

William K. Slate II and Denis J. Hauptly

# American Justice

*A Guide to Courts,  
Arbitration, and Mediation*



Full Court Press

# AMERICAN JUSTICE



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William K. Slate II  
*and*  
Denis J. Hauptly

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The front cover features the image *Minerva Flanked by  
Peace and Justice (Armoiries de Gallard et de Mesmes)*  
by Claude Mellan, courtesy of the Metropolitan  
Museum of Art's Open Access collection. Active in  
the seventeenth century, Mellan is remembered for  
the cross-hatching shading technique deployed in his  
engravings.

To  
*Debra Miller Slate, who has been a  
wonderful source of inspiration,*  
And to  
*Augustus Lamar Hauptly and, at long last,  
to Jessica Knapp Ziegler and Daniel Hauptly.*



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# Acknowledgments

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We would also like to thank Professor Thomas E. Baker of Florida International University College of Law, Eric Tuchman, General Counsel of the American Arbitration Association, and Donald Gehring for reviewing all or part of the manuscript.



# About the Authors

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William K. Slate II is the Co-founder, Chairman, and General Counsel for Dispute Resolution Data (recognized by Global Arbitration Review in 2017 as Best Innovation by an Organization). Prior to DRD, Bill led the American Arbitration Association/International Centre for Dispute Resolution for nineteen years. He has served as both an arbitrator and a mediator. For twelve years he was a member of the Arbitration Working Group of the United Nations Commission on International Trade Law (UNCITRAL). He founded CAMCA (the Commercial Arbitration and Mediation Center for the Americas) and has been a Visiting Senior Fellow in Negotiation, Mediation, and Arbitration at Duke University Law School, and a visiting professor at Seton Hall University Law School, University of Richmond Law School, Virginia Union University, and Virginia Commonwealth University. He serves as an elected member of the International Conference for Commercial Arbitration Governing Council.

Previously, Mr. Slate was an executive in both federal and state courts in the United States, and was the Director of a seminal study of federal courts in America mandated by the US Congress and reporting to the President, the Chief Justice of the Supreme Court, and the Speaker of the House of Representatives of the US

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He is the author of five books, including *Something Really New: Three Simple Steps to Creating Truly*

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# Introduction:

## The Resolution of Disputes

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This is a book about dispute resolution. It seeks to describe in simple terms the ways in which American society has tried to formally resolve disputes between people or businesses.

We get glimpses of such dispute resolution all the time. Half of all television shows involve a courtroom scene filled with lawyers and judges. But that leaves a false impression for two reasons. First, not all disputes are of a legal nature (though all need to be resolved). Some disputes are simply personal. I want to watch a movie, but my spouse wants to watch a reality show. There is no law involved in this, just a preference. Second, very few legal disputes are actually resolved in court. In fact, somewhere around 80 percent are resolved by some other process.<sup>1</sup> And a substantial number are simply dropped or rejected by the courts as having been filed too late or because of some other technical defect.

Formal resolution of disputes, through the courts or through processes such as arbitration and mediation, is actually a rarely used form of dispute resolution. It is

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<sup>1</sup> *Journal of Empirical Legal Studies*, Volume 6, Issue 1, 111–146, March 2009.



much more common to resolve disputes informally. We will illustrate that below, but it is important to understand why that context is important.

When we get to the main parts of the book, about “alternative dispute resolution” and court systems, we will see that these activities are highly organized, with everyone playing specific roles and legalistic rules governing how things proceed. We will see that often the decision made is binding on the parties and so the process and the results can be very serious.

That may give us a false impression that dispute resolution requires marble halls and wood-paneled rooms with stern authority figures glaring down at the disputing parties. Nothing could be further from the truth. Dispute resolution can be, and often is, carried out by one party choosing to not argue about something. That context about informal dispute resolution is important to understand the nature of formal dispute resolution. So, let us take a brief look at it, focusing on four variations on an ordinary scenario and the consequences of each variation.

## **The Scenario**

Two parties (Carol and Joe) jointly own a vacation timeshare for two months a year. They have used it in alternating months for a year or two. By coincidence one has always been busy in the month the other one wants and so no disputes have arisen. But this year both Carol and Joe are free in July. Based on what happened the year before, Joe has assumed, without mentioning, that he would take

July. Carol sends him an email saying, “My friends from out of town are going to be in the area and I look forward to spending July with them at the lake house.”

Joe is a little annoyed at what he sees as Carol’s presumption that he will be okay with this plan.

## **First Variation**

Joe thinks about it a bit and decides that he has no actual preference for July. He also feels that both he and Carol failed in not having a process for avoiding this situation. So he chooses to just forget about it but to propose to Carol that they exchange needs each December in the future. He does not indicate any unhappiness.

The consequence is that Carol is not really aware there had been a dispute because it was resolved without confrontation or involvement of a third party. Conversely, Joe may feel that he has done a good deed or that he is owed a favor.

## **Second Variation**

Joe tells Carol that he had been thinking about July himself and had some expectation that July was his based on the pattern of the past. Carol apologizes for not taking that into account and offers to see if her friends can change their dates. Joe tells her it is not such a big deal this year but that it would be best if they developed a process for the future.

The consequence is that both parties are aware that there is a dispute but one of them finds more value in

resolving it and dealing with the future than in “winning” this year. He makes an offer to solve things.

### **Third Variation**

Joe tells Carol that he had been thinking about July himself and had some expectation that July was his based on the pattern of the past. Carol disagrees that there was an agreed-upon pattern. They picked dates each year based on convenience that year, and it was just coincidence that Joe chose July two years in a row.

Joe and Carol are both annoyed with each other and think the other is being unreasonable. But a day or two passes, and Carol calls Joe and suggests that she take July this year and he have first choice the next year and they would alternate after that. They agree.

The consequences are some hard feelings and maybe a small amount of distrust that may dissipate as the new plan takes effect.

### **Fourth Variation**

Joe tells Carol that he had been thinking about July himself and had some expectation that July was his based on the pattern of the past. Carol disagrees that there was an agreed-upon pattern. They picked dates each year based on convenience that year and it was just coincidence that Joe got July two years in a row.

Joe and Carol are both annoyed with each other and think the other is being unreasonable. A day or two goes by, and neither one has budged. Joe calls Carol and suggests that they bring in their friend Dana to see if she can

help them sort it out. They meet with Dana and explain what transpired. Dana suggests that Carol take July this year, and Joe have first choice the next year, and they would alternate after that. They agree to Carol's plan.

The first consequence is that there is some sense of a loss of control over the property. While the third party did not have the authority to impose a solution, Joe and Carol brought Dana in and by doing so tacitly agreed that Dana's judgment would be reasonable. Second, a rejection of Dana's judgment would not only have widened the spit between Joe and Carol, it also could have insulted Dana.

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Almost every resolution of a dispute has a winner and a loser. "Win-win" solutions are actually very rare. Sometimes the "winners" get little more than the "losers." But the losers will still have the sense that they lost.

This sense becomes even more important when we turn to the formal methods of dispute resolution. The sense of being a "loser," and the fact that outcomes are real and very often binding with serious personal and financial consequences, hangs over every formal dispute resolution process. Because of this impact, formal dispute resolution requires open and detailed processes that can cause delay and complexity.

But the stakes are high, and parties sometimes choose to move to formal processes. So, let us turn to that more formal world with the understanding that disputes settled in informal ways are the norm and probably better in the long run, but that sometimes formal is the only way to go.



# AMERICAN JUSTICE



## Chapter I

# Federalism

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In the following chapters, we will be looking at the organization and structure of courts in America. Those chapters will cover state courts, federal courts, and specialized courts (which may be either federal or state). But first we need to understand how the courts got to where they are today.

The organization of the American system of courts will seem at first glance to be tremendously complex, filled with overlapping authority and based on seemingly random factors. That description is, of course, the exact opposite of what one would want in a system of justice. One wants simplicity, clarity of authority, and an appropriate level of efficiency.

But the American courts are as much a product of their history as of any logical design and so it is important to briefly trace that history and to place the courts in the context of the broader American history. It is only by doing so that the design becomes understandable.



So, let's move back to the beginning of the America and the drafting of the Constitution in 1787. Let's take a look at the decision to have a "federal" government and what that meant for the courts.

America separated from England as a result of the American Revolution and the Treaty of Paris in 1783. Before that each colony had acted independently of the others. All were subject to English rule as well. But virtually all government was local and colony based. After the Revolutionary War, the new American states adopted the Articles of Confederation. This agreement retained the basic structure of the colonial era. Each former colony was an independent state that agreed with the other former colonies to act together on a small number of items—largely foreign affairs and defense.

The new central government had no real power. If it needed an army for defense, it had to ask the states to voluntarily pay for it. If one state passed a law harmful to another, the central government could do nothing about it. It quickly became clear that the new nation could not flourish with a system in which no one was really in charge, and defense and commerce could not be efficiently managed. Something had to be done, but the independence of the states was a crucial fact that had wide support. People considered themselves to be New Yorkers or Virginians more than Americans and that was not going to change quickly.

Things had gotten bad enough that in 1787 delegates from around the new nation gathered in Philadelphia to create a new framework for governance. In doing so they had three basic options:

1. a strong central government such as the monarchies of Europe;
2. strong state governments such as they had under the Articles of Confederation;
3. some form of a federation in which the national and state governments shared power, with each having some significant strength.

The second choice was out. The failings of the Articles of Confederation were why they were meeting to draft a new agreement. The first option was not much better. They had just fought a revolution to get rid of a strong central executive power. They were not interested in creating an American version of Europe's kingdoms.

So a federation it would be! The states would take care of the day-to-day matters such as roads and police and fire protection. The national government would deal with "external" matters such as defense, foreign relations, and lawsuits about ships at sea (admiralty law). These things did not often lead to lawsuits and so the federal courts were small and quiet. Washington only appointed thirty-nine judges in his two terms in office. Today a president would appoint several hundred.

But the new federal government would also be in charge of "interstate commerce," that is, regulating business that took place in more than one state. For instance, if I milk my cows and sell the milk at the market in my town on Tuesdays, I am engaged in single state commerce. But if the border to the next state is two miles away, and I want to sell my milk at their market (held on Mondays), then I will be engaging in interstate commerce.

Now this latter task was a small one in 1787. Few businesses actually crossed state borders. There were no trucks, cars, or even trains or canals to carry people over distances. If you wanted to travel from New York to Boston by horseback, it would take you nearly a week in 1787. Today, of course, it is ninety minutes by plane and three hours by train.

But a revolution in transportation was about to begin. Canals were already being built. Within twenty years steamships were carrying passengers and goods up and down America's rivers. Within forty years railroads would be doing the same on land. The era of interstate commerce was upon us. Up until this expansion, the federal government had a minor impact on local activities. But as commerce expanded, so did the role of the federal government.

Did New York forbid steamships from New Jersey operating on its waters? Out of a desire to protect New York businesses, it did. A lawsuit was brought in federal courts, and the United States Supreme Court barred New York's practice. Other commerce cases began to appear, and the federal government also used its power to regulate interstate commerce to create federal crimes for criminal acts that would normally be punished by states. Moving stolen goods across state lines became a federal crime, for instance, because no one state could prosecute it easily.

The growth in federal courts was slow at first. Barely noticeable. But by the time the twentieth century came around the federal courts had become a very big deal, with large numbers of judges and a rapidly expanding

caseload. In 1789 there were nineteen judgeships authorized by Congress. By 1860 that number had grown to only fifty-five, even though the U.S. population had grown from four million to more than thirty million in that same time period. The number of judges had barely tripled while the population had grown eight-fold.

President Franklin Roosevelt's New Deal gave a huge boost to the expansion of federal regulation and, with it, federal litigation. The federal government used its commerce power to reach all sorts of behavior: drug trafficking, kidnapping, machine gun sales. By the end of World War II, the federal courts were a major institution. The start of the civil rights movement in the 1950s gave the federal courts one more growth spurt.

By 1950 there were 291 federal judges serving 150 million people.

Today, in 2020, there are approximately 900 federal judges serving 329 million people. Compared to 1950 that means that approximately three times as many judges are serving a bit more than twice as many people.

Comparable state numbers are hard to come by because each state has kept records separately and used different approaches to gathering the data. But it would help to know that today there are about 30,000 judgeships in state courts. So, despite the rapid growth in the number of federal courts, their total is still eclipsed compared to the massive size of state court systems.

Notice, though, that these two systems have grown independently of each other. There is no one in charge of "Courts" in America. Each of the fifty states is responsible for its own courts, while Congress is in charge of

the federal courts. And that does not take into account the various “territorial” courts in American-owned territories such as the Virgin Islands or Guam. Nor does it consider the Native American tribal courts.

This independence, this lack of coordination, has led to much overlap between the cases heard by the two systems. For instance, a person who uses a gun to steal \$1,000 from a credit union, commits the state crime of robbery and the federal crime of theft of money from a bank insured by the Federal Deposit Insurance Corporation.

A person who believes that their rights under the US Constitution have been violated may turn to the state or federal courts to protect those rights. A person injured by a collision with a vehicle driven by a person from another state may (under certain circumstances) bring a case in federal courts against that driver. This fear is based on an old notion that the courts in the driver’s state may be biased in his or her favor.

With these notions in mind, we are ready to take a closer look at courts and how they function in America in the twenty-first century.

## Chapter 2

# What Kind of Disputes Are There?

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Before exploring the nature of courts, we should know a little bit about the disputes they resolve.

There are many kinds of disputes. In court, they are generally described as civil or criminal. Understanding what is criminal is easy. A crime occurs when a person or corporation commits an act forbidden by law as an offense against the government (federal, state, city) that carries a possible sentence of a fine or imprisonment. Criminal law, enforced only by the government, punishes.

Civil law, on the other hand, does not seek to punish (though a civil case can end in a ruling that in fact punishes because of special financial penalties.) Its basic purpose is to restore the injured parties to where they were before an improper act by another party. Civil lawsuits may be brought by the government but also may be brought by private parties, including corporations. A couple of examples will help.

Jones and Smith agree in writing that Jones will pay Smith \$5,000 if Smith moves Jones' household goods to a new house he has purchased. Smith completes the move and Jones fails to pay him the \$5,000. Smith sues Jones, telling the court that they had a contract and Jones failed to keep his part of the bargain. Jones, in turn, may then say that all of that is true but that in moving the goods, Smith was careless and damaged several pieces of furniture. Jones might then tell the court that he ought not to have to pay for the bad job done by Smith.

Or Johnson and King are both driving their cars with Johnson behind King when King suddenly brakes for a squirrel running across the road. Johnson's car hits King's, and King sues and claims that Johnson was following too closely and was careless in doing so.

The first of these examples is a contracts case, and the second is what is called a torts case. Torts are a variety of wrongs that one can do to another that fall short of being criminal, but for which the law allows some remedy other than criminal fine or imprisonment. Generally, that remedy is meant to make up for the losses of one of the parties.

But money damages are not the only things one seeks in civil law. Sometimes you are in civil court to ask the court to order forcing the other party to do something or to stop doing something. These orders are often called injunctions.

For example, let us say that you own a building and another person is putting up a new building right next door. In doing so, they move heavy equipment across your property and damage some shrubbery. You can sue them for money damages for the loss of shrubbery, but

you can also ask the court to issue an order telling them to stop their machinery from crossing your land.

Some courts hear specialized types of cases. These are cases where it is thought that the judges should have particular expertise in a complex area of law. Many states have special family courts where divorces and adoption proceedings take place. A few have a housing court that hears evictions and other housing-related matters.

Federal courts also include specialized trial courts in bankruptcy and tax cases and a specialized appellate court<sup>1</sup> for intellectual property (patents, copyrights, and trademarks). There is even a United States Court of Appeals for the Armed Forces, which hears appeals from military personnel accused of crimes under the Uniform Code of Military Justice—the American military’s criminal code.

But the great majority of American court activity involves routine civil and criminal matters dealt with in small courthouses in communities all over the country. And most of that activity takes place in “trial courts.” What these courts are, how they are structured, and how they go about their daily business will be the subjects of our next chapter.

This is a particularly important chapter because the trial courts are the ones that Americans are most likely to come into contact with and they have the most profound effects on the lives of those who engage with them.

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<sup>1</sup> We will be discussing appellate courts later in this book. For now it is enough to know that they are higher courts that do not hold trials but instead review errors of law.