the court system, its influences, and the context in which it operates is therefore essential to considering the meaning of justice.

Courts are imperfect institutions, however. Take the case of Paris Hilton, discussed previously here. The sentence given her, although similar to sentences given to others committing the same offenses, must have seemed insignificant to her because she essentially ignored it. Because, for example, a $1,500 fine is insignificant to a wealthy person, would a larger fine have achieved justice? Conversely, was she treated too harshly when the court demanded that she be jailed after having been released by the sheriff? It is common practice for jailers to release low-level offenders for a variety of reasons, yet the court demanded she be returned to jail. Did Hilton's celebrity work against her?

Also consider the Duke lacrosse case. Clearly, the wrongful conduct of the prosecutor shows how some "bad apples" can become part of the criminal justice system, but some would argue that it was the wealth of the defendants' families who could afford private attorneys and investigative expenses that saved them from what initially seemed to be a lost cause. If the defendants had been poor or minorities or not attending a well-known private university, would the outcome be the same? Would the case have been pursued with the same vigor, even with an honest prosecutor?

Despite the best efforts of those who administer justice, questions of what is fair and what is just remain subjective. That is, justice is not a "one-size-fits-all" concept. It depends on the behavior of the individual being judged. It depends on the person doing the judging. It depends on the facts and the evidence. It depends on society's views, and it depends on the law. It is not surprising, therefore, that the concept of justice is best thought of as multifaceted, where its definition ultimately depends on the circumstances or problems to which its applies.

The case of Humberto Fidel Regalado Cuellar represents problems with which the courts are often confronted. At first blush, the case appears to be straightforward. Cuellar was driving his Volkswagen Beetle through Texas toward Mexico. He was stopped for driving erratically. Cuellar spoke no English and thus was questioned by a Spanish-speaking officer. He avoided eye contact, appeared nervous, gave varying accounts of where he had been and where he was going, had no luggage, had a wad of cash that smelled of marijuana in his shirt pocket, and made the sign of the cross while officers searched his Volkswagen. While searching the car, officers did not find any drugs, but did find $85,000 wrapped in plastic and duct tape under the rear floorboard, as well as quantities of animal hair in the rear seating area, which Cuellar claimed to be from transporting goats. Based on these facts, what would you conclude? Is Cuellar a criminal? If so, what crime was committed? Were any of Cuellar's actions illegal?

Cuellar was charged with the federal crime of money laundering, by attempting to transport money from unlawful activity outside the United States. The money laundering statute required the prosecutor to show that the transportation was designed "to conceal or disguise the nature, the location, the source, the ownership, or the control" of the money (*Cuellar v. U.S.*, 128 S.Ct. 1994, 1998 (2008)). A jury found Cuellar guilty, and he was sentenced to 78 months in prison.

After trial, Cuellar appealed to the federal court of appeals, which first overturned the conviction, then reheard the case, changed its mind, and upheld the trial court and the conviction. Read the case excerpt found in **Case Decision 1.1**, which explains why. The case was then appealed to the United States Supreme Court, which upheld the court of appeals, dismissing Cuellar's conviction. Why did the Supreme Court overturn the conviction? Was this a just result?

The Cuellar case is unusual because it went "all the way to the Supreme Court," but otherwise, it represents the normal workings of the American court system and the processes in place to achieve justice. It also shows very clearly what courts do; they interpret the law. The case required each of the courts involved to determine what the requirements of the federal money laundering statute were and whether they were supported by the facts. Each of the cases discussed in this book involves that same process. Courts take a procedural approach to the law, and the administration of justice depends on such an approach.

Types of Justice

Given the difficulty in reaching a single definition of justice, it is not surprising that different ways of categorizing or thinking about justice have arisen. Justice is perhaps best considered, not as a single concept capable of definition, but as a collection of differing viewpoints on fairness in society. Although each of these is concerned with the concept of fairness, each examines the meaning of justice from a different societal perspective.

A primary distinction that may be drawn is between forms of "corrective justice" and forms of "distributive justice." Corrective justice relates to the manner in which individuals who violate the law should be punished. It defines justice in terms of who should be punished, how punishments should be imposed, and whether punishments bear a proper relationship to the violation of law

Case Decision 1.1 *Cuellar v. U.S.*, 128 S. Ct. 1994 (2008)

Opinion of the Court by Justice Thomas:

This case involves the provision of the federal money laundering statute that prohibits international transportation of the proceeds of unlawful activity. Petitioner argues that his conviction cannot stand because, while the evidence demonstrates that he took steps to hide illicit funds *en route* to Mexico, it does not show that the cross-border transport of those funds was designed to create the appearance of legitimate wealth. Although we agree with the Government that the statute does not require proof that the defendant attempted to "legitimize" tainted funds, we agree with petitioner that the Government must demonstrate that the defendant did more than merely hide the money during its transport. We therefore reverse the judgment of the Fifth Circuit.

I

On July 14, 2004, petitioner Humberto Fidel Regalado Cuellar was stopped in southern Texas for driving erratically. Driving south toward the Mexican border, about 114 miles away, petitioner had just passed the town of Eldorado. In response to the officer's questions, petitioner, who spoke no English, handed the officer a stack of papers. Included were bus tickets showing travel from a Texas border town to San Antonio on July 13 and, in the other direction, from San Antonio to Big Spring, Texas, on July 14. A Spanish-speaking officer, Trooper Danny Nuñez, was called to the scene and began questioning petitioner. Trooper Nuñez soon became suspicious because petitioner was avoiding eye contact and seemed very nervous. Petitioner claimed to be on a 3-day business trip, but he had no

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luggage or extra clothing with him, and he gave conflicting accounts of his itinerary. When Trooper Nuñez asked petitioner about a bulge in his shirt pocket, petitioner produced a wad of cash that smelled of marijuana.

Petitioner consented to a search of the Volkswagen Beetle that he was driving. While the officers were searching the vehicle, Trooper Nuñez observed petitioner standing on the side of the road making the sign of the cross, which he interpreted to mean that petitioner knew he was in trouble. A drug detection dog alerted on the cash from petitioner's shirt pocket and on the rear area of the car. Further scrutiny uncovered a secret compartment under the rear floorboard, and inside the compartment the officers found approximately $81,000 in cash. The money was bundled in plastic bags and duct tape, and animal hair was spread in the rear of the vehicle. Petitioner claimed that he had previously transported goats in the vehicle, but Trooper Nuñez doubted that goats could fit in such a small space and suspected that the hair had been spread in an attempt to mask the smell of marijuana.

There were signs that the compartment had been recently created and that someone had attempted to cover up the bodywork: The Beetle's carpeting appeared newer than the rest of the interior, and the exterior of the vehicle appeared to have been purposely splashed with mud to cover up toolmarks, fresh paint, or other work. In the backseat, officers found a fast-food restaurant receipt dated the same day from a city farther north than petitioner claimed to have traveled. After a check of petitioner's last border crossing also proved inconsistent with his story, petitioner was arrested and interrogated. He continued to tell conflicting stories about his travels. At one point, before he knew that the officers had found the cash, he remarked to Trooper Nuñez that he had to have the car in Mexico by midnight or else his family would be "floating down the river." App. 50.

Petitioner was charged with attempting to transport the proceeds of unlawful activity across the border, knowing that the transportation was designed "to conceal or disguise the nature, the location, the source, the ownership, or the control" of the money. 18 U.S.C. § 1956(a)(2)(B)(i). After a 2-day trial, the jury found petitioner guilty. The District Court denied petitioner's motion for judgment of acquittal based on insufficient evidence and sentenced petitioner to 78 months in prison, followed by three years of supervised release.

On appeal, a divided panel of the Fifth Circuit reversed and rendered a judgment of acquittal, [holding] that, although the evidence showed that petitioner concealed the money for the purpose of transporting it, the statute requires that the purpose of the transportation itself must be to conceal or disguise the unlawful proceeds. Analogizing from cases interpreting another provision of the money laundering statute, the court held that the transportation must be undertaken in an attempt to create the appearance of legitimate wealth. Although the evidence showed intent to avoid detection while driving the funds to Mexico, it did not show that petitioner intended to create the appearance of legitimate wealth, and accordingly no rational trier of fact could have found petitioner guilty.

The Fifth Circuit granted rehearing en banc and affirmed petitioner's conviction. The court rejected as inconsistent with the statutory text petitioner's argument that the Government must prove that he attempted to create the appearance of legitimate wealth. But it held that petitioner's extensive efforts to prevent detection of the funds during transportation showed that petitioner sought to conceal or disguise the nature, location, and source, ownership, or control of the funds.

We granted certiorari.

II

The federal money laundering statute, 18 U.S.C. § 1956, prohibits specified transfers of money derived from unlawful activities. Subsection (a)(1) makes it unlawful to engage in certain financial transactions, while subsection (a)(2) criminalizes certain kinds of transportation. Petitioner was charged under the transportation provision: The indictment alleged that he attempted to transport illicit proceeds across the Mexican border "knowing that such transportation was designed in whole or in part to conceal and disguise the nature, location, source, ownership, and control" of the funds.

A

We first consider the "designed . . . to conceal" element. Petitioner argues that to satisfy this element, the Government must prove that the defendant attempted to create the appearance of legitimate wealth. Petitioner would replace "designed . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds" with "designed to create the appearance of

legitimate wealth." This is consistent with the plain meaning of "money laundering," petitioner argues, because that term is commonly understood to mean disguising illegally obtained money in order to make it appear legitimate. In petitioner's view, this common understanding of "money laundering" is implicit in both the transaction and transportation provisions of the statute because concealing or disguising any of the listed attributes would necessarily have the effect of making the funds appear legitimate, and, conversely, revealing any such attribute would necessarily reveal the funds as illicit. The Government disagrees, contending that making funds appear legitimate is merely one way to accomplish money laundering, and that revealing a listed attribute would not necessarily reveal the funds' illicit nature. In any event, the Government argues, the statute should not be cabined to target only classic money laundering because Congress intended to reach any conduct that impairs the ability of law enforcement to find and recover the unlawful proceeds.

We agree with petitioner that taking steps to make funds appear legitimate is the common meaning of the term "money laundering." See American Heritage Dictionary 992 (4th ed. 2000) (hereinafter Am. Hert.) (defining "launder" as "[t]o disguise the source or nature of (illegal funds, for example) by channeling through an intermediate agent"); Black's Law Dictionary 1027 (8th ed. 2004) (hereinafter Black's) (defining "money-laundering" to mean "[t]he act of transferring illegally obtained money through legitimate people or accounts so that its original source cannot be traced"). But to the extent they are inconsistent, we must be guided by the words of the operative statutory provision, and not by the common meaning of the statute's title. Here, Congress used broad language that captures more than classic money laundering: In addition to concealing or disguising the nature or source of illegal funds, Congress also sought to reach transportation designed to conceal or disguise the location, ownership, or control of the funds. For example, a defendant who smuggles cash into Mexico with the intent of hiding it from authorities by burying it in the desert may have engaged in transportation designed to conceal the location of those funds, but his conduct would not necessarily have the effect of making the funds appear legitimate.

Nor do we find persuasive petitioner's attempt to infuse a "classic money laundering" requirement into the listed attributes. Contrary to petitioner's argument, revealing those attributes—nature, location, source, ownership, or control—would not necessarily expose the illegitimacy of the funds. Digging up the cash buried in the Mexican desert, for example, would not necessarily reveal that it was derived from unlawful activity. Indeed, of all the listed attributes, only "nature" is coextensive with the funds' illegitimate character: Exposing the nature of illicit funds would, by definition, reveal them as unlawful proceeds. But nature is only one attribute in the statute; that it may be coextensive with the creation of the appearance of legitimate wealth does not mean that Congress intended that requirement to swallow the other listed attributes.

We likewise are skeptical of petitioner's argument that violating the elements of the statute would necessarily have the effect of making the funds appear more legitimate than they did before. It is true that concealing or disguising any one of the listed attributes may have the effect of making the funds appear more legitimate—largely because concealing or disguising those attributes might impede law enforcement's ability to identify illegitimate funds—but we are not convinced that this is necessarily so. It might be possible for a defendant to conceal or disguise a listed attribute without also creating the appearance of legitimate wealth. Petitioner's "appearance of legitimate wealth" requirement simply has no basis in the operative provision's text.

B

Having concluded that the statute contains no "appearance of legitimate wealth" requirement, we next consider whether the evidence that petitioner concealed the money during transportation is sufficient to sustain his conviction. As noted, petitioner was convicted under § 1956(a)(2)(B)(i), which, in relevant part, makes it a crime to attempt to transport "funds from a place in the United States to . . . a place outside the United States . . . knowing that the . . . funds involved in the transportation . . . represent the proceeds of some form of unlawful activity and knowing that such transportation . . . is designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." Accordingly, the Government was required in this case to prove that petitioner (1) attempted to transport funds from the United States to Mexico, (2) knew that these funds "represent[ed] the proceeds of some form of unlawful activity,"

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e.g., drug trafficking, and (3) knew that "such transportation" was designed to "conceal or disguise the nature, the location, the source, the ownership, or the control" of the funds.

It is the last of these that is at issue before us, viz., whether petitioner knew that "such transportation" was designed to conceal or disguise the specified attributes of the illegally obtained funds. In this connection, it is important to keep in mind that the critical transportation was not the transportation of the funds within this country on the way to the border. Instead, the term "such transportation" means transportation "from a place in the United States to . . . a place outside the United States"—here, from the United States to Mexico. Therefore, what the Government had to prove was that petitioner knew that taking the funds to Mexico was "designed," at least in part, to conceal or disguise their "nature," "location," "source," "ownership," or "control."

Petitioner argues that the evidence is not sufficient to sustain his conviction because concealing or disguising a listed attribute of the funds during transportation cannot satisfy the "designed . . . to conceal" element. Citing cases that interpret the identical phrase in the transaction provision to exclude "mere spending," petitioner argues that the transportation provision must exclude "mere hiding." Otherwise, petitioner contends, all cross-border transport of illicit funds would fall under the statute because people regularly make minimal efforts to conceal money, such as placing it inside a wallet or other receptacle, in order to secure it during travel. The Government responds that concealment during transportation is sufficient to satisfy this element because it is circumstantial evidence that the ultimate purpose of the transportation—*i.e.*, its "design"—is to conceal or disguise a listed attribute of the funds. This standard would not criminalize all cross-border transport of illicit funds, the Government argues, because, just as in the transaction cases, the statute encompasses only *substantial* efforts at concealment. As a result, the Government agrees with the Court of Appeals that a violation of the transportation provision cannot be established solely by evidence that the defendant carried money in a wallet or concealed it in some other conventional or incidental way.

We agree with petitioner that merely hiding funds during transportation is not sufficient to violate the statute, even if substantial efforts have been expended to conceal the money. Our conclusion turns on the text of § 1956(a)(2)(B)(i), and particularly on the term "design." In this context, "design" means purpose or plan; *i.e.*, the intended aim of the transportation. See Am. Hert. 491 ("To formulate a plan for; devise"; "[t]o create or contrive for a particular purpose or effect"); Black's 478 ("A plan or scheme"; "[p]urpose or intention combined with a plan"); see also Brief for United States 14 (" 'to conceive and plan out in the mind' " (quoting Webster's Third New International Dictionary 611 (1993))). Congress wrote "knowing that such transportation is designed . . . to conceal or disguise" a listed attribute of the funds, § 1956(a)(2)(B)(i), and when an act is "designed to" do something, the most natural reading is that it has that something as its purpose. The Fifth Circuit employed this meaning of design when it referred to the "transportation design or plan to get the funds out of this country."

But the Fifth Circuit went on to discuss the "design" of the transportation in a different sense. It described the packaging of the money, its placement in the hidden compartment, and the use of animal hair to mask its scent as "*aspects* of the transportation" that "were designed to conceal or disguise" the nature and location of the cash. Because the Fifth Circuit used "design" to refer not to the purpose of the transportation but to the manner in which it was carried out, its use of the term in this context was consistent with the alternate meaning of "design" as structure or arrangement. See Am. Hert. 491, 492 ("To plan out in systematic, usually graphic form"; "[t]he purposeful or inventive arrangement of parts or details"); Black's 478 ("The pattern or configuration of elements in something, such as a work of art"). If the statutory term had this meaning, it would apply whenever a person transported illicit funds in a secretive manner. Judge Smith [of the court of appeals] supplied an example of this construction: A petty thief who hides money in his shoe and then walks across the border to spend the money in local bars has engaged in transportation designed to conceal the location of the money because he has hidden it in an unlikely place.

We think it implausible, however, that Congress intended this meaning of "design." If it had, it could have expressed its intention simply by writing "knowing that such transportation conceals or disguises," rather than the more complex formulation "knowing that such transportation . . . is designed . . . to conceal or disguise." § 1956(a)(2)(B)(i). It seems far more likely that Congress intended courts to apply the familiar criminal law concepts of purpose and intent than to focus exclusively on how a defendant "structured" the transportation. In addition, the structural meaning of "design" is both overinclusive and underinclusive: It would capture individuals who structured trans-

portation in a secretive way but lacked any criminal intent (such as a person who hid illicit funds *en route* to turn them over to law enforcement); yet it would exclude individuals who fully intended to move the funds in order to impede detection by law enforcement but failed to hide them during the transportation.

To be sure, purpose and structure are often related. One may employ structure to achieve a purpose: For example, the petty thief may hide money in his shoe to prevent it from being detected as he crosses the border with the intent to hide the money in Mexico. Although transporting money in a conventional manner may suggest no particular purpose other than simply to move it from one place to another, secretively transporting it suggests, at least, that the defendant did not want the money to be detected during transport. In this case, evidence of the methods petitioner used to transport the nearly $81,000 in cash—bundled in plastic bags and hidden in a secret compartment covered with animal hair—was plainly probative of an underlying goal to prevent the funds from being detected while he drove them from the United States to Mexico. The same secretive aspects of the transportation also may be circumstantial evidence that the transportation itself was intended to avoid detection of the funds, because, for example, they may suggest that the transportation is only one step in a larger plan to facilitate the cross-border transport of the funds. But its probative force, in that context, is weak. [T]hat is, *how* one moves the money is distinct from *why* one moves the money. Evidence of the former, standing alone, is not sufficient to prove the latter.

This case illustrates why: Even with abundant evidence that petitioner had concealed the money in order to transport it, the Government's own expert witness—ICE Agent Richard Nuckles—testified that the purpose of the transportation was to compensate the leaders of the operation. ("[T]he bulk of [the money] generally goes back to Mexico, because the smuggler is the one who originated this entire process. He's going to get a large cut of the profit, and that money has to be moved back to him in Mexico"). The evidence suggested that the secretive aspects of the transportation were employed to *facilitate* the transportation, but not necessarily that secrecy was the *purpose* of the transportation. Agent Nuckles testified that the secretive manner of transportation was consistent with drug smuggling, but the Government failed to introduce any evidence that the reason drug smugglers move money to Mexico is to conceal or disguise a listed attribute of the funds.

Agent Nuckles also testified that Acuna, the Mexican border town to which petitioner was headed, has a cash economy and that U.S. currency is widely accepted there. The Fifth Circuit apparently viewed this as evidence that petitioner transported the money in order to conceal or disguise it: "[G]iven Mexico's largely cash economy, if [petitioner] had successfully transported the funds to Mexico without detection, the jury was entitled to find that the funds would have been better concealed or concealable after the transportation than before." The statutory text makes clear, however, that a conviction under this provision requires proof that the purpose—not merely effect—of the transportation was to conceal or disguise a listed attribute. Although the evidence suggested that petitioner's transportation would have had the effect of concealing the funds, the evidence did not demonstrate that such concealment was the purpose of the transportation because, for instance, there was no evidence that petitioner knew about or intended the effect.

In sum, we conclude that the evidence introduced by the Government was not sufficient to permit a reasonable jury to conclude beyond a reasonable doubt that petitioner's transportation was "designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds." § 1956(a)(2)(B)(i).

III

The provision of the money laundering statute under which petitioner was convicted requires proof that the transportation was "designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control" of the funds. § 1956(a)(2)(B)(i). Although this element does not require proof that the defendant attempted to create the appearance of legitimate wealth, neither can it be satisfied solely by evidence that a defendant concealed the funds during their transport. In this case, the only evidence introduced to prove this element showed that petitioner engaged in extensive efforts to conceal the funds *en route* to Mexico, and thus his conviction cannot stand. We reverse the judgment of the Fifth Circuit.

It is so ordered.

they seek to address (Tomasi, 2002). The focus of the criminal justice system is largely on implementing corrective justice (Feinberg, 1987). Distributive justice refers to the manner in which rights, liberties, and benefits of membership in a society are allocated among its members. Distributive justice defines justice in terms of whether the parties to a dispute get what they "deserve" (Rawls, 1971, 2001). Some of the specific conceptualizations of both corrective and distributive justice are discussed later here.

Social Justice

Social justice is a broad term that encompasses notions of equality and fairness to all individuals and groups within society (Wendorf et al., 2002; Tyler & Smith, 1997). In this respect, the concepts of distributive justice and social justice are closely aligned; however, social justice may be distinguished from justice for individuals. Whereas distributive justice involves questions of whether another individual, the government, or society itself has treated a person in a manner consistent with the treatment of others or in an otherwise equitable manner, social justice examines broader influences and outcomes within society that may affect an individual, a group, or the larger society in which they exist (Douglass, 1978). It adheres to the idea that individual justice cannot be said to exist when social forces prevent subgroups within society from achieving the opportunities that others may have (Buchanan & Mathieu, 1986). This includes the idea of economic justice that addresses concerns about the distribution of economic resources among people, helping the poor, as well as job availability and advancement, and opportunities for producing wealth. Social justice also includes race, gender, or age discrimination, as well as concerns about the status of the mentally disabled in society. It highlights the need for society to adopt policies that create equal opportunities for individuals within these groups, whether through affirmative action, legislation, court action, or civic activism.

Thus, social justice is a matter that depends on the concerns of the individual or group asserting it, but always has the betterment of society as a goal. That is, proponents of social justice are typically proponents of social welfare, where the welfare of society is said to improve only to the extent that subgroups within society stand on an equal footing (Hegtvedt & Markovsky, 1995). This contrasts with the view that individual rights supersede societal interests and that social justice, to the extent that it is a goal, can only be achieved by the fair adjudication of individual cases. In other words, justice for one is justice for all.

Retributive Justice

The focus of retributive justice is the view that justice demands a penalty from those who act in a way that is harmful to others or is harmful to society. Retributive justice accomplishes the punishment goal of retribution, which is the "just deserts" philosophy that views offenders as deserving of punishment in accordance with the seriousness of their offense. Retributive justice is also said to be unilateral; that is, it seeks to "repair" justice by unilaterally imposing punishment on offenders (Wenzel et al., 2008). To a large extent, the criminal justice system in America is based on retributive justice policies. Indeed, retributive justice may be viewed as a justification for the criminal law itself (Moore, 1997). Those who commit crimes are considered deserving of punishment and the system focuses on imposing a penalty on the offender that exacts retribution and satisfies the demands of society (Husak, 2000). These demands include safety for members of the community, punishment that deters future offenses, and to some extent victims' desire for revenge.

One basis for retributive justice as a social theory is that victims are entitled to see that those who harm them are punished, in order for the victim to find "closure" and in order for the wrongdoer to have any chance of redemption and acceptance by society (Fletcher, 1999; Moore, 1999). Retributive justice is therefore sometimes viewed as consistent with the "victims' rights" movement in criminal justice, which seeks greater input from victims in determining the liability and punishment of criminal offenders. Despite this affinity between retributive justice and victim rights, retributive justice does not depend on or provide any role for victims as necessary to accomplish justice in the punishment of offenders (Moore, 1999).

Restorative Justice

Restorative justice reflects a focus on the victim of crime. Traditionally, the criminal justice system has viewed violations of criminal law as offenses against the state, where the government's role in "bringing an offender to justice" solely involved criminal prosecution and punitive sanctions. Restorative justice attempts to shift the perspective of the system by considering the effect of criminal offenses on specific individual victims, rather than the more generalized harm inflicted on society (Strickland, 2004). It seeks to "restore" the victim to his or her precrime state by having the perpetrator make amends for the harm caused. It also has as a goal the "restoration" of the offender as a member of the community or, more generally, society. In this respect it may be viewed as bilateral, where society and the offender together seek to restore justice to the community (Wenzel et al., 2008). Thus, restorative justice has a rehabilitative emphasis where the offender benefits from his attempt to "fix" the harm caused the victim (Murphy, 1990).

This may take various forms. Offenders may be required to pay financial or other forms of restitution, such as fixing a broken window or a door lock or replacing slashed tires on a car. They may be ordered to engage in victim-offender mediation, where the offender must meet with the victim to discuss the harm and its effects. It may also include participating in community service programs focused on assistance to other victims of crimes similar to the one committed by the offender and allow the offender to see more the clearly the personal effect that his or her behavior has on others.

Procedural Justice

The idea of procedural justice is one in which the process through which disputes are resolved is paramount. The reason for this is that people will perceive outcomes as fair

only to the extent that the procedures used to reach them are fair (Skitka & Crosby, 2003; Tyler, 1990). Because the emphasis is on procedure, what is considered to be just is an outcome that results from a clearly established process that is followed in the same way in each case. Thus, procedural justice defines justice not in terms of a judicial decision's effect on a person, but rather in terms of whether the individual had the opportunity to present his or her case in the same manner as other litigants. Much of our system of justice administered by courts of law is guided by principles of procedural justice.

Two aspects of procedural justice exist: fairness as it relates to the actual decision-making process used by a court and fairness involving the type of treatment people believe they have received in court (Tyler & Blader, 2000). Both of these aspects affect the confidence people have in the justice system as well as having an effect on their behavior and their perceptions of whether the system is "fair."

Questions of procedural justice have been raised about the detention without trial of suspected terrorists at a U.S. military base in Guantanamo Bay, Cuba. In *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the U.S. Supreme Court held that prisoners of the American "war on terror" being held at Guantanamo have a right to habeas corpus, which is the right of a prisoner to a hearing before a court of law in which the government must justify holding the prisoner. The case required interpretation of Article I, Section 9 of the U.S. Constitution, referred to as the "suspension clause," which provides that "the Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in the Case of Rebellion or Invasion the public safety may require it." The government argued that the war on terror was a circumstance in which public safety required that the detainees be held and that the suspension clause (and Congress' approval) authorized the President to suspend habeas corpus for the Guantanamo prisoners. The government further argued that because the detainees were not on U.S. soil, they were not entitled to the benefit of constitutional rights in any case. Throughout its lengthy opinion, the Court noted that neither Congress nor the President could justify the lengthy detention (6 years) of prisoners or deny them access to the courts. The Court found that

> petitioners may invoke the fundamental procedural protections of habeas corpus. The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law (128 S. Ct. at 2277).

By finding a right to habeas corpus for non-Americans being held outside of U.S. soil, the Court was basing its conclusions on the need for procedural justice.

And Justice for All

Regardless of one's perspective on what constitutes justice or the type of justice employed, it is clear that the concept of justice relates to the treatment of people and is an important concept only to the extent that it benefits people. In the American democracy, justice involves relationships among people and the relationship of people to their government, and the law seeks to clarify those relationships. For example, in the case of *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L.Ed. 937 (1905), the labor movement and its unions in the state of New York sought to achieve shorter working hours for workers in many businesses, including bakeries, where workers chronically worked over 12 hours a day for 6 or 7 days a week, in unsafe working conditions for low pay. As a result, the legislature passed a law limiting the number of hours bakers could work to 10 hours per day, or no more than 60 hours per week. Many employers ignored the law, however. When one bakery owner, Joseph Lochner, did so, he was fined. He appealed the fine to the U.S. Supreme Court, claiming that he had a constitutional right to conduct his business in a manner he saw fit and that the state cannot limit his business activities by regulating working hours. The Court overturned the fine, stating that the government may not infringe Lochner's freedom to contract with his employees, unless the government could prove that an actual threat to public health existed. In a famous dissent, Justice Oliver Wendell Holmes argued that the Court could not substitute its opinion about economic matters for that of the legislature. Although the reasoning in the case was overruled nearly 30 years later, it raised important questions (that remain today) about what justice requires, the relationship between people and government, and the role of the courts.

There is little question that the working conditions of many industries in 1905 in New York were horrendous and that, as a matter of justice, the legislature's role was to address these problems. Yet, the highest Court in the country perceived justice to require the legislature to have a "hands off" attitude in economic matters, one that has been termed "laissez-faire." The Court's decision, however, was one that had far-reaching effects on workers and employers; the decision replaced the conclusions of the New York legislature regarding what was in the best interests of the people of the state. The question of judicial activism and the extent to which judges can or should replace legislative rules with their own decisions about what justice requires is a continuing debate, one which is reflected in many of the cases discussed in this book.

Our democracy provides for the institutions—legislative, executive, and judicial—that specify the ways in which rules for society will be created, enforced, and interpreted. In addition, it creates rights to which American citizens (and, to some extent, non-Americans) are entitled. These are discussed in detail in later chapters. For now, we briefly consider the boundaries of justice in the relationship between government and individual citizens.

Among many other important provisions, the Fifth Amendment to the U.S. Constitution provides that the private property of citizens shall not "be taken for public use, without just compensation." Referred to as the "Takings Clause," this constitutional right is intended to protect people from the unwarranted and uncompen-

sated seizure of their property by the government, local, state, or federal, but the Takings Clause also anticipates that, in some circumstances, the government may have the need for property held privately; in those circumstances, the Fifth Amendment allows the government to exercise eminent domain power to seize the property for public use, as long as just compensation is paid to the owner. Normally, these circumstances involve a clear public benefit, such as taking property to build a road through the property or to erect a school building for the families of the community. The circumstances in which this government power may be exercised has been a continuing source of litigation for years, and the meaning of the Takings Clause has been an area of controversy nearly since the beginning of the country, including very recently.

Throughout the 1990s, the city of New London, Connecticut, located on Long Island Sound, was in economic decay, losing businesses, jobs, and revenue for government services. With the loss of jobs came the loss of residents. Even the state considered the city to be a "distressed municipality." In order to revitalize the city, in 2000, the city created a redevelopment plan designed to use property along the waterfront to develop business facilities, office buildings, retail space, and condominiums in an attempt to bring jobs to the area and improve the economic future of the city. With the assistance of state funding, the city was able to purchase much of the necessary property from private landowners, but some were unwilling to sell their homes to the city. Using its power of eminent domain, the city took the property of these individuals, leaving it to the state court to decide on just compensation. It was the intention of the city to offer a long-term lease of the property to private developers so that they could rebuild the area in accordance with the redevelopment plan.

The homeowners sued the city, arguing that the city exceeded its eminent domain powers because it wanted their property solely for economic reasons, not for any public benefit. The question, of course, is whether the Fifth Amendment protects these property owners from the taking of their property by the city government, who intended to immediately transfer the property to private developers solely for economic reasons. The case made its way to the U.S. Supreme Court, which issued the opinion excerpted in **Case Decision 1.2**.

Case Decision 1.2 *Susette Kelo et al. v. City of New London, Connecticut, et al.*, 545 U.S. 469, 125 S. Ct. 2655, 162 L.Ed.2d 439 (2005)

Opinion of the court by Justice Stevens:

In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." In assembling the land needed for this project, the city's development agent has purchased property from willing sellers and proposes to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. The question presented is whether the city's proposed disposition of this property qualifies as a "public use" within the meaning of the Takings Clause of the Fifth Amendment to the Constitution.

The city of New London (hereinafter City) sits at the junction of the Thames River and the Long Island Sound in southeastern Connecticut. Decades of economic decline led a state agency in 1990 to designate the City a "distressed municipality." These conditions prompted state and local officials to target New London, and particularly its Fort Trumbull area, for economic revitalization. To this end, respondent New London Development Corporation (NLDC), a private nonprofit entity established some years earlier to assist the City in planning economic development, was reactivated. In January 1998, the State authorized a $5.35 million bond issue to support the NLDC's planning activities and a $10 million bond issue toward the creation of a Fort Trumbull State Park. In February, the pharmaceutical company Pfizer Inc. announced that it would build a $300 million research facility on a site immediately adjacent to Fort Trumbull; local planners hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation. Upon obtaining state-level approval, the NLDC finalized an integrated development plan focused on 90 acres of the Fort Trumbull area.

The Fort Trumbull area is situated on a peninsula that juts into the Thames River. The area comprises approximately 115 privately owned properties, as well as the 32 acres of land formerly occupied by the naval facility (Trumbull State Park now occupies 18 of those 32 acres). The development plan encompasses seven parcels. Parcel 1 is designated for a waterfront conference hotel at the center of a "small urban village" that will include restaurants and shopping. Parcel 2 will be the site of approximately 80 new residences organized into an urban neighborhood and linked by public walkway to the remainder of the development, including the state park. Parcel 3, which is located immediately north of the Pfizer facility, will contain at least 90,000 square feet of research and development office space.

Parcel 4A is a 2.4-acre site that will be used either to support the adjacent state park, by providing parking or retail services for visitors, or to support the nearby marina. Parcel 4B will include a renovated marina, as well as the final stretch of the riverwalk. Parcels 5, 6, and 7 will provide land for office and retail space, parking, and water-dependent commercial uses.

The NLDC intended the development plan to capitalize on the arrival of the Pfizer facility and the new commerce it was expected to attract. In addition to creating jobs, generating tax revenue, and helping to "build momentum for the revitalization of downtown New London," the plan was also designed to make the City more attractive and to create leisure and recreational opportunities on the waterfront and in the park.

The NLDC successfully negotiated the purchase of most of the real estate in the 90-acre area, but its negotiations with petitioners failed. As a consequence, in November 2000, the NLDC initiated the condemnation proceedings that gave rise to this case.

II

Petitioner Susette Kelo has lived in the Fort Trumbull area since 1997. She has made extensive improvements to her house, which she prizes for its water view. Petitioner Wilhelmina Dery was born in her Fort Trumbull house in 1918 and has lived there her entire life. Her husband Charles (also a petitioner) has lived in the house since they married some 60 years ago. In all, the nine petitioners own 15 properties in Fort Trumbull—4 in parcel 3 of the development plan and 11 in parcel 4A. Ten of the parcels are occupied by the owner or a family member; the other five are held as investment properties. There is no allegation that any of these properties is blighted or otherwise in poor condition; rather, they were condemned only because they happen to be located in the development area.

In December 2000, petitioners brought this action in the New London Superior Court. They claimed, among other things, that the taking of their properties would violate the "public use" restriction in the Fifth Amendment. After a 7-day bench trial, the Superior Court granted a permanent restraining order prohibiting the taking of the properties located in parcel 4A (park or marina support). It, however, denied petitioners relief as to the properties located in parcel 3 (office space).

After the Superior Court ruled, both sides took appeals to the Supreme Court of Connecticut. That court held, over a dissent, that all of the City's proposed takings were valid. We granted certiorari to determine whether a city's decision to take property for the purpose of economic development satisfies the "public use" requirement of the Fifth Amendment.

III

Two polar propositions are perfectly clear. On the one hand, it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example. Neither of these propositions, however, determines the disposition of this case.

As for the first proposition, the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit. The takings before us, however, would be executed pursuant to a "carefully considered" development plan. [T]he City's development plan was not adopted "to benefit a particular class of identifiable individuals."

On the other hand, this is not a case in which the City is planning to open the condemned land—at least not in its entirety—to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers. But although such a projected use would be sufficient to satisfy the public use requirement, this "Court long ago rejected any literal requirement that condemned property be put into use for the general public." Indeed, while many state courts in the mid-19th century endorsed "use by the public" as the proper definition of public use, that narrow view steadily eroded over time. Not only was the "use by the public" test difficult to administer (*e.g.*, what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society. Accordingly, when this Court began applying the Fifth Amendment to the States at the close

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of the 19th century, it embraced the broader and more natural interpretation of public use as "public purpose." Thus, in a case upholding a mining company's use of an aerial bucket line to transport ore over property it did not own, Justice Holmes' opinion for the Court stressed "the inadequacy of use by the general public as a universal test." We have repeatedly and consistently rejected that narrow test ever since.

The disposition of this case therefore turns on the question whether the City's development plan serves a "public purpose." Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.

Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the "great respect" that we owe to state legislatures and state courts in discerning local public needs. For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.

IV

Those who govern the City were not confronted with the need to remove blight in the Fort Trumbull area, but their determination that the area was sufficiently distressed to justify a program of economic rejuvenation is entitled to our deference. The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. To effectuate this plan, the City has invoked a state statute that specifically authorizes the use of eminent domain to promote economic development. Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.

To avoid this result, petitioners urge us to adopt a new bright-line rule that economic development does not qualify as a public use. Putting aside the unpersuasive suggestion that the City's plan will provide only purely economic benefits, neither precedent nor logic supports petitioners' proposal. Promoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized. It would be incongruous to hold that the City's interest in the economic benefits to be derived from the development of the Fort Trumbull area has less of a public character than any of those other interests. Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose.

Petitioners contend that using eminent domain for economic development impermissibly blurs the boundary between public and private takings. Again, our cases foreclose this objection. Quite simply, the government's pursuit of a public purpose will often benefit individual private parties.

It is further argued that without a bright-line rule nothing would stop a city from transferring citizen *A*'s property to citizen *B* for the sole reason that citizen *B* will put the property to a more productive use and thus pay more taxes. Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case.

Alternatively, petitioners maintain that for takings of this kind we should require a "reasonable certainty" that the expected public benefits will actually accrue. Such a rule, however, would represent an even greater departure from our precedent.

Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project.

In affirming the City's authority to take petitioners' properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation. We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than

the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised. [T]he necessity and wisdom of using eminent domain to promote economic development are certainly matters of legitimate public debate. This Court's authority, however, extends only to determining whether the City's proposed condemnations are for a "public use" within the meaning of the Fifth Amendment to the Federal Constitution. Because over a century of our case law interpreting that provision dictates an affirmative answer to that question, we may not grant petitioners the relief that they seek.

The judgment of the Supreme Court of Connecticut is affirmed.

Justice O'Connor, with whom The Chief Justice, Justice Scalia, and Justice Thomas join, dissenting.

Over two centuries ago, just after the Bill of Rights was ratified, Justice Chase wrote: "An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. A few instances will suffice to explain what I mean. [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it." *Calder v. Bull*, 3 Dall. 386, 388, 1 L.Ed. 648 (1798) (emphasis deleted).

Today the Court abandons this long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property—and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment. Accordingly I respectfully dissent.

II

The Fifth Amendment to the Constitution, made applicable to the States by the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." When interpreting the Constitution, we begin with the unremarkable presumption that every word in the document has independent meaning, "that no word was unnecessarily used, or needlessly added." In keeping with that presumption, we have read the Fifth Amendment's language to impose two distinct conditions on the exercise of eminent domain: "[T]he taking must be for a 'public use' and 'just compensation' must be paid to the owner."

These two limitations serve to protect "the security of Property," which Alexander Hamilton described to the Philadelphia Convention as one of the "great obj[ects] of Gov[ernment]." 1 Records of the Federal Convention of 1787, p. 302 (M. Farrand ed. 1911). Together they ensure stable property ownership by providing safeguards against excessive, unpredictable, or unfair use of the government's eminent domain power—particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will.

While the Takings Clause presupposes that government can take private property without the owner's consent, the just compensation requirement spreads the cost of condemnations and thus "prevents the public from loading upon one individual more than his just share of the burdens of government." The public use requirement, in turn, imposes a more basic limitation, circumscribing the very scope of the eminent domain power: Government may compel an individual to forfeit her property for the *public's* use, but not for the benefit of another private person. This requirement promotes fairness as well as security.

Where is the line between "public" and "private" property use? We give considerable deference to legislatures' determinations about what governmental activities will advantage the public. But were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to retain any meaning.

Our cases have generally identified three categories of takings that comply with the public use requirement, though it is in the nature of things that the boundaries between these categories are not

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always firm. Two are relatively straightforward and uncontroversial. First, the sovereign may transfer private property to public ownership—such as for a road, a hospital, or a military base. Second, the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, a public utility, or a stadium. But "public ownership" and "use-by-the-public" are sometimes too constricting and impractical ways to define the scope of the Public Use Clause. Thus we have allowed that, in certain circumstances and to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use.

This case returns us for the first time in over 20 years to the hard question of when a purportedly "public purpose" taking meets the public use requirement. It presents an issue of first impression: Are economic development takings constitutional? I would hold that they are not.

Because courts are ill equipped to evaluate the efficacy of proposed legislative initiatives, we rejected as unworkable the idea of courts' "deciding on what is and is not a governmental function and invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields." Likewise, we recognized our inability to evaluate whether, in a given case, eminent domain is a necessary means by which to pursue the legislature's ends.

In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even esthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words "for public use" do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power.

The Court protests that it does not sanction the bare transfer from A to B for B's benefit. It suggests two limitations on what can be taken after today's decision. First, it maintains a role for courts in ferreting out takings whose sole purpose is to bestow a benefit on the private transferee—without detailing how courts are to conduct that complicated inquiry. The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing. In this case, for example, any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised public gains in taxes and jobs.

Even if there were a practical way to isolate the motives behind a given taking, the gesture toward a purpose test is theoretically flawed. If it is true that incidental public benefits from new private use are enough to ensure the "public purpose" in a taking, why should it matter, as far as the Fifth Amendment is concerned, what inspired the taking in the first place? How much the government does or does not desire to benefit a favored private party has no bearing on whether an economic development taking will or will not generate secondary benefit for the public. And whatever the reason for a given condemnation, the effect is the same from the constitutional perspective—private property is forcibly relinquished to new private ownership.

A second proposed limitation is implicit in the Court's opinion. The logic of today's decision is that eminent domain may only be used to upgrade—not downgrade—property. For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.

Finally, in a coda, the Court suggests that property owners should turn to the States, who may or may not choose to impose appropriate limits on economic development takings. This is an abdication of our responsibility. States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution (and a provision meant to curtail state action, no less) is not among them.

Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. "[T]hat alone is a *just*

government," wrote James Madison, "which *impartially* secures to every man, whatever is his *own*." For the National Gazette, Property, (Mar. 27, 1792), reprinted in 14 Papers of James Madison 266 (R. Rutland et al. eds. 1983).

I would hold that the takings in both Parcel 3 and Parcel 4A are unconstitutional, reverse the judgment of the Supreme Court of Connecticut, and remand for further proceedings.

Justice Thomas, dissenting.

Long ago, William Blackstone wrote that "the law of the land . . . postpone[s] even public necessity to the sacred and inviolable rights of private property." 1 Commentaries on the Laws of England 134-135 (1765) (hereinafter Blackstone). The Framers embodied that principle in the Constitution, allowing the government to take property not for "public necessity," but instead for "public use." Defying this understanding, the Court replaces the Public Use Clause with a "'[P]ublic [P]urpose'" Clause (or perhaps the "Diverse and Always Evolving Needs of Society" Clause [capitalization added]), a restriction that is satisfied, the Court instructs, so long as the purpose is "legitimate" and the means "not irrational" (internal quotation marks omitted). This deferential shift in phraseology enables the Court to hold, against all common sense, that a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a "public use."

I cannot agree. If such "economic development" takings are for a "public use," any taking is, and the Court has erased the Public Use Clause from our Constitution, as Justice O'Connor powerfully argues in dissent. I do not believe that this Court can eliminate liberties expressly enumerated in the Constitution and therefore join her dissenting opinion. Regrettably, however, the Court's error runs deeper than this. Today's decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning. In my view, the Public Use Clause, originally understood, is a meaningful limit on the government's eminent domain power.

Was the U.S. Supreme Court's decision in the Kelo case just? Who did the Fifth Amendment protect in the case? Did it accomplish its intent? The constitutional law applied in the Kelo case arguably was intended to protect the government as it seeks to benefit the public, as much as it was intended to preserve individual rights. Moreover, the rights and protections involved are not absolute; the Fifth Amendment limits the manner in which private property may be taken and it limits the right of individuals to keep their property. Justice is thus a matter of perspective and not always absolute—what is justice for society may not seem just to individuals, and what is just for a single person may not be in the best interests of the larger society (if the Kelo plaintiffs had kept their property, would the potentially resulting economic loss to the community have been just?). Much of the law is like this, balancing the needs of society against the rights of the individual. As a result, decisions made in accordance with the law frequently involve consideration of both of these perspectives.

The Purpose of Courts

As noted previously here, the primary purpose of the courts is to achieve justice, but this does not occur in the abstract or in ways in which a particular judge deems most consistent with his or her views of a just society. It occurs in the context of disputes that require a decision to be made so that order is maintained in society and, win or lose, people believe that they have been treated fairly.

Characteristics of Courts

At their most basic, all courts have four characteristics (Murphy et al., 2006). First, they have an independent, unbiased judge. As is discussed throughout this book, the judge serves many functions. Central to these is to instill confidence in the courts through the formal and orderly resolution of disputes.

Second, courts apply preexisting norms in determining a just outcome. These norms, which include laws and rules of procedure, are applied in a uniform way to facts asserted to be true by the parties. They have various sources, which are discussed in Chapter 2.

Third, courts operate by using an adversarial process in which the parties have opposing positions. By relying on adversarial proceedings to administer justice, the issues for decision become clearly drawn, the individuals who argue them are given a full opportunity to present their version of the truth, and the proceeding itself necessarily produces an outcome presumed to accomplish justice.

Finally, all courts render a decision in which one party wins and another party loses. In complex cases, many such decisions may need to be made, and at times, different parties may be on the winning end of a decision. Regardless, however, each decision made results in a "winner" and a "loser."

In order to achieve its purpose, a court relies on formal rules of procedure. In civil cases, the rules of civil procedure govern who may bring a case to court, how cases

must be presented to the court, what documents are allowed, how evidence may be presented, and the scope of the judge's discretion to make decisions. In criminal cases, the rules of criminal procedure govern similar aspects of a case as it proceeds through the court, but the rules also serve to protect the individual rights of criminal defendants.

Thus, courts can operate only in the context of the cases brought by litigants and can operate only in accordance with the specific rules of procedure affecting the type of case heard.

Disputes and Their Resolution

The history of humans has been a history of disagreement. For centuries, humans would fight over the right to possess things such as food or land, or they would fight to defend themselves or their honor. As English law developed in the 11th and 12th centuries, the king and his representatives served as judges to conduct "trials" in which disputes between parties were resolved in accordance with conceptions of justice at the time. These included *trial by battle*, in which the parties to the dispute were required to fight using swords or other weapons (later, duels using pistols were seen as more "civilized"); the victor was seen as having justice on his side and declared the winner of the dispute. In *trial by ordeal*, one or both parties were required to submit to a specified ordeal in order to show the truth of his position in the dispute. The ordeal might involve walking barefoot across hot metal or coals (trial by fire) or submersion in a tub of water (trial by water). If, after the ordeal, there were no signs of harm to the person, he was declared to be the winner of the dispute. Regardless of the dispute resolution method, the view was that God would protect the disputant whose position was just. Of course, sometimes both parties suffered horribly or died, effectively ending the matter.

The resolution of disputes evolved as humans became more "civilized." In England, the king appointed others to judge matters of dispute throughout the kingdom. These courts relied on rules and forms of procedure that made dispensing justice more predictable and based on rules of reason, in accordance with the will of the king, rather than chance.

In colonial America, courts were created under English law and government, although they functioned in ways to meet the needs of the new and growing country. There were few, if any, colonists trained as lawyers, and resolution of disputes was left to religious leaders or the colonial governor and his assistants. The law dispensed during this period was based on what was commonly known of the law by nonlegally trained citizens, and this largely stemmed from their knowledge of the Bible and religious precepts. This is not surprising when we consider that most of the early colonists were Puritans who had left England because of religious persecution and sought to create a new society based on their religious views.

Sidebar 1.1 *Colonial Punishment: Cruel and Unusual?*

Punishment in the American colonies before the Revolutionary War was harsh. Offenses against society were local and personal and were generally dealt with in a swift and public way. Thus, it was not uncommon for a colonist whose words were blasphemous to have his tongue bored with a hot iron or those found guilty of theft to be whipped at a post. Colonists were also subjected to such penalties as hanging, branding, being placed in stocks, and subjected to ducking stools, as well as fines, imprisonment, or banishment. Many of these forms of punishment were brought from the colonists' native land of England, and from these, the colonists adopted or devised painful, degrading, or embarrassing punishments in order to bring wrongdoers' behavior in line with expectations of colonial society, including both criminal violations and nonconformance with the religious practices and beliefs of the time.

Colonial leaders did not always succeed in making a punishment "fit" the crime. Not unlike today, monetary fines were common, used in an attempt to make a wrongdoer "compensate" for his improper behavior. Although forcing the guilty colonist to pay a certain sum in order to rectify their misdeeds was used, colonists were also allowed to use monetary payments in order to avoid physical punishment. This practice cannot be viewed as fair, nor was it impartial because wealthy males especially could avoid physical punishment, whereas a poor female or a child could be made to suffer lasting physical pain and scars for the same behavior. For example, the crime of slander, false statements that damage one's reputation, would often result in a fine. In one such occurrence, a minister and a colonist had a verbal altercation at a town meeting. The minister questioned the man's religious sincerity, and the man claimed the minister was a "stoned priest, and a Perjured man, guilty of simony and bribery . . . who spoke false latten and taught false doctrines" (Chapin, 1983, p. 133). The town council found both parties guilty and made each pay a fine, but not all colonists were so fortunate as to pay a fine for voicing their opinions.

Given the many forms of potential misconduct, few colonists could escape some form of physical punishment. In a religious-based society with established religious rules and practices, punishments were not lacking when one misspoke or behaved untowardly. In one incident in 1684, a colonist stated that there was "no God, no devil and no hell" (Merrill, 1945, p. 769). He was immediately found guilty, sentenced to pay a fine, and had his tongue bored with a hot iron. Many other colonists endured pain and suffered for violations of social norms that would now be considered minor or not even criminal. For example, Roger Scott of Salem, Massachusetts, in 1634 was charged of violating the Sabbath by "common sleeping at the public exercise upon the Lord's day, and for striking him that waked him" (Merrill, 1945, p. 772). The penalty for sleeping in church was to be whipped. Another man in Massachusetts was also whipped for

hunting on the Sabbath, and yet another case demonstrating the strictness of colonial courts occurred in 1656 when Captain Kimble of Boston was "put into the stocks for two hours for his lewd and unseemly behavior . . . for publiquely kissing his wife on the doorstep of his home upon his return, on the Sabbath day, from a three-years' sea voyage" (Merrill, 1945, p. 772).

Public humiliation was a common form of punishment in colonial America. Those accused and convicted of public drunkenness, adultery, and theft, along with many other crimes, could expect to be punished in the village center for passing colonists to see. There were three popular methods of public shaming in this time: the stocks, the pillory, and the ducking post. The stocks consisted of a wooden framework in which the ankles of the unfortunate colonist would be restrained in the wooden stocks, requiring the guilty to sit immobile until the sentence time was up. Like the stocks, the pillory also was a wooden frame, but the guilty was forced to stand with his or her hands and neck restrained in the wooden frame. The ducking post was a chair to which the guilty was tied and repeatedly submerged in water. All of these forms of punishment were physically and emotionally harsh and humiliating. The colonist would have to suffer the rain, cold, or hot sun, and hunger and very commonly were pelted with rocks or rotten vegetables by passersby.

As painful and embarrassing as public shaming may have been, it was a relatively mild form of punishment imposed during colonial times. Torture and hanging were used to punish what were considered to be the most serious offenses. For example, the infamous Salem witch trials resulted in the execution by hanging of 19 colonists (mostly women) on being found guilty of practicing witchcraft. One woman accused was Bridget Bishop. In 1692, she was tried based on the accusations of several neighbors who claimed that on several occasions she summoned "demons" to haunt them. The judge found her guilty, and she was executed by hanging at Gallows Hill (Hawke, 1966, pp. 243–245).

By today's standards, punishment in colonial America was unusual and almost always cruel. The constitutional protections we enjoy today did not exist, and local leaders were allowed to devise such punishments as they saw fit to maintain conformity in colonial society. By adopting procedural protections for the accused, separating religious offenses from societal ones, punishing behavior and not beliefs, and focusing on the harm that results from one's act, the American courts have placed punishment of offenders within a system in which the goal is not punishment itself, but justice for victims, offenders, and society itself.

The colonial period in America saw an increase in the number of courts as the colonists settled on land, established trade and commerce, and formed communities with their attendant institutions for maintaining order such as churches, schools, and local governing bodies. Such activities and interactions among colonists led to disagreements that required resolution to keep the peace. These may have involved criminal wrongdoing such as theft, vagrancy, or failure to attend church services; land disputes about the ownership or right to farm sections of land; or "contract" disputes regarding the delivery or quality of goods bartered or sold. The governor served as judge to resolve such disputes, holding "court" a few times a year to hear cases. The governor thus served many functions, usually as religious leader, chief executive, legislator, and judge. As obvious as the separation of powers seems to us today, in colonial times in America, it was accepted that governmental functions would be handled by a small number of community leaders; that, after all, was the way it had been in England. Only after the American Revolution and the adoption of our Constitutional form of government did this begin to change.

As the country grew and moved toward independence from England, cities developed, and the number of cases involving antisocial activity or private disputes rose, requiring governors to appoint judges to travel around the countryside ("ride the circuit") to hear the variety of cases that arose. In rural communities, justices of the peace were appointed to serve the interests of the community and decide lesser matters. Although the justice of the peace has traditionally been seen as a minor judicial role, it was a dispute regarding a justice of the peace that led to the case having the greatest impact on the court system in America, *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60 (1803).

Marbury v. Madison

In 1800, national politics was as acrimonious as it is today. John Adams was the second President of the United States and sought re-election to a second term in that year. His opponent was Thomas Jefferson. (The two men were contemptuous of each other at the time, although they reconciled in later years and became fast friends.) In the election, Adams was soundly defeated, as were his Federalist colleagues in Congress; however, Adams and his Federalist Congress remained in office as "lame ducks" until March 1, 1801, giving them time to take a number of end-of-term actions impacting the future government. Among these was passage of the Organic Act, authorizing the President to appoint a large number of additional federal judges, as well as 42 additional justices of the peace for the District of Columbia.

In addition, President Adams himself made a number of decisions. First among these was appointment of his Secretary of State, John Marshall, as Chief Justice of the U.S. Supreme Court; however, Marshall would remain as Secretary of State and not begin his service as Chief Justice until the end of Adams's term.

In addition, President Adams was busy appointing new judges. After appointing a judge to office, the President would deliver a commission to his Secretary of State, John Marshall, for delivery to the new appointee. Although most of these were delivered, in the concluding days of the Adams administration and John Marshall's time as Secretary of State, a few commissions were left on the Secretary of State's

desk and remained undelivered. Among these was one for an appointee to a justice of the peace position, William Marbury.

After taking office in March of 1801, President Jefferson discovered these commissions and ordered his new Secretary of State, James Madison, to not deliver them, effectively preventing Adams's appointments. Not receiving his appointment, Marbury sued, petitioning the U.S. Supreme Court to issue a writ of mandamus directing Secretary of State Madison to give him his commission. A writ of mandamus is a court order that requires a public official to perform some act which the official's public office requires be performed. Although the Court could have dismissed the petition for want of jurisdiction, it did not, giving Marshall the opportunity to craft what has become one of the most important judicial opinions in history (**Case Decision 1.3**).

Case Decision 1.3 *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 1803 WL 893 (D.C.), 2 L.Ed. 60 (1803)

Opinion of the Court by Chief Justice Marshall:

At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to shew cause why a mandamus should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the District of Columbia.

His right originates in an act of congress passed in February 1801, concerning the district of Columbia. After dividing the district into two counties, the 11th section of this law, enacts, "that there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace as the president of the United States shall, from time to time, think expedient, to continue in office for five years."

It appears, from the affidavits, that in compliance with this law, a commission for William Marbury as a justice of peace for the county of Washington, was signed by John Adams, then president of the United States; after which the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out. In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

The 2d section of the 2d article of the constitution declares, that, "the president shall nominate, and, by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for." The third section declares, that "he shall commission all the officers of the United States."

An act of congress directs the secretary of state to keep the seal of the United States, "to make out and record, and affix the said seal to all civil commissions to officers of the United States, to be appointed by the President, by and with the consent of the senate, or by the President alone; provided that the said seal shall not be affixed to any commission before the same shall have been signed by the President of the United States."

It is therefore decidedly the opinion of the court, that when a commission has been signed by the President, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state.

Mr. Marbury, then, since his commission was signed by the President, and sealed by the secretary of state, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of this country. To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

The act to establish the judicial courts of the United States authorizes the Supreme Court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

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 in 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 mere surplusage, 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.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all. 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 shewn 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 cause. 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 inquire 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 recognize 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

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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 effectual. 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 as 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. In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the constitution which serve to illustrate this subject. It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law.

The constitution declares that "no bill of attainder or *ex post facto* law shall be passed." If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve? "No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out of* court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, 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 this 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.

Apart from the political undertones and historical backdrop of the opinion, *Marbury v. Madison* teaches a number of important lessons. First, *Marbury* created the rule that it is the job of the courts to "say what the law is." This is the heart of the principle of *judicial review*. Judicial review means that the judicial branch of government has the power to examine and determine whether acts taken by the legislative and executive branches comply with the Constitution. Furthermore, this principle therefore necessarily precludes the other branches of government from exercising this power.

Second, the decision reaffirmed that the Constitution was the Supreme law of the land and that neither the executive nor the judicial branch could act outside of or in contrast to its provisions.

Third, *Marbury* announced that the authority of the Supreme Court, like that of the other two branches of government, is found in the Constitution itself. Therefore, the Supreme Court's original jurisdiction cannot be restricted by act of Congress or Executive decree (however, it is worth noting that the Constitution authorizes Congress to determine the Court's *appellate* jurisdiction; this distinction is discussed further in Chapter 3).

A Note on Reading Cases

Courts make decisions that, in most appellate cases and some trials, are written and published. This book discusses numerous case decisions and, as noted in the preface, has included many excerpts from actual case decisions written by judges. These are found in the "Case Decision" boxes throughout the book. The first three such excerpts, *Cuellar v. U.S.*, *Kelo v. City of New London*, and *Marbury v. Madison*, were discussed earlier in this chapter. As you read the cases excerpts, however, it will be helpful to do so with a particular structure or outline of the case in your mind. Understanding this structure will be of great assistance in understanding the decisions themselves and the principles of law and legal procedure they represent. Nearly every written court decision follows this structure,

and grasping the court's reasoning will be easier if you understand the way in which case decisions are drafted.

Legal "cases" are real-life stories; like all good stories, they have a beginning, a middle, and an end. They involve people who did something, and their actions created some conflict between the parties. The court process involved hearing what happened, sorting out what was important and what was not, and reaching a decision in order to resolve the conflict. The written decision reflects this process, although it is not always a chronological rendering, but reading the story and learning how a resolution about the conflict was reached are necessary to understanding the point of law a case represents. Reading cases in this way may assist you in retelling them and importantly in learning what the legal point of the story was.

The "opinion of the court" means that a majority of the judges sitting on the court hearing the case agreed as to what the conclusion should be. Normally, one of these is assigned to write the court's opinion, but it represents the opinions of all of those judges who voted in the majority for the outcome reached. At times, less than a majority of the judges will agree as to the outcome. In such cases, a written decision will still be produced by one judge, but it will represent the views of a *plurality*, rather than a majority of the court members. In such cases, a majority of the judges do not agree on the holding, the rationale, or both, and opinions by more than a single judge will be written.

Case decisions can be divided into six parts. The first two are the beginning. The second two are the middle, and the last two are the end of the story. First, every case will have a caption that is a heading that states who the parties are and the court making the decision. Second, the case decision will set out the facts that form the basis of the decision. This includes both the substantive facts regarding the dispute between the parties as well as the procedural facts regarding how the parties proceeded in attempting to resolve the dispute. Third, the legal issue or issues that the court has been called on to decide will be stated, including the sources of law that the court relies on in reaching its decision. Fourth, the court's rationale or reasons for its decision are explained. This is a detailed explanation of how the court reached its conclusion, including consideration of the facts and the requirements of the law applicable to each legal issue the case presents. Fifth, the written opinion will reach a conclusion on the legal issues and if it is an appellate decision either affirm or reverse the decision of the prior court, sometimes with instructions regarding how the case should next proceed. Finally, some cases will include additional opinions drafted by other judges on a panel of judges considering a case. These are known as concurring opinions and dissenting opinions and represent additional reasoning to support the agreement or disagreement of one or more of the judges with the majority opinion.

Caption

As the title of the case, the caption names the parties involved in the dispute. The titles in the edited case decision boxes are usually abbreviated; therefore, not all parties will be named in the caption in every case. By using the case citation to the law reporter in which the case is found, it is possible to view the complete caption, listing all of the parties. The caption will also show the court from which the decision was issued and the year in which it was decided. It is important to note this information in order to understand the scope of influence the court's decision may have (e.g., a U.S. Supreme Court decision will have broader applicability than a state supreme court's decision) and to understand the historical context in which the dispute arose and the decision was made.

Facts

There are two categories of facts: those that describe the actions of the parties leading to the dispute and those reflecting the procedures followed in attempting to resolve the dispute. Not all facts about the actions of the parties are important; some are relevant to the court's decision, and some are irrelevant. For example, in a contract case, knowing the ages of the parties is likely irrelevant, but in an age discrimination case, it is clearly relevant. In reading the case, therefore, it is necessary to determine which of the reported facts form the necessary basis for the court's conclusions about the law. That is, which facts, if omitted, would change the court's conclusions or are those without which the court could not reach a conclusion?

The procedural facts describe how the case proceeded to and through the courts, leading to the decision being read. Thus, this portion of the case should explain who initially filed the court action (and perhaps steps taken to resolve the matter before going to court), the court in which it was filed, the lower court's decision and the basis for it, who brought the appeal, and the grounds for appeal.

Issue

The issue in a case is the question of law that one or both parties have brought to the court to be answered. Although the issue is a question of law, it always relates to the facts, which is why it is necessary to know which facts are relevant. Courts do not answer questions in the abstract; it is only in the context of the facts of the case that the issue will be addressed. Thus, a legal issue in the Kelo case may be posed, "Does the Takings Clause allow the City of New London to transfer homeowners' property to a private entity for economic development purposes?" Some cases have only one issue; others have several. How the legal issues are stated by the court will indicate how narrowly or broadly the court's statement of the law will apply in other similar cases.

Holding

The holding is the court's *ratio decidendi*, which from the Latin means the "reason for deciding" (Garner, 2004). It is not a full explanation of the basis for the court's decision (see rationale, later here). Rather, it encapsulates the legal principle on which the case was decided and reflects the essence of the court's interpretation of the law. Thus, the holding answers the legal issue presented by the case, based on the court's application of the governing princi-

ples of law to the facts. For example, the primary holding in the Kelo case can be stated: The taking of property by a city to be used by private businesses for economic development constitutes a "public use" under the Takings Clause of the U.S. Constitution. Because the holding relates to the legal issue, each case will have as many holdings as there are issues.

Rationale

The rationale is the court's reasoning in support of its decision. This is the section of the case decision in which the court explains itself, giving the reasons why it decided the case in the way that it did. Because, in each case, a court is called on by the parties to resolve a dispute about the facts, the law, or both, the rationale will typically include a discussion of these for each of the legal issues presented. Although the issue and the holding will identify each specific provision of law at issue, whether a statute, regulation, constitutional section, or matter of common law, the rationale will examine each provision of law and explain what it means and how it leads to the holding in the case. The court's interpretation and discussion of the law may involve consideration of the history of the law being interpreted, other cases in which it was at issue, the opinions of expert commentators on a topic, the views of special interests, or other laws that may have some bearing on the case. Thus, the court's rationale is an elaboration of its *ratio decidendi*. At times, a judge who drafts a case decision will also discuss some tangential matter not necessary to the holding, referred to as *orbiter dicta*, which from Latin means "a remark by the way" (Garner, 2004). *Orbiter dicta*, or "dicta" for short, may be difficult to separate from the discussion of the court that is necessary for the holding. A good example of this is Chief Justice Marshall's opinion in *Marbury v. Madison*, even in the excerpted form found in Case Decision 1.3. Recall that the parties asked the Court to decide whether Marbury was entitled to his commission as justice of the peace but that Marshall discussed much that was not necessary to decide this issue. Indeed, *Marbury v. Madison* has become best known for the legal propositions found in Marshall's dicta, rather than in his rationale in the case (Abraham, 1998). For most of the case decisions excerpted in this book, however, the dictum is excluded in order to focus on the *ratio decidendi* and its basis.

Other Opinions

Written case decisions from appellate courts, especially the U.S. Supreme Court, may also include other opinions written by another judge sitting on the panel of judges hearing the case. A *concurring opinion* is one in which one or more judges agree with the holding of the majority, but for different or additional reasons. Although a concurring opinion is in agreement with the holding of the case, it does not represent the opinion of a majority of the court, only those judges who join in it. A *dissenting* opinion is one written by a judge who does not agree with either the holding or the rationale of the majority. The dissent is written to express the opinion of the judge writing it, as well as any other judges who agree. It is quite possible, therefore, that a court opinion may have several concurring and dissenting opinions, in addition to the opinion of the court.

Key Terms

Corrective Justice
Distributive Justice
Social Justice
Economic Justice
Retributive Justice
Restorative Justice
Procedural Justice
Judicial Activism
Dispute Resolution
Judicial Review
Court Characteristics
Rules of Procedure
Ratio Decidendi
Orbiter Dicta

Discussion Questions

1. American courts are given the task of achieving justice for citizens. What are the primary ways in which they seek to accomplish this?
2. How does the distinction between corrective and distributive justice affect the criminal and civil law?
3. In what ways do various types of justice, such as social, retributive, restorative, and procedural, affect society's approach to resolving disputes?
4. What are the four characteristics all courts share? Explain why they are important.
5. Courts rely on formal rules of procedure to achieve their goals, but why are those rules important for the parties in both criminal and civil cases?
6. Discuss the procedures used in two of the earliest forms of dispute resolution: trial by battle and trial by ordeal.
7. Written case decisions issued by courts typically include facts, issue, holding, and rationale. Explain the purpose of each of these and why they are necessary to a court's decision.

Cases

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Cuellar v. U.S., 128 S. Ct. 1994, 1998 (2008).
Kelo v. City of New London, 545 U.S. 469, 125 S. Ct. 2655, 162 L.Ed.2d 439 (2005).
Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 49 L.Ed. 937 (1905).
Marbury v. Madison, 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60 (1803).

Criminal Justice on the Web

For an up-to-date list of Web links, go to *The American Courts: A Procedural Approach* online companion site at http://criminaljustice.jbpub.com/AmericanCourts. The online companion site will introduce you to some of the most important sites for finding American courts information on the Internet.

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