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The Federal Courts

Politics in Action: Finding Justice in the Supreme Court

Jason Pepper, a meth addict and drug dealer, got lucky after he was arrested in 2004. A sympathetic judge gave him a fraction of the prison time he could have received and, more importantly, sent him to a place where he got extensive drug treatment. He turned his life around, attended college, succeeded at a good job, and got married. Then his luck ran out. A federal appeals court held that his sentence was too lenient under federal sentencing rules and ordered him back to prison in 2009.

His luck turned again, however, as the U.S. Supreme Court chose his appeal from the thousands it receives each year. On December 6, 2010, the day of the oral argument on Pepper's case (there are no trials in the Supreme Court), his attorneys walked up the steep steps of the Supreme Court building, the impressive "Marble Palace" with the motto "Equal Justice Under Law" engraved over its imposing columns. The justices, clothed in black robes, took their seats at the bench in front of a red velvet curtain. The attorneys for each side had just 30 minutes to present their cases, including time for interruptions by justices with questions. When the attorneys' time was up, a discreet red light went on over their lectern, and they immediately stopped talking.

That was the end of the hearing, but not the end of the process. Months passed as the justices deliberated and negotiated an opinion. On March 2, 2011, the Court ruled that the appeals court had erred and that the sentencing guidelines were advisory, not mandatory. Moreover, it declared that judges should consider all available evidence, such as Pepper's exemplary change in lifestyle, to determine the appropriate punishment. Pepper had won his case (*Pepper v. United States*). Equally important, in clarifying the rules that guide judges as they try to set sentences

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The United States has unusually powerful courts, and the Supreme Court sits atop the judicial hierarchy. Americans have never fully resolved the role of strong, unelected courts in a democracy and the appropriate extent of judicial power.



The Big Picture Why do the unelected judges in the Supreme Court have so much power in a democratic system? Author George C. Edwards III asks this fundamental question and delves into why decision-making at the Supreme Court level is often based on the personal ideologies of the judges.



The Basics Do you have confidence in the U.S. court system? Watch this video to discover what the founders did to make sure the federal judiciary would be independent of political influence. You'll also learn about an important check the Supreme Court has on the other two branches of U.S. government.



In Context Discover how the Supreme Court gained a check on the other two branches after the U.S. Constitution was written. East Central University political scientist Christine Pappas discusses *Marbury v. Madison* and analyzes how the power of judicial review has impacted campaign finance law.



Thinking Like a Political Scientist Why do legal scholars and political scientists disagree over how judges make decisions? East Central University political scientist Christine Pappas analyzes this and other questions scholars study. She explains how the other branches of government limit the role of the judiciary in public policy-making, and discusses research on how public opinion influences the courts.



In the Real World Should the Supreme Court have the power to knock down popular laws? This segment uses the Supreme Court's decision in *U.S. v. Arizona* (2012) to illustrate the tension between protecting the law and having a government that's run by the people



So What? What is the difference between decisions made by a local judge and those made by a Supreme Court judge? Find out how the vagueness of the Constitution leaves quite a bit of room for interpretation by Supreme Court justices—and why that often leads to the justices' personal opinions influencing their decisions.



that both comport with national norms and ensure justice is done in individual cases, the Court's decision became a precedent that gave federal judges more leeway to provide second chances to the criminals who come before them.

In *Pepper's* case, the Supreme Court decided the meaning of an act of Congress, which had established the sentencing rules. In other cases, it may decide the meaning of the Constitution and even overrule the decisions of elected officials. Despite the trappings of tradition and majesty, however, the Court does not reach its decisions in a political vacuum. Instead, it and other courts work in a context of political influences and considerations, a circumstance that raises important questions about the role of the judiciary in the U.S. political system.

The federal courts pose a special challenge to American democracy. Although it is common to elect state judges, the president *nominates* federal judges to their positions—for life. The Framers of the Constitution purposefully insulated federal judges from the influence of public opinion. How can we reconcile powerful courts populated by unelected judges with American democracy? Do they pose a threat to majority rule? Or do the federal courts actually function to protect the rights of minorities and thus maintain the type of open system necessary for democracy to flourish?

The power of the federal courts also raises the issue of the appropriate scope of judicial power in our society. Federal courts are frequently in the thick of policymaking on issues ranging from affirmative action and abortion to physician-assisted suicide and health care policy. Numerous critics argue that judges should not be actively involved in determining public policy—that they should leave policy to elected officials, focusing instead on settlement of routine disputes. On the other hand, advocates of a more aggressive role for the courts emphasize that judicial decisions have often met pressing needs—especially needs of the politically or economically powerless—left unmet by the normal processes of policymaking. For example, we have already seen the leading role that the federal courts played in ending legally supported racial segregation in the United States. To determine the appropriate role of the courts in our democracy, we must first understand the nature of our judicial system.

However impressive the Supreme Court may be, it makes only the tiniest fraction of American judicial policy. The Court decides a handful of issues each year—albeit often key issues, with some decisions shaping people's lives and perhaps even determining matters of life and death. In addition to the Supreme Court, there are 12 federal courts of appeals plus a Court of Appeals for the Federal Circuit, 91 federal district courts, and thousands of state and local courts. This chapter focuses on federal courts and the judges who serve on them—the men and women in black robes who are important policymakers in the American political system.

The Nature of the Judicial System

15.1

Identify the basic elements of the American judicial system and the major participants in it.

The judicial system in the United States is, at least in principle, an adversarial one in which the courts provide an arena for two parties to bring their conflict before an impartial arbiter (a judge). The system is based on the theory that justice will emerge out of the struggle between two contending points of view. The task of the judge is to apply the law to the case, determining which party is legally correct. In reality, most cases never go to trial, because they are settled by agreements reached out of court.

There are two basic kinds of cases—criminal law and civil law cases:

- In a *criminal law* case, the government charges an individual with violating specific laws, such as those prohibiting robbery. The offense may be harmful to an

standing to sue

The requirement that plaintiffs have a serious interest in a case, which depends on whether they have sustained or are likely to sustain a direct and substantial injury from another party or from an action of government.

class action suits

Lawsuits in which a small number of people sue on behalf of all people in similar circumstances.

justiciable disputes

Issues capable of being settled as a matter of law.

individual or to society as a whole, but in either case it warrants punishment, such as imprisonment or a fine.

- A *civil law* case involves a dispute between two parties (one of whom may be the government itself) over a wide range of matters including contracts, property ownership, divorce, child custody, mergers of multinational companies, and personal and property damage. Civil law consists of both *statutes* (laws passed by legislatures) and *common law* (the accumulation of judicial decisions about legal issues).

Just as it is important not to confuse criminal and civil law, it is important not to confuse state and federal courts. The vast majority of all criminal and civil cases involve state law and are tried in state courts. Criminal cases such as burglary and civil cases such as divorce normally begin and end in the state, not the federal, courts.

□ Participants in the Judicial System

Every case has certain components in common, including litigants, attorneys, and judges; in some cases organized groups also become directly involved. Judges are the policymakers of the American judicial system, and we examine them extensively in later sections of this chapter. Here we will discuss the other regular participants in the judicial process.

LITIGANTS The Constitution restricts federal judges to deciding “cases” or “controversies”—that is, actual disputes rather than hypothetical ones. Judges do not issue advisory opinions on what they think (in the abstract) may be the meaning or constitutionality of a law. The judiciary is essentially passive, dependent on others to take the initiative.

Thus, two parties must bring a case to the court before it may be heard. Every case is a dispute between a *plaintiff* and a *defendant*, in which the former brings some charge against the latter. Sometimes the plaintiff is the government, which may bring a charge against an individual or a corporation. The government may charge Smith with a brutal murder or charge the XYZ Corporation with illegal trade practices. All cases are identified with the name of the plaintiff first and the defendant second, for example, *State v. Smith* or *Anderson v. Baker*. In many (but not all) cases, a *jury*, a group of citizens (usually 12), is responsible for determining the outcome of a lawsuit.

Litigants end up in court for a variety of reasons. Some are reluctant participants—the defendant in a criminal case, for example. Others are eager for their day in court. For some, the courts can be a potent weapon in the search for a preferred policy.

Not everyone can challenge a law, however. Plaintiffs must have what is called **standing to sue**; that is, they must have serious interest in a case, which is typically determined by whether they have sustained or are in immediate danger of sustaining a direct and substantial injury from another party (such as a corporation) or an action of government. Merely being a taxpayer and being opposed to a law do not provide the standing necessary to challenge that law in court.

The courts have broadened the concept of standing to sue to include **class action suits**, which permit a small number of people to sue on behalf of all other people in similar circumstances. These suits may be useful in cases as varied as civil rights, in which a few persons seek an end to discriminatory practices on behalf of all who might be discriminated against, and environmental protection, in which a few persons may sue a polluting industry on behalf of all who are affected by the air or water that the industry pollutes. In recent years, the Supreme Court has placed some restrictions on such suits.

Conflicts must not only arise from actual cases between litigants with standing to sue, but they must also be **justiciable disputes**—issues that are capable of being settled by legal methods. For example, one would not go to court to determine whether Congress should fund missile defense, for the matter could not be resolved through legal methods or knowledge.

ATTORNEYS Lawyers are indispensable actors in the judicial system. Law is one of the nation’s largest professions, with about a million attorneys practicing in the United States today.¹ Although lawyers were once available primarily to the rich, today the

federally funded Legal Services Corporation employs lawyers to serve the legal needs of the poor, and state and local governments provide public defenders for poor people accused of crimes. Moreover, some employers and unions now provide legal insurance, through which individuals who have prepaid can secure legal aid when needed. That access to lawyers has become more equal does not, of course, mean that quality of representation is equal. The wealthy can afford high-powered attorneys who can invest many hours in their cases and arrange for testimony by expert witnesses. The poor are often served by overworked attorneys with few resources to devote to an individual case.

GROUPS Because they recognize the courts' ability to shape policy, interest groups often seek out litigants whose cases seem particularly strong. Few groups have been more successful in finding good cases and good litigants than the National Association for the Advancement of Colored People (NAACP), which decided to sue the school board of Topeka, Kansas, on behalf of a young schoolgirl named Linda Brown in *Brown v. Board of Education* (1954). The NAACP was seeking to end the policy of "separate but equal"—meaning racially segregated—public education, and NAACP legal counsel Thurgood Marshall believed that Topeka represented a stronger case than did other school districts because the city provided segregated facilities that were otherwise genuinely equal. The courts could not resolve the case simply by insisting that expenditures for schools for white and African American children be equalized.

The American Civil Liberties Union (ACLU) is another interest group that is always seeking cases and litigants to support in its defense of civil liberties. One ACLU attorney stressed that principle took priority over a particular client, saying that some of ACLU's clients are "pretty scurvy little creatures. It's the principle that we're going to be able to use these people for that's important."²

At other times groups do not directly argue the case for litigants, but support them instead with *amicus curiae* ("friend of the court") briefs, which attempt to influence the Court's decision, raise additional points of view, and present information not contained in the briefs of the attorneys for the official parties to the case. In controversial cases, many groups may submit such briefs to the Court: groups presented 136 briefs in the health care reform case in 2012.

All these participants—plaintiffs, defendants, lawyers, and interest groups—play a role in the judicial drama, as do, in many instances, the public and the press. Much of the drama takes place outside the courtroom. How these participants arrive in the courtroom and which court they go to reflect the structure of the court system.

The Structure of the Federal Judicial System

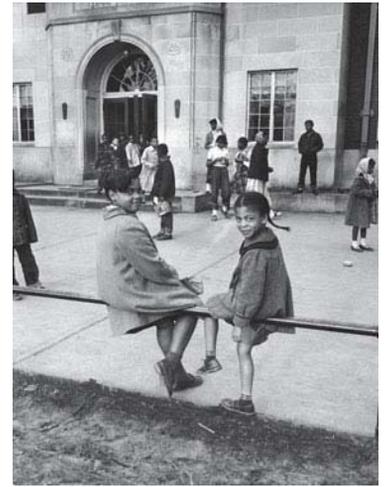
15.2 Outline the structure of the federal court system and the major responsibilities of each component.

The Constitution is vague about the structure of the federal court system. Specifying only that there would be a Supreme Court, the Constitution left it to Congress's discretion to establish lower federal courts of general jurisdiction. In the Judiciary Act of 1789, Congress created these additional *constitutional courts*, and although the system has been altered over the years, the United States has never been without them. The current organization of the federal court system is displayed in Figure 15.1.

As you can see in the figure, Congress has also established *legislative courts* for specialized purposes. These courts include the Court of Military Appeals, the Court of Federal Claims, the Court of International Trade, and the Tax Court. Legislative courts

amicus curiae briefs

Legal briefs submitted by a "friend of the court" for the purpose of influencing a court's decision by raising additional points of view and presenting information not contained in the briefs of the formal parties.



Linda Brown (left), shown here outside her segregated school, was the plaintiff challenging legal segregation in public education.

original jurisdiction

The jurisdiction of courts that hear a case first, usually in a trial. These are the courts that determine the facts about a case.

appellate jurisdiction

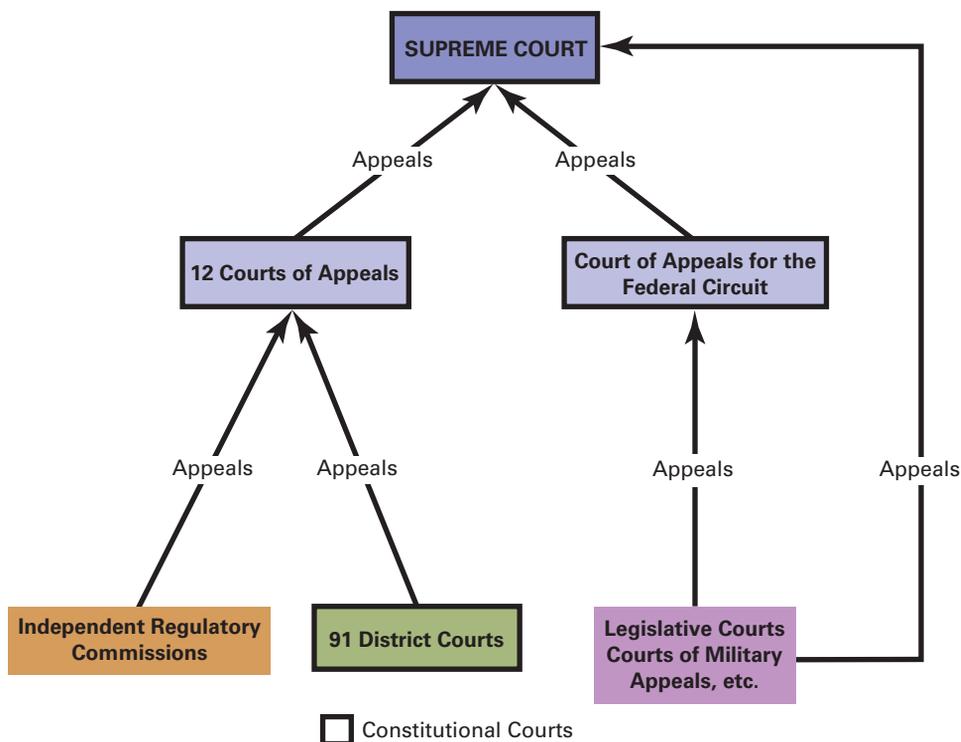
The jurisdiction of courts that hear cases brought to them on appeal from lower courts. These courts do not review the factual record, only the legal issues involved.

district courts

The 91 federal courts of original jurisdiction. They are the only federal courts in which trials are held and in which juries may be impaneled.

FIGURE 15.1 ORGANIZATION OF THE FEDERAL COURT SYSTEM

The federal court system is composed of both constitutional courts (the Supreme Court, the courts of appeals, and the district courts) and legislative courts, which have specialized jurisdictions. Losers in cases before independent regulatory commissions may appeal to the courts of appeals.



are staffed by judges who have fixed terms of office and who lack the protections against removal or salary reductions that judges on constitutional courts enjoy. The judges apply a body of law within their area of jurisdiction but cannot exercise the power of judicial review (of finding the actions of the legislative or executive branch unconstitutional).

In this section, we focus on the constitutional courts, that is, on the courts of general jurisdiction—district courts, courts of appeals, and the Supreme Court—which hear a wide range of cases. First, we must clarify another difference among courts—that between courts with original jurisdiction and courts with appellate jurisdiction:

- Courts with **original jurisdiction** hear a case first, usually in a trial. These are the courts that determine the facts about a case, whether it is a criminal charge or a civil suit. More than 90 percent of court cases begin and end in the court of original jurisdiction. Lawyers can sometimes appeal an adverse decision to a higher court for another decision.
- Courts with **appellate jurisdiction** hear cases brought to them on appeal from a lower court. Appellate courts do not review the factual record, only the legal issues involved. At the state level, the appellate process normally ends with the state's highest court of appeal, which is usually called the state supreme court. Litigants may appeal decisions from a state high court only to the U.S. Supreme Court, and only if they meet certain conditions, discussed next.

□ District Courts

The entry point for most litigation in the federal courts is one of the **district courts**, of which there are 91, with at least 1 in each state, in addition to 1 in Washington, D.C., and 1 in Puerto Rico (there are also 3 somewhat different territorial courts for Guam,

the Virgin Islands, and the Northern Mariana Islands). The district courts are courts of original jurisdiction; they hear no appeals. They are the only federal courts that hold trials and impanel juries. The 675 district court judges usually preside over cases alone, but certain rare cases require that 3 judges constitute the court. Each district court has between 2 and 28 judges, depending on the amount of judicial work within its territory.

The jurisdiction of the district courts extends to the following:

- *Federal crimes.* Keep in mind that about 98 percent of all the criminal cases are heard in state and local court systems, not in the federal courts. Moreover, only a small percentage of the persons convicted of federal crimes in the federal district courts actually have a trial. Most enter guilty pleas as part of a bargain to receive lighter punishment.
- *Civil suits under federal law.* As with criminal cases, state and local courts handle most civil suits. Also as with criminal cases, only a small percentage of those civil cases that commence in the federal courts are decided by trial—about 1 percent of the more than 250,000 civil cases resolved each year;³ in the vast majority of cases, litigants settle out of court.
- *Civil suits between citizens of different states, or between a citizen and a foreign national, where the amount in question exceeds \$75,000.* Such *diversity of citizenship* cases may involve, say, a Californian suing a Texan. Congress established this jurisdiction to protect against the possible bias of a state court in favor of a citizen from that state. In these cases, federal judges are to apply the appropriate state laws.
- *Supervision of bankruptcy proceedings.*
- *Review of the actions of some federal administrative agencies.*
- *Admiralty and maritime law cases.*
- *Supervision of the naturalization of aliens.*

District judges rely on an elaborate supporting cast, including clerks, bailiffs, law clerks, stenographers, court reporters, and probation officers. U.S. marshals are assigned to each district to protect the judicial process and to serve the writs that the judges issue. Federal magistrates, appointed to eight-year terms, issue warrants for arrest, determine whether to hold arrested persons for action by a grand jury, and set bail. They also hear motions subject to review by their district judge and, with the consent of both parties in civil cases and of defendants in petty criminal cases, preside over some trials. As the workload for district judges increases (more than 309,000 cases commenced in 2010),⁴ magistrates are becoming essential components of the federal judicial system.

Another important player at the district court level is the *U.S. attorney*. Each of the 91 regular districts has a U.S. attorney who is nominated by the president and confirmed by the Senate and who serves at the discretion of the president (U.S. attorneys do not have lifetime appointments). These attorneys and their staffs prosecute violations of federal law and represent the U.S. government in civil cases.

Most of the cases handled in the district courts are routine, and few result in policy innovations. Usually district court judges do not even publish their decisions. Although most federal litigation ends at this level, a large percentage of the cases that district court judges actually decide (as opposed to those settled out of court or by guilty pleas) go forward on appeal. A distinguishing feature of the American legal system is the relative ease of appeals. U.S. law gives everyone a right to an appeal to a higher court. The loser in a case only has to request an appeal to be granted one. Of course, the loser must pay a substantial legal bill to exercise this right.

□ Courts of Appeals

Congress has empowered the U.S. **courts of appeals** to review all final decisions of district courts, except in rare instances in which the law provides for direct review by the Supreme Court (injunctive orders of special three-judge district courts and

courts of appeals

Appellate courts empowered to review all final decisions of district courts, except in rare cases. In addition, they also hear appeals to orders of many federal regulatory agencies.

15.1

Supreme Court

The pinnacle of the American judicial system. The Court ensures uniformity in interpreting national laws, resolves conflicts among states, and maintains national supremacy in law. It has both original jurisdiction and appellate jurisdiction.

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certain decisions holding acts of Congress unconstitutional). Courts of appeals also have authority to review and enforce the orders of many independent regulatory commissions, such as the Securities and Exchange Commission and the National Labor Relations Board. About 75 percent of the more than 55,000 cases filed in the courts of appeals each year come from the district courts.⁵

The United States is divided into 12 *judicial circuits*, including one for the District of Columbia (see Figure 15.2). Each circuit, except that for Washington, D.C., serves at least 2 states and has between 6 and 28 permanent circuit judgeships (179 in all), depending on the amount of judicial work in the circuit. Each court of appeals normally hears cases in rotating panels consisting of 3 judges but may sit *en banc* (with all judges present) in particularly important cases. Decisions in either arrangement are made by majority vote of the participating judges.

There is also a special appeals court called the *U.S. Court of Appeals for the Federal Circuit*. Congress established this court, composed of 12 judges, in 1982 to hear appeals in specialized cases, such as those regarding patents, claims against the United States, and international trade.

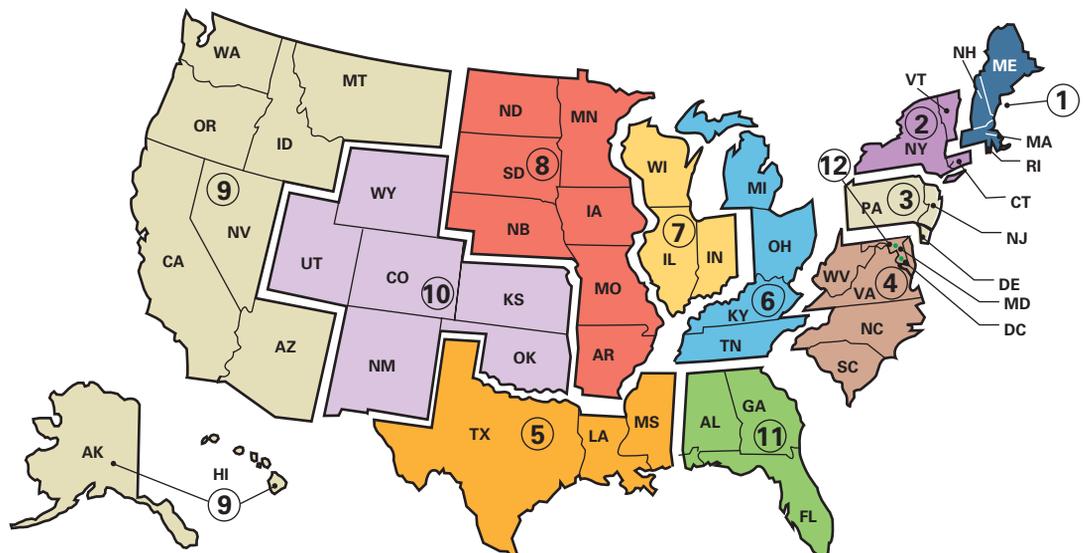
The courts of appeals focus on correcting errors of procedure and law that occurred in the original proceedings of legal cases, such as when a district court judge gave improper instructions to a jury or misinterpreted the rights provided under a law. These courts are appellate courts and therefore hold no trials and hear no testimony. Their decisions set precedent for all the courts and agencies within their jurisdictions.

□ The Supreme Court

Sitting at the pinnacle of the American judicial system is the U.S. **Supreme Court**. The Court does much more for the American political system than decide individual cases. Among its most important functions are resolving conflicts among the states and maintaining national supremacy in the law. The Supreme Court also plays an important role in ensuring uniformity in the interpretation of national laws. For example, in 1984 Congress created a federal sentencing commission to write guidelines aimed at reducing

FIGURE 15.2 THE FEDERAL JUDICIAL CIRCUITS

The 12 judicial circuits differ considerably in size. Not shown in the map are Puerto Rico (part of the First Circuit), the Virgin Islands (in the Third Circuit), and Guam and the Northern Mariana Islands (in the Ninth Circuit).



the wide disparities in punishment for similar crimes tried in federal courts. By 1989, more than 150 federal district judges had declared the law unconstitutional, and another 115 had ruled it valid. Only the Supreme Court could resolve this inconsistency in the administration of justice, which it did when it upheld the law.

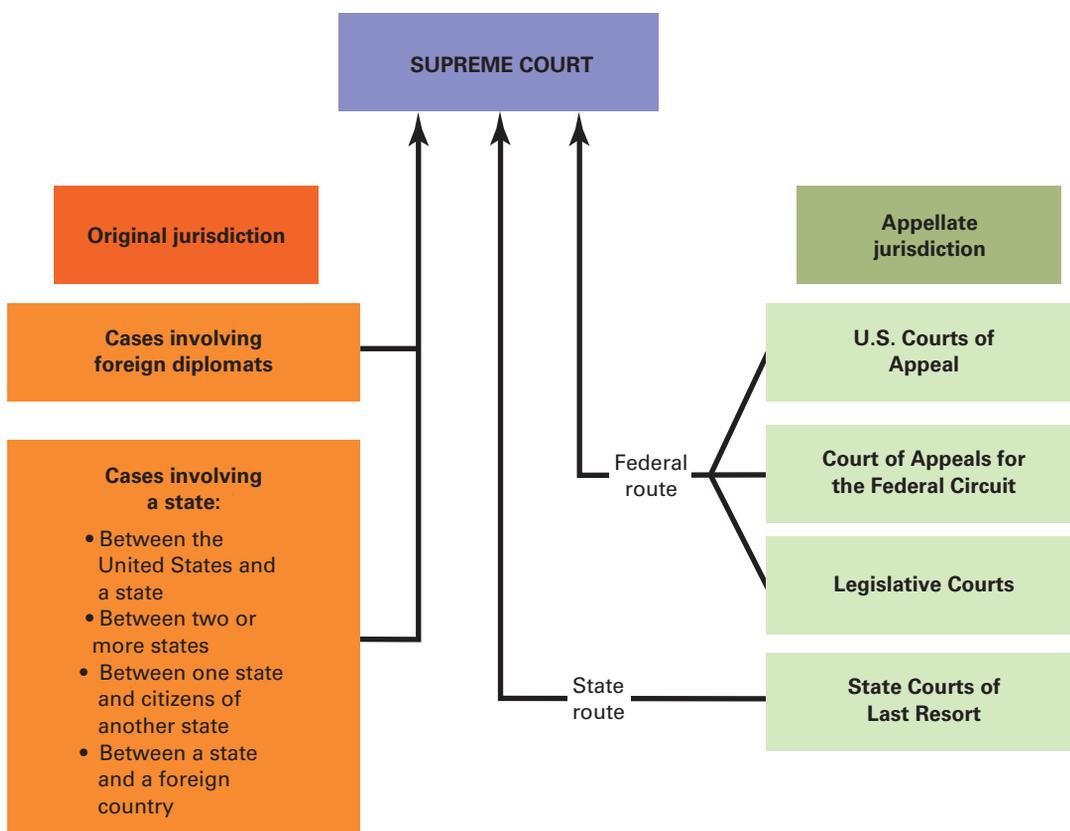
There are 9 justices on the Supreme Court: 8 associates and 1 chief justice (only members of the Supreme Court are called *justices*; all others are called *judges*). The Constitution does not require this number, however, and there have been as few as 6 justices and as many as 10. Congress altered the size of the Supreme Court many times between 1801 and 1869. In 1866, it reduced the size of the Court from 10 to 7 members so that President Andrew Johnson could not nominate new justices to fill 2 vacancies. When Ulysses S. Grant took office, Congress increased the number of justices to 9 because it was confident that he would nominate members to its liking. Since then, the number of justices has remained stable.

All nine justices sit together to hear cases and make decisions. But they must first decide which cases to hear. A familiar battle cry for losers in litigation in lower courts is “I’ll appeal this all the way to the Supreme Court!” In reality, this is unlikely to happen. Unlike other federal courts, the Supreme Court decides which cases it will hear.

You can see in Figure 15.3 that the Court does have an original jurisdiction, yet very few cases arise under it. The government does not usually wish to prosecute diplomats (it just sends them home), and there are not many legal disputes involving states as states (as opposed to, say, a prosecutor representing a state in criminal trial). Almost all the business of the Court comes from the appellate process. Litigants may appeal cases from both federal and state courts. However, as you can see in

FIGURE 15.3 HOW CASES REACH THE SUPREME COURT

There are three routes to the U.S. Supreme Court. The first is through its original jurisdiction, where the Court hears a case in the first instance. Very few cases fall into this category, however. Most cases reach the Court through appeals from decisions in lower federal courts. Some cases also reach the Court as appeals from the highest state court that can hear a state case.



15.1

senatorial courtesy

An unwritten tradition whereby nominations for state-level federal judicial posts are usually not confirmed if they are opposed by a senator of the president's party from the state in which the nominee will serve. The tradition also applies to courts of appeals when there is opposition from a senator of the president's party who is from the nominee's state.

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TABLE 15.1 SOURCES OF FULL OPINIONS IN THE SUPREME COURT, 2010–2011

Most cases that reach the Supreme Court are appeals from lower federal courts. Federal *habeas corpus* is a procedure under which a federal court may review the legality of an individual's incarceration.

Type of Case	Number of Cases
Original jurisdiction	1
Civil actions from lower federal courts	50
Criminal cases from lower federal courts	12
Federal <i>habeas corpus</i> cases	9
Civil actions from state courts	5
Criminal cases from state courts	5
Total	82

SOURCE: "The Supreme Court, 2010 Term: The Statistics," 125 (November 2011): 373–377.

Table 15.1, the vast majority of appeals heard by the Supreme Court are from the federal courts (i.e., from the federal system appellate courts shown in Figure 15.1).

Appeals from state courts must involve a "substantial federal question"; in deference to the states, the Supreme Court hears cases from state courts only if they involve federal law, and then only after the petitioner has exhausted all the potential remedies in the state court system. (Losers in a case in the state court system can appeal only to the Supreme Court, and not to any other federal court.) The Court will not try to settle matters of state law or determine guilt or innocence in state criminal proceedings. To obtain a hearing in the Supreme Court, a defendant convicted in a state court might demonstrate, for example, that the trial was not fair as required by the Bill of Rights, which was extended to cover state court proceedings by the due process clause of the Fourteenth Amendment.

The Politics of Judicial Selection

15.3 Explain the process by which judges and justices are nominated and confirmed.

Judges are the central participants in the judicial system, and nominating federal judges and Supreme Court justices is a president's opportunity to leave an enduring mark on the American legal system. Guaranteed by the Constitution the right to serve "during good behavior," federal judges and justices enjoy, for all practical purposes, lifetime positions. They may be removed only by conviction of impeachment, which has occurred a mere seven times in over two centuries. Congress has never removed a Supreme Court justice from office, although it tried but did not convict Samuel Chase in 1805. Nor can Congress reduce the salaries of judges, a stipulation that further insulates them from political pressures. The president's discretion is actually less than it appears, however, since the Senate must confirm each nomination

Why It Matters to You

Judicial Election

The public directly elects most state and local judges. All federal judges and justices are nominated by the president and confirmed by the Senate for lifetime tenures. If we elected federal judges, their decisions on highly visible issues might be more responsive to the public—but less responsive to the Constitution.

by majority vote. Because the judiciary is a coequal branch, the upper house of the legislature sees no reason to be especially deferential to the executive's recommendations.

□ The Lower Courts

Central to the Senate's consideration of state-level federal judicial nominations to the district courts and courts of appeals is the unwritten tradition of **senatorial courtesy**:⁶

- For district court positions, the Senate does not confirm nominees if they are opposed by a senator of the president's party from the state in which the nominee is to serve.
- For courts of appeals positions, the Senate does not confirm nominees opposed by a senator of the president's party from the state of the nominee's residence.

To invoke the right of senatorial courtesy, the relevant senator usually simply states a general reason for opposition. Other senators then honor their colleague's views and oppose the nomination, regardless of their personal evaluations of the candidate's merits.

Because of the strength of this informal practice, presidents usually check carefully with the relevant senator or senators ahead of time to avoid making a nomination that the Senate will not confirm. Moreover, typically when there is a vacancy for a federal district judgeship, the relevant senator or senators from the state where the judge will serve suggest one or more names to the attorney general and the president. If neither senator is of the president's party, then the party's state congresspersons or other state party leaders may make suggestions. Other interested senators may also try to influence a selection.⁷

In early 2009, Senate Republicans added a new element to senatorial courtesy when they sent President Obama a letter in which they vowed to prevent the confirmation of judicial nominees in instances where the White House did not properly consult Republican home-state senators. The implication of this letter is that members of the opposition party would have a de facto veto power, something without precedent in the history of judicial selection.⁸

The White House, the Department of Justice, and the Federal Bureau of Investigation conduct competency and background checks on persons suggested for judgeships, and the president usually selects a nominee from those who survive the screening process. If one of these survivors was recommended by a senator to whom senatorial courtesy is due, it is difficult for the president to reject the recommendation in favor of someone else who survived the process. Thus, senatorial courtesy turns the Constitution on its head, and, in effect, the Senate ends up making nominations and the president then approving them.

Why It Matters to You

Senatorial Courtesy

Because of the practice of senatorial courtesy, senators in effect end up nominating persons to be district court judges. If the Senate abolished this practice, it would give presidents greater freedom in making nominations and more opportunity to put their stamp on the judiciary.

Others have input in judicial selection as well. The Department of Justice may ask sitting judges, usually federal judges, to evaluate prospective nominees. Sitting judges may also initiate recommendations, advancing or retarding someone's chances of being nominated. In addition, candidates for the nomination are often active on their own behalf. They alert the relevant parties that they desire the position and may orchestrate a campaign of support. As one appellate judge observed, "People don't just get judgeships without seeking them."⁹

The president usually has more influence in the selection of judges to the federal courts of appeals than to federal district courts. The decisions of appellate courts are generally more significant than those of lower courts, so the president naturally takes a greater interest in appointing people to these courts. At the same time, individual senators are in a weaker position to determine who the nominee will be because the jurisdiction of an appeals court encompasses several states. Although custom and pragmatic politics require that these judgeships be apportioned among the states in a circuit, the president has some discretion in doing this and therefore has a greater role in recruiting appellate judges than in recruiting district court judges. Even here, however, senators of the president's party from the state in which the candidate resides may be able to veto a nomination.

Traditionally, the Senate confirmed lower federal court nominations swiftly and unanimously. However, the increasing polarization of partisan politics in recent years has affected judicial nominations, especially those for the courts of appeals. Increasingly, lower court confirmations have become lengthy and contentious proceedings. Interest groups opposed to nominations have become more active and encourage senators aligned with them to delay and block nominations.¹⁰ As a result, there has been a dramatic increase in the time for confirmation,¹¹ which in turn has decreased the chances of confirmation. Since 1992, the Senate has confirmed only 60 percent of nominees to the courts of appeals.¹²

Senators of the opposition party filibustered or otherwise derailed the confirmations of a number of high-profile nominations of Presidents Clinton and George W. Bush. In response, the presidents appointed some judges to the courts of appeals as recess appointments. Such appointments are unusual and good only for the remainder of a congressional term. They are also likely to anger opposition senators. After the Republicans nearly voted to end the possibility of filibustering judicial nominations, 14 senators from both parties forged a deal without White House approval that allowed some—but not all—of Bush's stalled judicial nominees to receive floor votes. Nevertheless, conflict over nominations has continued as the Republican minority has used secret holds, threats of filibusters, and various Senate procedures to delay and often stymie Barack Obama's judicial nominations, even at the district court level.

□ The Supreme Court

The president is vitally interested in the Supreme Court because of the importance of its work and is usually intimately involved in recruiting potential justices. Nominations to the Court may be a president's most important legacy to the nation.

A president cannot have much impact on the Court unless there are vacancies to fill. Although on the average there has been an opening on the Supreme Court every two years, there is a substantial variance around this mean.¹³ Franklin D. Roosevelt had to wait five years before he could nominate a justice; in the meantime, he was faced with a Court that found much of his New Deal legislation unconstitutional. Jimmy Carter was never able to nominate a justice. Between 1972 and 1984, there were only two vacancies on the Court. Nevertheless, Richard Nixon was able to nominate four justices in his first three years in office, and Ronald Reagan had the opportunity to add three new members.

When the chief justice's position is vacant, the president may nominate either someone already on the Court or someone from outside to fill the position. Usually presidents choose the latter course to widen their range of options, but if they decide to elevate a sitting associate justice—as President Reagan did with William Rehnquist in 1986—the nominee must go through a new confirmation hearing by the Senate Judiciary Committee.

The president operates under fewer constraints in nominating persons to serve on the Supreme Court than in nominations for the lower courts. Although many of the same actors are present in the case of Supreme Court nominations, their influence is typically quite different. The president usually relies on White House aides, the attorney general, and the Department of Justice to identify and screen candidates for the Court. Sitting justices often try to influence the nominations of their future colleagues, but presidents feel little obligation to follow their advice.

Senators also play a lesser role in the recruitment of Supreme Court justices than in the selection of lower-court judges, as the jurisdiction of the Court obviously goes beyond individual senators' states or regions. Thus presidents typically consult with senators from the state of residence of a nominee after they have decided whom to select. At this point, senators are unlikely to oppose a nomination, because they like having their state receive the honor and are well aware that the president can simply select someone from another state. Although home-state senators do not play prominent roles in the selection process for the Court, the Senate actively exercises its confirmation powers and, through its Judiciary Committee, may probe a nominee's judicial philosophy in great detail.

Candidates for nomination usually keep a low profile. They can accomplish little through aggressive politicking, and because of the Court's standing, actively pursuing the position might offend those who play important roles in selecting nominees. The American Bar Association's Standing Committee on the federal judiciary has played a varied but typically modest role at the Supreme Court level. Presidents have not generally been willing to allow the committee to prescreen candidates before their nominations are announced. George W. Bush chose not to seek its advice at all.

Through 2012, there have been 153 nominations to the Supreme Court, and 112 people have served on the Court. Four people were nominated and confirmed twice, 8 declined appointment or died before beginning service on the Court, and 29 failed to secure Senate confirmation. Presidents have failed 20 percent of the time to appoint the nominees of their choice to the Court—a percentage much higher than for any other federal position.

RECENT NOMINATIONS For most of the twentieth century, confirmations of Supreme Court nominees were routine affairs. Only one nominee failed to win confirmation in the first two-thirds of the century. But, as Table 15.2 shows, the situation changed beginning in the 1960s, tumultuous times that bred ideological conflict. Although John F. Kennedy had no trouble with his two nominations to the Court—Byron White and Arthur Goldberg—his successor, Lyndon Johnson, was less fortunate. In the face of strong opposition, Johnson had to withdraw his nomination of Abe Fortas (already serving on the Court) to serve as chief justice; as a result, the Senate never voted on Homer Thornberry, Johnson's nominee to replace Fortas as an associate justice. Richard Nixon, the next president, had two nominees in a row rejected after bruising battles in the Senate.

Two of President Reagan's nominees proved unsuccessful. In 1987, Reagan nominated Robert H. Bork to fill the vacancy created by the resignation of Justice Lewis Powell. Bork testified before the Senate Judiciary Committee for 23 hours. A wide range of interest groups entered the fray, mostly in opposition to the nominee, whose views they claimed were extremist. In the end, following a bitter floor debate, the Senate

TABLE 15.2 UNSUCCESSFUL SUPREME COURT NOMINEES SINCE 1900

Nominee	Year	President
John J. Parker	1930	Hoover
Abe Fortas ^a	1968	Johnson
Homer Thornberry ^b	1968	Johnson
Clement F. Haynesworth, Jr.	1969	Nixon
G. Harrold Carswell	1970	Nixon
Robert H. Bork	1987	Reagan
Douglas H. Ginsburg ^a	1987	Reagan
Harriet Miers ^a	2005	G. W. Bush

^aNomination withdrawn. Fortas was serving on the Court as an associate justice and was nominated to be chief justice.

^bThe Senate took no action on Thornberry's nomination.

rejected the president's nomination by a vote of 42 to 58. Six days after the Senate vote on Bork, the president nominated Judge Douglas H. Ginsburg to the high court. Just nine days later, however, Ginsburg withdrew his nomination after disclosures that he had used marijuana while a law professor at Harvard.

In June 1991, when Associate Justice Thurgood Marshall announced his retirement from the Court, President George H. W. Bush announced his nomination of another African American, federal appeals judge Clarence Thomas, to replace Marshall. Thomas was a conservative, so this decision was consistent with the Bush administration's emphasis on placing conservative judges on the federal bench. Liberals were placed in a dilemma. On the one hand, they favored a minority group member serving on the nation's highest court, and particularly an African American replacing the Court's only African American. On the other hand, Thomas was unlikely to vote the same way as Thurgood Marshall had voted, and was likely instead to strengthen the conservative trend in the Court's decisions. This ambivalence inhibited spirited opposition to Thomas, who was circumspect about his judicial philosophy in his appearances before the Senate Judiciary Committee. Thomas's confirmation was nearly derailed, however, by charges of sexual harassment leveled against him by University of Oklahoma law professor Anita Hill. Ultimately, following Hill's testimony and Thomas's denial of the charges, he was confirmed in a 52-to-48 vote—the closest margin by which a Supreme Court nomination had been confirmed in more than a century.

President Clinton's two nominees—Ruth Bader Ginsburg and Stephen Breyer—did not cause much controversy and were readily confirmed. Similarly, the Senate easily confirmed George W. Bush's nomination of John Roberts as chief justice to succeed William Rehnquist. Indeed, he was not an easy target to oppose. His pleasing and professional personal demeanor and his disciplined and skilled testimony before the Senate Judicial Committee gave potential opponents little basis for opposition.

Ideological conflict returned to the fore, however, when Bush then nominated White House counsel Harriet Miers to replace Justice Sandra Day O'Connor. By settling on a loyalist with no experience as a judge and little substantive record on abortion, affirmative action, religion, and other socially divisive issues, the president shied away from a direct confrontation with liberals and in effect asked his base on the right to trust him on his nomination. However, many conservatives, having hoped and expected that he would make an unambiguously conservative choice to fulfill their goal of clearly altering the Court's balance, were bitterly disappointed and highly critical. They demanded a known conservative. The nomination also smacked of cronyism, with the president selecting a friend rather than someone of obvious merit, and the comparison with Roberts underscored the thinness of Miers's qualifications. In short order, Miers withdrew from consideration, and the president nominated Samuel Alito.

Alito was clearly a traditional conservative and had a less impressive public presence than Roberts. Response to him followed party lines, but he appeared too well qualified and unthreatening in his confirmation hearings to justify a filibuster, and without one, his confirmation was assured. The Senate confirmed Alito by a vote of 58 to 42.

President Obama made his first nomination to the Court in 2009, selecting Sonia Sotomayor. Although conservatives raised questions about some of her previous statements and decisions, she was confirmed by a vote of 68 to 31, largely along party lines. When she took the oath of office, she became the first Hispanic justice. In 2010, the president nominated solicitor general Elena Kagan to the Court. She was confirmed by a vote of 63 to 37, once again largely along party lines.

It is difficult to predict the politics surrounding future nominations to the Supreme Court. One prediction seems safe, however: as long as Americans are polarized around social issues and as long as the Court makes critical decisions about these issues, the potential for conflict over the president's nominations is always present.

Nominations are most likely to run into trouble under certain conditions. Presidents whose parties are in the minority in the Senate or who make a nomination at the end of their terms face a greatly increased probability of substantial opposition.¹⁴ Presidents whose views are more distant from the norm in the Senate or who are



Elena Kagan is the newest member of the Supreme Court. She is unusual among recent justices in not having been a judge prior to her nomination. Instead, she was solicitor general of the United States, arguing cases before the Court.

appointing a person who might alter the balance on the Court are also likely to face additional opposition. However, opponents of a nomination usually must be able to question a nominee's legal competence or ethics in order to defeat the nomination. Most people do not consider opposition to a nominee's ideology a valid reason to vote against confirmation. For example, liberals disagreed strongly with the views of William Rehnquist, but he was easily confirmed as chief justice. By raising questions about competence or ethics, opponents are able to attract moderate senators to their side and to make ideological protests seem less partisan.

The Backgrounds of Judges and Justices

15.4 Describe the backgrounds of judges and justices and assess the impact of background on their decisions.

The Constitution sets no special requirements for judges or justices, but most observers conclude that the federal judiciary comprises a distinguished group of men and women. Competence and ethical behavior are important to presidents for reasons beyond merely obtaining Senate confirmation of their judicial nominees. Skilled and honorable judges and justices reflect well on the president and are likely to do so for many years, and, of course, they can more effectively represent the president's views. The criteria of competence and ethics, however, still leave a wide field from which to choose; other characteristics also carry considerable weight.

□ Backgrounds

The judges serving on the federal district and circuit courts are not a representative sample of the American people. They are all lawyers (although this is not a constitutional requirement). They are also overwhelmingly white males. Jimmy Carter appointed more women and minorities to the federal bench, more than all previous presidents combined. Ronald Reagan did not continue this trend, although he was the first to appoint a woman to the Supreme Court. In screening candidates, his administration placed a higher priority on conservative ideology than on diversity, as did George H. W. Bush's administration. Bill Clinton's nominees were more liberal than were the nominees of Reagan and Bush, and a large percentage of them were women and minorities. George W. Bush's nominees were more diverse than those of his father although less so than those of Clinton and Carter, and they were uniformly conservative.¹⁵ Barack Obama nominated mostly ideologically moderate judges and justices, and, for the first time in American history, the president nominated women and ethnic minorities to a majority of the judicial vacancies.¹⁶

Federal judges have typically held office as a judge or prosecutor, and often they have been involved in partisan politics. This involvement is generally what brings them to the attention of senators and the Department of Justice when they seek nominees for judgeships. As former U.S. Attorney General and Circuit Court Judge Griffin Bell once remarked, "For me, becoming a federal judge wasn't very difficult. I managed John F. Kennedy's presidential campaign in Georgia. Two of my oldest and closest friends were senators from Georgia. And I was campaign manager and special unpaid counsel for the governor."¹⁷

Like their colleagues on the lower federal courts, Supreme Court justices are not a representative sample of the population (see Table 15.3 for the current justices). All have been lawyers, and all but six have been white males (Thurgood Marshall, nominated in 1967; Sandra Day O'Connor, nominated in 1981; and Clarence Thomas, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, all on the current Court). Most have been in their fifties and sixties when they took office, from the upper-middle or upper class, and Protestants.¹⁸

Typically, justices have held high administrative or judicial positions before moving to the Supreme Court. Most have had some experience as a judge, often at the appellate level, and many have worked for the Department of Justice. Some have held elective office, and a few have had no government service but have been distinguished attorneys. The fact that many justices, including some of the most distinguished ones, have not had previous judicial experience may seem surprising, but the unique work of the Court renders this background much less important than it might be for other appellate courts.

TABLE 15.3 SUPREME COURT JUSTICES, 2013

Name	Year of Birth	Previous Position	Nominating President	Year of Confirmation
John G. Roberts, Jr.	1955	U.S. Court of Appeals	G. W. Bush	2005
Antonin Scalia	1936	U.S. Court of Appeals	Reagan	1986
Anthony M. Kennedy	1936	U.S. Court of Appeals	Reagan	1988
Clarence Thomas	1948	U.S. Court of Appeals	G. H. W. Bush	1991
Ruth Bader Ginsburg	1933	U.S. Court of Appeals	Clinton	1993
Stephen G. Breyer	1938	U.S. Court of Appeals	Clinton	1994
Samuel A. Alito, Jr.	1950	U.S. Court of Appeals	G. W. Bush	2006
Sonia Sotomayor	1954	U.S. Court of Appeals	Obama	2009
Elena Kagan	1960	U.S. Solicitor General	Obama	2010



The backgrounds of federal judges are not representative of Americans. Sonia Sotomayor is the first Hispanic American to serve on the Supreme Court.

□ Criteria for Selection

Geography was once a prominent criterion for selection to the Court, but it is no longer very important. Presidents do like to spread the slots around, however, as when Richard Nixon decided that he wanted to nominate a Southerner. At various times there have been what some have termed a “Jewish seat” and a “Catholic seat” on the Court, but these guidelines are not binding on the president. For example, after a half-century of having a Jewish justice, the Court did not have one from 1969 to 1993. And although only 12 Catholics have served on the Court, 6 of the current justices are Catholic.

Partisanship has been and remains an important influence on the selection of judges and justices. Only 13 of 112 members of the Supreme Court have been nominated by presidents of a different party. Moreover, many of the 13 exceptions were actually close to the president in ideology, as was the case in Richard Nixon’s appointment of Lewis Powell. Herbert Hoover’s nomination of Benjamin Cardozo seems to be one of the few cases in which partisanship was completely dominated by merit as a criterion for selection.

The role of partisanship is really not surprising. Most of a president’s acquaintances are made through the party, and there is usually a certain congruity between party and political views. Most judges and justices have at one time been active partisans—an experience that gave them visibility and helped them obtain the positions from which they moved to the courts. Moreover, judgeships are considered very prestigious patronage plums. Indeed, the decisions of Congress to create new judgeships—and

thus new positions for party members—are closely related to whether the majority party in Congress is the same as the party of the president. Members of the majority party in the legislature want to avoid providing an opposition party president with new positions to fill with their opponents.

Ideology is as important as partisanship in the selection of judges and justices. Presidents want to appoint to the federal bench people who share their views. In effect, all presidents try to “pack” the courts. They want more than “justice”; they want policies with which they agree. Presidential aides survey candidates’ decisions (if they have served on a lower court),¹⁹ speeches, political stands, writings, and other expressions of opinion. They also glean information from people who know the candidates well. Although it is considered improper to question judicial candidates about upcoming court cases, it is appropriate to discuss broader questions of political and judicial philosophy. The Reagan administration was especially concerned about such matters and had each potential nominee fill out a lengthy questionnaire and be interviewed by a special committee in the Department of Justice. Both George H. W. Bush and George W. Bush were also attentive to appointing conservative judges. Bill Clinton was less concerned with appointing liberal judges, at least partly to avoid costly confirmation fights, and instead focused on identifying persons with strong legal credentials, especially women and minorities. Barack Obama approached judicial nominations much like Clinton.²⁰

Members of the federal bench also play the game of politics, of course, and may try to time their retirements so that a president with compatible views will choose their successor and perhaps a like-minded Senate will vote on the nomination. For example, it appears that Justice David Souter timed his retirement in 2009 so that Barack Obama rather than George W. Bush would name a new justice. This concern about a successor is one reason why justices remain on the Supreme Court for so long, even when they are clearly infirm.²¹

□ Background Characteristics and Policymaking

Presidents are typically pleased with the performance of their nominees to the Supreme Court and through them have slowed or reversed trends in the Court’s decisions. Franklin D. Roosevelt’s nominees substantially liberalized the Court, whereas Richard Nixon’s turned it in a conservative direction, from which it has yet to move.

Nevertheless, it is not always easy to predict the policy inclinations of candidates, and presidents have been disappointed in their nominees about one-fourth of the



The U.S. Supreme Court, 2013: Front row, left to right: Clarence Thomas, Antonin Scalia, John G. Roberts, Anthony M. Kennedy, and Ruth Bader Ginsburg. Second row, left to right: Sonia Sotomayor, Stephen G. Breyer, Samuel Alito, and Elena Kagan.

time. President Eisenhower, for example, was displeased with the liberal decisions of both Earl Warren and William Brennan. Once, when asked whether he had made any mistakes as president, Eisenhower replied, “Yes, two, and they are both sitting on the Supreme Court.”²² George H. W. Bush was disappointed with David Souter, who ended up siding with the Court’s liberal bloc on abortion rights and other issues.

Presidents influence policy through the values of their judicial nominees, but this impact is limited by numerous legal and “extralegal” factors beyond the chief executive’s control. As Harry Truman put it, “Packing the Supreme Court can’t be done. . . . I’ve tried it and it won’t work. . . . Whenever you put a man on the Supreme Court, he ceases to be your friend. I’m sure of that.”²³

Although women and people of different ethnicities and religions may desire to have people in their group appointed to the federal bench—at the very least, judgeships have symbolic importance for them²⁴—the real question is what, if any, policy differences result. There is some evidence that female judges on the courts of appeals are more likely than are male judges to support charges of sex discrimination and sexual harassment, and they seem to influence the male judges deciding the cases with them.²⁵ Similarly, racial and ethnic minority judges on these courts are more likely to find for minority plaintiffs in voting rights cases and also to influence the votes of white judges sitting with them.²⁶ At the level of the Supreme Court, conservative Justice Antonin Scalia has said that Justice Thurgood Marshall “could be a persuasive force just by sitting there. He wouldn’t have to open his mouth to affect the nature of the conference and how seriously the conference would take matters of race.”²⁷ It is true, of course, that Justice Clarence Thomas, the second African American justice, is one of the most conservative justices since the New Deal, illustrating that not everyone from a particular background has a particular point of view.

Many members of each party have been appointed, of course, and it appears that Republican judges in general are somewhat more conservative than are Democratic judges. Former prosecutors serving on the Supreme Court have tended to be less sympathetic toward defendants’ rights than have other justices. It seems, then, that background does make some difference,²⁸ yet for reasons that we examine in the following sections, on many issues party affiliation and other characteristics are imperfect predictors of judicial behavior.

The Courts as Policymakers

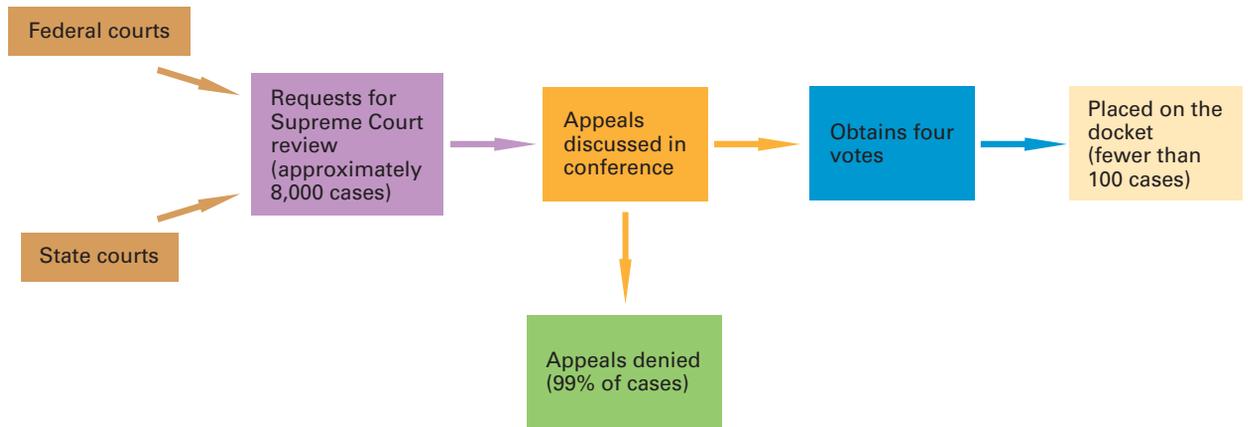
15.5 Outline the judicial process at the Supreme Court level and assess the major factors influencing decisions and their implementation.

“Judicial decision making,” a former Supreme Court law clerk wrote in the *Harvard Law Review*, “involves, at bottom, a choice between competing values by fallible, pragmatic, and at times nonrational men and women in a highly complex process in a very human setting.”²⁹ This is an apt description of policymaking in the Supreme Court and in other courts, too. The next sections look at how courts make policy, paying particular attention to the role of the U.S. Supreme Court. Although it is not the only court involved in policymaking and policy interpretation, its decisions have the widest implications for policy.

□ Accepting Cases

Deciding what to decide about is the first step in all policymaking. Courts of original jurisdiction cannot very easily refuse to consider a case; the U.S. Supreme Court has much more control over its agenda. The approximately 8,000 cases submitted annually to the U.S. Supreme Court must be read, culled, and sifted. Figure 15.4 shows the stages of this process. At least once each week, the nine justices meet in conference.

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FIGURE 15.4 OBTAINING SPACE ON THE SUPREME COURT'S DOCKET**solicitor general**

A presidential appointee and the third-ranking office in the Department of Justice. The solicitor general is in charge of the appellate court litigation of the federal government.

With them in the conference room sit some 25 carts, each wheeled in from the office of one of the 9 justices and each filled with petitions, briefs, memoranda, and every item the justices are likely to need during their discussions. These meetings operate under the strictest secrecy; only the justices themselves attend.

The first task of the justices at these weekly conferences is to establish an agenda for the Court. Before the meeting, the chief justice circulates a list of cases to discuss, and any justice may add other cases. Because few of the justices can take the time to read materials on every case submitted to the Court, most rely heavily on law clerks to screen each case.³⁰ If four justices agree to grant review of a case (in what is known as the “rule of four”), it is placed on the docket and scheduled for oral argument and the Court typically issues to the relevant lower federal or state court a *writ of certiorari*, a formal document calling up the case. In some instances, the Court will instead decide a case on the basis of the written record already on file with the Court.

The cases the Court is most likely to select are those that involve major issues—especially civil liberties, conflict between different lower courts on the interpretation of federal law (as when a court of appeals in Texas prohibits the use of affirmative action criteria in college admissions and a court of appeals in Michigan approves their use), or disagreement between a majority of the Supreme Court and lower-court decisions.³¹

Because getting into the Supreme Court is half the battle, it is important to remember this chapter’s earlier discussion of standing to sue (litigants must have serious interest in a case, having sustained or being in immediate danger of sustaining a direct and substantial injury from another party or an action of government)—a criterion the Court often uses to decide whether to hear a case. As we discuss later in this chapter, the Court will sometimes avoid hearing cases that are too politically “hot” to handle or that divide the Court too sharply.³²

Another important influence on the Supreme Court’s decisions to accept cases is the solicitor general. As a presidential appointee and the third-ranking official in the Department of Justice, the **solicitor general** is in charge of the appellate court litigation of the federal government. The solicitor general and a staff of about two dozen experienced attorneys have four key functions: (1) to decide whether to appeal cases the government has lost in the lower courts, (2) to review and modify the briefs presented in government appeals, (3) to represent the government before the Supreme Court, and (4) to submit an *amicus curiae* brief on behalf of a litigant in a case in which the government has an interest but is not directly involved.³³ The solicitors general are careful to seek Court review only of important cases. By avoiding frivolous appeals and displaying a high degree of competence, they typically earn the confidence of the Court, which in turn grants review of a large percentage of the cases they submit.³⁴ Often, the Court asks the solicitor general to provide the government’s opinion on whether to accept a case.

Ultimately, the Supreme Court decides very few cases. In recent years, the Court has made about 80 formal written decisions per year in which their opinions could serve as precedent and thus as the basis of guidance for lower courts. In a few dozen additional cases, the Court reaches a *per curiam decision*—that is, a decision without explanation. Such decisions resolve the immediate case but have no value as precedent because the Court does not offer reasoning that would guide lower courts in future decisions.³⁵

opinion

A statement of legal reasoning behind a judicial decision. The content of an opinion may be as important as the decision itself.

□ The Process of Decision Making

The second task of the justices' weekly conferences is to discuss cases that the Court has heard. From the first Monday in October until June, the Court hears oral arguments in two-week cycles: two weeks of courtroom arguments followed by two weeks of reflecting on cases and writing opinions about them. Figure 15.5 shows the stages in this process.

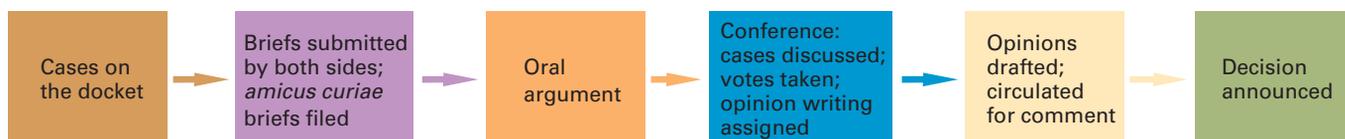
Before the justices enter the courtroom to hear the lawyers for each side present their arguments, they have received elaborately prepared written briefs from each party involved. They have also probably received several *amicus curiae* briefs from parties (often groups) who are interested in the outcome of the case but who are not formal litigants. As already noted, *amicus curiae* briefs may be submitted by the government, under the direction of the solicitor general, in cases in which it has an interest. For instance, if a case between two parties involves the question of the constitutionality of a federal law, the federal government naturally wants to have its voice heard. Administrations also use these briefs to urge the Court to change established doctrine. For example, the Reagan administration frequently submitted *amicus curiae* briefs to the Court to try to change the law dealing with defendants' rights.

In most instances, the attorneys for each side have only a half-hour to address the Court. During this time they summarize their briefs, emphasizing their most compelling points.³⁶ The justices may listen attentively, interrupt with penetrating or helpful questions, request information, talk to one another, read (presumably briefs), or simply gaze at the ceiling. After 25 minutes, a white light comes on at the lectern from which the lawyer is speaking, and five minutes later a red light signals the end of that lawyer's presentation, even if he or she is in midsentence. Oral argument is over.³⁷

Back in the conference room, the chief justice, who presides over the Court, raises a particular case and invites discussion, turning first to the senior associate justice. Discussion can range from perfunctory to profound and from courteous to caustic. If the votes are not clear from the individual discussions, the chief justice may ask each justice to vote. Once a tentative vote has been reached on a case, it is necessary to write an **opinion**, a statement of the legal reasoning behind the decision for the case.

Opinion writing is no mere formality. In fact, the content of an opinion may be as important as the decision itself. Broad and bold opinions have far-reaching implications for future cases; narrowly drawn opinions may have little impact beyond the case being decided. Tradition in the Supreme Court requires that the chief justice, if in the majority, write the opinion or assign it to another justice in the majority. The chief justice often writes the opinion in landmark cases, as Earl Warren did in *Brown v. Board of Education* and Warren Burger did in *United States v. Nixon*. If the chief justice is part of the minority, the senior associate justice in the majority assigns the opinion. The person assigned to write an opinion circulates drafts within the Court, justices make suggestions, and they all conduct negotiations among themselves.³⁸ The content of the opinion can win

FIGURE 15.5 THE SUPREME COURT'S DECISION-MAKING PROCESS



15.1

stare decisis

A Latin phrase meaning “let the decision stand.” Most cases reaching appellate courts are settled on this principle.

15.2

precedent

How similar cases have been decided in the past.

15.3

15.4

15.5

15.6

15.7

or lose votes. A justice must redraft an opinion that proves unacceptable to the majority of his or her colleagues on the Court.

Justices are free to write their own opinions, to join in other opinions, or to associate themselves with part of one opinion and part of another. Justices opposed to all or part of the majority’s decision write *dissenting opinions*. *Concurring opinions* are those written not only to support a majority decision but also to stress a different constitutional or legal basis for the judgment.

When the justices have written their opinions and taken the final vote, they announce their decision. At least six justices must participate in a case, and decisions are made by majority vote. If there is a tie (because of a vacancy on the Court or because a justice chooses not to participate because of a conflict of interest), the decision of the lower court from which the case came is sustained. Five votes in agreement on the reasoning underlying an opinion are necessary for the logic to serve as precedent for judges of lower courts.

□ The Basis of Decisions

Judges and justices settle the vast majority of cases on the principle of *stare decisis* (“let the decision stand”), meaning that an earlier decision should hold for the case being considered. All courts rely heavily on **precedent**—the way similar cases were handled in the past—as a guide to current decisions. Lower courts, of course, are expected to follow the precedents of higher courts in their decision making. If the Supreme Court, for example, rules in favor of the right to abortion under certain conditions, it has established a precedent that lower courts are expected to follow. Lower courts have much less discretion than the Supreme Court.³⁹

The Supreme Court is in a position to overrule its own precedents, and it has done so more than 200 times.⁴⁰ One of the most famous of such instances occurred with *Brown v. Board of Education* (1954), in which the court overruled *Plessy v. Ferguson* (1896) and found that segregation in the public schools violated the Constitution.

What happens when precedents are unclear? This is especially a problem for the Supreme Court, which is more likely than other courts to handle cases at the forefront of the law, where precedent is typically less firmly established. Moreover, the justices are often asked to apply to concrete situations the vague phrases of the Constitution (“due process of law,” “equal protection,” “unreasonable searches and seizures”) or vague statutes passed by Congress. This ambiguity provides leeway for the justices to disagree (the Court decides unanimously only about one-third of the cases in which it issues full opinions) and for their values to influence their judgment. In contrast, when precedents are clear and legal doctrine is well established, legal factors are more likely to play a preeminent role in Supreme Court decision making.⁴¹



The content of a Supreme Court opinion may be as important as the decision itself, and justices may spend months negotiating a majority opinion. Here, William Rehnquist prepares an opinion.

The Constitution does not specify a set of rules by which justices are to interpret it. There are a number of approaches to decision making. One is **originalism**, which takes two principal forms:

- The *original intent theory* holds that interpretation of a written constitution or law should be consistent with what was meant by those who drafted and ratified it. Justice Clarence Thomas is the most prominent advocate of this view.
- The *original meaning theory* is the view that judges should base their interpretations of a written constitution or law on what reasonable persons living at the time of its adoption would have declared the ordinary meaning of the text to be. It is with this view that most originalists, such as Justice Antonin Scalia, are associated,⁴² original meaning being more discernible than the often nebulous original intent.

Advocates of originalism view it as a means of constraining the exercise of judicial discretion, which they see as the foundation of the liberal Court decisions, especially on matters of civil liberties, civil rights, and defendants' rights. They also see following original intent or meaning as the only basis of interpretation consistent with democracy. Judges, they argue, should not dress up constitutional interpretations with *their* views on "contemporary needs," "today's conditions," or "what is right." It is the job of legislators, not judges, to make such judgments.

Both of these theories share the view that there is an authority, contemporaneous with a constitution's or statute's ratification, that should govern its interpretation. However, originalists do not propose to turn the clock back completely, as by, say, upholding a statute that imposed the punishment of flogging, of which the Constitution's Framers approved.

Of course, originalists often disagree among themselves about original meanings, and sometimes they agree about the founders' intentions but disagree about overturning deeply rooted precedents, such as bans on segregation and school prayers, that may clash with those intentions. Moreover, even when there is broad scholarly agreement about original understanding, originalists sometimes ignore it.

The primary alternative does not have a clear label, but those holding it view the Constitution as written in flexible terms, as a document whose meaning is dynamic and thus changes over time. Advocates of this approach to decision making, such as Justice Stephen Breyer, assert that the Constitution is subject to multiple meanings, to being given different interpretations by thoughtful people in different ages. Judges from different times and places will differ about what they think the Constitution means.⁴³ Thus, judicial discretion comes into play even if judges claim to be basing decisions on original intent. For advocates of this approach, originalism's apparent deference to the intentions of the Framers is simply a cover for making conservative decisions.

In addition, these jurists contend that trying to reconstruct or guess the Framers' intentions or meaning is very difficult. Recent key cases before the Supreme Court have concerned issues such as campaign financing, abortions, the Internet, and wiretapping that the Framers could not have imagined; there were no super-PACs, contraceptives or modern abortion techniques, or computers, electronic surveillance equipment, or telephones in 1787. When the Founders wrote the Constitution, they embraced not specific solutions but general principles, which frequently lacked discrete, discoverable meaning or intent. Moreover, there is often no record of their intentions, nor is it clear whose intentions should count—those of the writers of the Constitution, those of the more than 1,600 members who attended the ratifying conventions, or those of the voters who sent them there. This problem grows more complex when you consider the amendments to the Constitution, which involve thousands of additional "Framers." Moreover, historian Jack N. Rakove points out that there is little historical evidence that the Framers believed that their intentions should guide later interpretations of the Constitution.⁴⁴

Given the discretion that justices often have in making decisions, it is not surprising that consistent patterns related to their values and ideology—to conservative versus liberal positions—are often evident in their decisions. A number of scholars have proposed an *attitudinal model* of decision making in which justices decide cases based largely on the outcomes they prefer rather than on precedent or the meaning or

originalism

A view that the Constitution should be interpreted according to the original intentions or original meaning of the Framers. Many conservatives support this view.

15.1

judicial implementation

How and whether court decisions are translated into actual policy, thereby affecting the behavior of others. The courts rely on other units of government to enforce their decisions.

15.2

15.3

15.4

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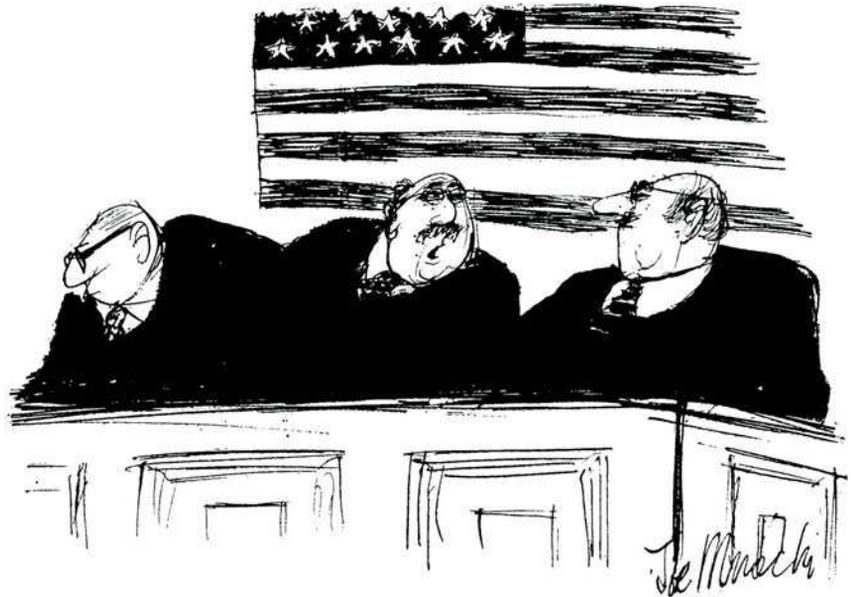
15.6

15.7

Point to Ponder

Supreme Court justices have substantial discretion in deciding constitutional issues.

Are you content with this judicial freedom? Is there any way to constrain Court decisions?



“Do you ever have one of those days when everything seems unconstitutional?”

intentions of the Constitution’s framers or of legislators.⁴⁵ In other words, they argue, policy preferences matter in judicial decision making, especially on the nation’s highest court. Although precedent, legal principles, and even political pressures from the public, Congress, and the White House constrain justices’ discretion,⁴⁶ justices usually arrive at a decision consistent with their policy preferences.

▣ Implementing Court Decisions

The Court conveys its decisions to the press and the public through formal announcements in open court. Media coverage of the Court remains primitive—short and shallow. Doris Graber reports that “much reporting on the courts—even at the Supreme Court level—is imprecise and sometimes even wrong.”⁴⁷ More important to the legal community, the decisions are bound weekly and made available to every law library and lawyer in the United States. There is, of course, an air of finality to the public announcement of a decision. In fact, however, even Supreme Court decisions are not self-implementing; they are actually “remands” to lower courts, instructing them to act in accordance with the Court’s decisions.

Reacting bitterly to one of Chief Justice Marshall’s decisions, President Andrew Jackson is said to have grumbled, “John Marshall has made his decision; now let him enforce it.” Court decisions carry legal, even moral, authority, but courts must rely on other units of government to enforce their decisions. **Judicial implementation** refers to how and whether court decisions are translated into actual policy, thereby affecting the behavior of others.

Judicial decision is the end of one process—the litigation process—and the beginning of another process—the process of judicial implementation. Sometimes delay and stalling follow even decisive court decisions. There is, for example, the story of the tortured efforts of a young African American named Virgil Hawkins to get himself admitted to the University of Florida Law School. Hawkins’s efforts began in 1949, when he first applied for admission, and ended unsuccessfully in 1958, after a decade of

court decisions. Despite a 1956 order from the U.S. Supreme Court to admit Hawkins, legal skirmishing continued and eventually produced a 1958 decision by a U.S. district court in Florida ordering the admission of nonwhites but upholding the denial of admission to Hawkins. Thus, other courts and other institutions of government can be roadblocks in the way of judicial implementation.

Charles Johnson and Bradley Canon suggest that implementation of court decisions involves several elements:⁴⁸

- First, there is an *interpreting population*, heavily composed of lawyers and judges. They must correctly understand and reflect the intent of the original decision in their subsequent actions. Usually lower-court judges do follow the Supreme Court, but sometimes they circumvent higher-court decisions to satisfy their own policy interests.⁴⁹
- Second, there is an *implementing population*. Suppose the Supreme Court held (as it did) that prayers organized by school officials in the public schools are unconstitutional. The implementing population (school boards and school administrators whose schools are conducting prayers) must then actually abandon prayers. Police departments, hospitals, corporations, government agencies—all may be part of the implementing population. With so many implementors, many of whom may disagree with a decision, there is plenty of room for “slippage” between what the Supreme Court decides and what actually occurs (as has been evident with school prayers).⁵⁰ Judicial decisions are more likely to be implemented smoothly if implementation is concentrated in the hands of a few highly visible officials, such as the president or state legislators. Even then, the courts may face difficulties. Responding to the *Brown* decision ending legal segregation in the nation’s public schools, in 1959 the Board of Supervisors for Prince Edward County, abetted by changes in Virginia laws, refused to appropriate *any* funds for the County School Board. This action effectively closed all public schools in the county to avoid integrating them. The schools remained closed for five years until the legal process finally forced them to reopen.
- Third, every decision involves a *consumer population*. For example, the consumer population of an abortion decision is those people who may want to have an abortion (and those who oppose them); the consumers of the *Miranda* decision on reading suspects their rights are criminal defendants and their attorneys. The consumer population must be aware of its newfound rights and stand up for them.



Virgil Hawkins’ unsuccessful struggle to attend the all-white University of Florida Law School illustrates how judicial implementation can affect the impact of Court decisions. Despite the Court’s order to admit Hawkins, he was never able to attend the university.

Congress and presidents can also help or hinder judicial implementation. When the Supreme Court, the year after its 1954 decision in *Brown v. Board of Education*, ordered public schools desegregated “with all deliberate speed,” President Eisenhower refused to state clearly that Americans should comply, which may have encouraged local school boards to resist the decision. Congress was not much help either; only a decade later, in the wake of the civil rights movement, did it pass legislation denying federal aid to segregated schools. Different presidents have different commitments to a particular judicial policy. For example, the Obama administration decided not to defend the constitutionality of the 1996 Defense of Marriage Act.

Why It Matters to You

The Lack of a Judicial Bureaucracy

The federal courts lack a bureaucracy to implement their decisions. In fact, some of the Supreme Court’s most controversial decisions, such as those dealing with school integration and school prayers, have been implemented only with great difficulty. If the courts had a bureaucracy to enforce their decisions, justice might be better served, but such a bureaucracy would have to be enormous to monitor, for example, every school or every police station.

The Courts and Public Policy: A Historical Review

15.6 Trace the Supreme Court’s use of judicial review in major policy battles in various eras of American history.

Like all policymakers, the courts are choice makers. Ultimately, the choices they make affect us all (see “Young People and Politics: The Supreme Court Is Closer Than You Think”). Confronted with controversial policies, they make controversial decisions that leave some people winners and others losers. The courts have made policy about slavery and segregation, corporate power and capital punishment, and dozens of other controversial matters.

Until the Civil War, the dominant questions before the Court concerned slavery and the strength and legitimacy of the federal government; these latter issues were resolved in favor of the supremacy of the federal government. From the Civil War until 1937, questions of the relationship between the federal government and the economy predominated. During this period, the Court restricted the power of the federal government to regulate the economy. From 1938 to the present, the paramount issues before the Court have concerned personal liberty and social and political equality. In this era, the Court has enlarged the scope of personal freedom and civil rights and has removed many of the constitutional restraints on the regulation of the economy.

Few justices played a more important role in making the Court a significant national agenda setter than John Marshall, chief justice from 1801 to 1835. His successors have continued not only to respond to the political agenda but also to shape discussion and debate about it.

□ John Marshall and the Growth of Judicial Review

Scarcely was the government housed in its new capital when Federalists and Democratic-Republicans clashed over the courts. In the election of 1800, Democratic-Republican Thomas Jefferson beat Federalist incumbent John Adams. Determined to leave at least the judiciary in trusted hands, Adams tried to fill it with Federalists. He is alleged to have stayed at his desk signing commissions until 9:00 PM on his last day in the White House (March 3, 1801).

Young People & Politics

The Supreme Court Is Closer Than You Think

The Supreme Court of the United States may seem remote and not especially relevant to a college student. Yet a surprising number of its most important decisions have been brought by young adults seeking protection for their civil rights and liberties. For example, in *Rostker v. Goldberg* (1981) several young men filed a suit claiming that the Military Selective Service Act's requirement that only males register for the draft was unconstitutional. Although the Court held that the requirement was constitutional, draft registration was suspended temporarily during the suit.

In *Board of Regents of University of Wisconsin System v. Southworth* (2000), the Court upheld the University of Wisconsin's requirement of a fee to fund speakers on campus, even if the speakers advocated views that offended some students; in *Zurcher v. Stanford Daily* (1978), the Court decided against a campus newspaper that sought to shield its files from a police search. In 1992, the Supreme Court ruled that legislatures and universities may not single out racial, religious, or sexual insults or threats for prosecution as "hate speech" or "bias crimes" (*R.A.V. v. St. Paul*). In cases such as those stemming from Gregory Johnson's burning an American flag at the 1984 Republican National Convention to protest nuclear arms buildup (which the Court protected in *Texas v. Johnson* [1989]) and David O'Brien's burning a draft card (which the Court

did not protect in *United States v. O'Brien* [1968]), young adults have also been pioneers in the area of symbolic speech.

Issues of religious freedom have also prominently featured college students. In *Widmar v. Vincent* (1981), the Court decided that public universities that permit student groups to use their facilities must allow student religious groups on campus to use the facilities for religious worship. In 1995, the Court held that the University of Virginia was constitutionally required to subsidize a student religious magazine on the same basis as other student publications (*Rosenberger v. University of Virginia*). However, in 2004 the Court held that the state of Washington was within its rights when it excluded students pursuing a devotional theology degree from its general scholarship program (*Locke v. Davey*).

Thus, the Supreme Court has a long history of dealing with issues of importance to young adults. Often it is young adults themselves who initiate the cases—and who take them all the way to the nation's highest court.

CRITICAL THINKING QUESTIONS

1. Why do you think cases involving young people tend to involve civil liberties issues?
2. What other issues of particular importance to young people should the Supreme Court decide?

In the midst of this flurry, Adams appointed William Marbury to the minor post of justice of the peace in the District of Columbia. In the rush of last-minute business, however, Secretary of State John Marshall failed to deliver commissions to Marbury and 16 others. He left the commissions to be delivered by the incoming secretary of state, James Madison.

Madison and Jefferson were furious at Adams's actions and refused to deliver the commissions. Marbury and three others in the same situation sued Madison, asking the Supreme Court to order Madison to give them their commissions. They took their case directly to the Supreme Court under the Judiciary Act of 1789, which gave the Court original jurisdiction in such matters.

The new chief justice was none other than Adams's former secretary of state and arch-Federalist John Marshall, himself one of the "midnight appointments" (he took his seat on the Court barely three weeks before Adams's term ended). Marshall and his Federalist colleagues were in a tight spot. Threats of impeachment came from Jeffersonians fearful that the Court would vote for Marbury. Moreover, if the Court ordered Madison to deliver the commissions, he was likely to ignore the order, putting the prestige of the nation's highest court at risk over a minor issue. Marshall had no means of compelling Madison to act. The Court could also deny Marbury's claim. Taking that option, however, would concede the issue to the Jeffersonians and give the appearance of retreat in the face of opposition, thereby reducing the power of the Court.

Marshall devised a shrewd solution to the case of *Marbury v. Madison*. In February 1803, he delivered the unanimous opinion of the Court. First, Marshall and

Marbury v. Madison

The 1803 case in which Chief Justice John Marshall and his associates first asserted the right of the Supreme Court to determine the meaning of the U.S. Constitution. The decision established the Court's power of judicial review over acts of Congress, in this case the Judiciary Act of 1789.

judicial review

The power of the courts to determine whether acts of Congress and, by implication, the executive are in accord with the U.S. Constitution. Judicial review was established by John Marshall and his associates in *Marbury v. Madison*.

his colleagues argued that Madison was wrong to withhold Marbury's commission. The Court also found, however, that the Judiciary Act of 1789, under which Marbury had brought suit, contradicted the plain words of the Constitution about the Court's original jurisdiction. Thus, Marshall dismissed Marbury's claim, saying that the Court, according to the Constitution, had no power to require that the commission be delivered.

Conceding a small battle over Marbury's commission (he did not get it), Marshall won a much larger war, asserting for the courts the power to determine what is and what is not constitutional. As Marshall wrote, "An act of the legislature repugnant to the Constitution is void," and "it is emphatically the province and duty of the judicial department to say what the law is." The chief justice established the power of **judicial review**, the power of the courts to hold acts of Congress and, by implication, the executive in violation of the Constitution.

Marbury v. Madison was part of a skirmish between the Federalists on the Court and the Democratic-Republican-controlled Congress. Partly to rein in the Supreme Court, for example, the Jeffersonian Congress in 1801 abolished the lower federal appeals courts and made the Supreme Court judges return to the unpleasant task of "riding circuit"—serving as lower-court judges around the country. This was an act of studied harassment of the Court by its enemies.

After *Marbury*, angry members of Congress, together with other Jeffersonians, claimed that Marshall was a "usurper of power," setting himself above Congress and the president. This view, however, was unfair. State courts, before and after the Constitution, had declared acts of their legislatures unconstitutional. In the Federalist Papers, Alexander Hamilton had expressly assumed the power of the federal courts to review legislation. And in fact the federal courts had already used this power: *Marbury* was not even the first case to strike down an act of Congress, as a lower federal court had done so in 1792, and the Supreme Court itself had approved a law after a constitutional review in 1796. Marshall was neither inventing nor imagining his right to review laws for their constitutionality.

The case illustrates that the courts must be politically astute in exercising their power over the other branches. By in effect reducing its *own* power—the authority to hear cases such as Marbury's under its original jurisdiction—the Court was able to assert the right of judicial review in a fashion that the other branches could not easily rebuke.

More than any other power of the courts, judicial review has embroiled them in policy controversy. Before the Civil War, the Supreme Court, headed by Chief Justice Roger Taney, held the Missouri Compromise unconstitutional because it restricted slavery in the territories. The decision was one of many steps along the road to the Civil War. After the Civil War, the Court was again active, this time using judicial review to strike down dozens of state and federal laws curbing the growing might of business corporations.

□ The "Nine Old Men"

Never was the Court as controversial as during the New Deal. At President Roosevelt's urging, Congress passed dozens of laws designed to end the Depression. However, conservatives (most nominated by Republican presidents), who viewed federal intervention in the economy as unconstitutional and tantamount to socialism, dominated the Court.

The Supreme Court began to dismantle New Deal policies one by one. The National Industrial Recovery Act was one of a string of anti-Depression measures. Although this act was never particularly popular, the Court sealed its doom in *Schechter Poultry Corporation v. United States* (1935), declaring it unconstitutional because it regulated purely local business that did not affect interstate commerce.

Incensed, Roosevelt in 1937 proposed what critics called a "court-packing plan." Noting that the average age of the Court was over 70, Roosevelt railed against those "nine old men." The Constitution gave the justices lifetime jobs (see "America in Perspective: The Tenure of Supreme Court Judges"), but Congress can determine the number of justices. Thus, FDR proposed that Congress expand the size of the Court, a move that would have allowed him to appoint additional justices sympathetic to the New Deal.

Congress objected and never passed the plan. It became irrelevant, however, when two justices, Chief Justice Charles Evans Hughes and Associate Justice Owen Roberts, began switching their votes in favor of New Deal legislation. (One wit called it the “switch in time that saved nine.”) Shortly thereafter, Associate Justice William Van Devanter retired, and Roosevelt got to make the first of his many appointments to the Court.

□ The Warren Court

Few eras of the Supreme Court have been as active in shaping public policy as that of the Warren Court (1953–1969), presided over by Chief Justice Earl Warren. Scarcely had President Eisenhower appointed Warren when the Court faced the issue of school segregation. In 1954, it held that laws requiring segregation of the public schools were unconstitutional. Later it expanded the rights of criminal defendants, extending the right to counsel and protections against unreasonable search and seizure and self-incrimination. It ordered states to reapportion both their legislatures and their congressional districts according to the principle of one person, one vote, and it prohibited organized prayer in public schools. So active was the Warren Court that right-wing groups, fearing that it was remaking the country, posted billboards all over the United States urging Congress to “Impeach Earl Warren.”⁵¹

□ The Burger Court

Warren’s retirement in 1969 gave President Richard Nixon his hoped-for opportunity to appoint a “strict constructionist”—that is, one who interprets the Constitution

America Perspective

The Tenure of Supreme Court Judges

The U.S. Supreme Court plays a crucial role in American government, and federal judges, including Supreme Court justices, have tenure for life. As a result, the average age of U.S. justices is high, and there are typically many justices who are over 75 years old. Life tenure also means that there are fewer changes of justices than there would be in a system with shorter terms.

Interestingly, every other established democracy provides for some limits on the tenure of judges on its highest constitutional court. Here are some examples:

CRITICAL THINKING QUESTIONS

1. If a constitutional convention were reconvened today, would we still opt for life tenure?
2. Do you agree with Alexander Hamilton’s argument in *Federalist #78* that life tenure was an excellent means of securing “a steady, upright, and impartial administration of the laws”?

Country	Term for Judges on Highest Constitutional Court
France	9-year, nonrenewable term
Italy	9-year, nonrenewable term
Portugal	9-year, nonrenewable term
Spain	9-year, nonrenewable term
Germany	12-year term, must retire at 68
Japan	10-year term, must retire at 70; voters vote to renew justices every 10 years
India	serve under good behavior up to age 65
Australia	serve under good behavior up to age 70
Canada	serve under good behavior up to age 75

SOURCE: Steven G. Calabresi and James Lindgren, “Term Limits for the Supreme Court: Life Tenure Reconsidered,” *Harvard Journal of Law and Public Policy* 29 (Summer 2006), pp. 819–822.

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narrowly—as chief justice. He chose Minnesotan Warren E. Burger, then a conservative judge on the District of Columbia Court of Appeals. As Nixon hoped, the Burger Court turned out to be more conservative than the liberal Warren Court. It narrowed defendants' rights, though it did not overturn the fundamental contours of the *Miranda* decision. The conservative Burger Court, however, also wrote the abortion decision in *Roe v. Wade*, required school busing in certain cases to eliminate historic segregation, and upheld affirmative action programs in the *Weber* case. One of the most notable decisions of the Burger Court weighed against Burger's appointer, Richard Nixon. At the height of the Watergate scandal, the Supreme Court was called on to decide whether Nixon had to turn his White House tapes over to the courts. It unanimously ordered him to do so in *United States v. Nixon* (1974), thus hastening the president's resignation.

□ The Rehnquist and Roberts Courts

By the early 1990s, the conservative nominees of Republican presidents, led by Chief Justice William Rehnquist, composed a clear Supreme Court majority. In 2005, John Roberts replaced Rehnquist as chief justice, but the basic divisions on the Court have remained relatively stable. Like the Burger Court, the Supreme Court in recent years has been conservative, and like both the Warren and the Burger Courts, it has been neither deferential to Congress nor reluctant to enter the political fray. The Court's decision in *Bush v. Gore* (2000) that decided the 2000 presidential election certainly represents a high point of judicial activism.

However one evaluates the Court's direction, in most cases in recent years the Court has not created a revolution in constitutional law. Instead, it has limited, rather than reversed, rights established by liberal decisions such as those regarding defendants' rights and abortion. Although its protection of the First Amendment rights of free speech and free press has remained robust, the Court has tended no longer to see itself as the special protector of individual liberties and civil rights for minorities and has raised important obstacles to affirmative action programs. In the area of federalism, however, the Court has blazed new paths in constraining the federal government's power over the states.

Understanding the Courts

15.7

Assess the role of unelected courts and the scope of judicial power in American democracy.

P

owerful courts are unusual; few nations have them. The power of American judges raises questions about the compatibility of unelected courts with a democracy and about the appropriate role for the judiciary in policymaking.

□ The Courts and Democracy

Announcing his retirement in 1981, Justice Potter Stewart made a few remarks to the handful of reporters present. Embedded in his brief statement was this observation: "It seems to me that there's nothing more antithetical to the idea of what a good judge should be than to think it has something to do with representative democracy." He meant that judges should not be subject to the whims of popular majorities. In a nation that insists so strongly that it is democratic, where do the courts fit in?

In some ways, the courts are not a very democratic institution. Federal judges are not elected and are almost impossible to remove. Indeed, their social backgrounds probably make the courts the most elite-dominated policymaking institution. If democracy requires that key policymakers always be elected or be continually responsible to those who are, then the courts diverge sharply from the requirements of democratic government.



The Supreme Court frequently makes controversial decisions regarding important matters of politics and public policy. Critics often argue that unelected judges are making decisions best left to elected officials. Here, demonstrators express their opinions about President Obama's health care reform bill.

The Constitution's Framers wanted it that way. Chief Justice Rehnquist, a judicial conservative, put the case as follows: "A mere change in public opinion since the adoption of the Constitution, unaccompanied by a constitutional amendment, should not change the meaning of the Constitution. A merely temporary majoritarian groundswell should not abrogate some individual liberty protected by the Constitution."⁵²

The courts are not entirely independent of popular preferences, however. Turn-of-the-twentieth-century Chicago humorist Finley Peter Dunne had his Irish saloon-keeper character "Mr. Dooley" quip that "th' Supreme Court follows th' iliction returns." Many years later, political scientists have found that the Court usually reflects popular majorities.⁵³ Even when the Court seems out of step with other policymakers, it eventually swings around to join the policy consensus,⁵⁴ as it did in the New Deal. A study of the period from 1937 to 1980 found that the Court was clearly out of line with public opinion only on the issue of prayers in public schools.⁵⁵ In addition, congressional Court-curbing proposals are typically driven by public discontent, and the Court usually responds to such proposals by engaging in self-restraint and moderating its decisions.⁵⁶ Similarly, the Court often moves toward the position articulated on behalf of the White House by the solicitor general.⁵⁷

Despite the fact that the Supreme Court sits in a "marble palace," it is not as insulated from the normal forms of politics as one might think. For example, when the Court took up *Webster v. Reproductive Health Services* (1989), the two sides in the abortion debate flooded the Court with mail, targeted it with advertisements and protests, and bombarded it with 78 *amicus curiae* briefs. Members of the Supreme Court are unlikely to cave in to interest group pressures, but they are aware of the public's concern about issues, and this awareness becomes part of their consciousness as they decide cases. Political scientists have found that the Court is more likely to hear cases for which interest groups have filed *amicus curiae* briefs.⁵⁸

Courts can also promote pluralism. When groups go to court, they use litigation to achieve their policy objectives.⁵⁹ Both civil rights groups and environmentalists, for example, have blazed a path to show how interest groups can effectively use the courts to achieve their policy goals. Thurgood Marshall, the legal wizard of the NAACP's litigation strategy, not only won most of his cases but also won for himself a seat on the Supreme Court. Almost every major policy decision these days ends up in court. Chances are good that some judge can be found who will rule in an interest group's favor. On the other hand, agencies and businesses commonly find themselves ordered

15.1

judicial restraint

An approach to decision making in which judges play minimal policy-making roles and defer to legislatures whenever possible.

15.2

judicial activism

An approach to decision making in which judges sometimes make bold policy decisions, even charting new constitutional ground.

15.3

15.4

15.5

15.6

15.7



Interest groups often use the judicial system to pursue their policy goals, forcing the courts to rule on important social issues. Some Hispanic parents, for example, have successfully sued local school districts to compel them to offer bilingual education.

by different courts to do opposite things. The habit of always turning to the courts as a last resort can add to policy delay, deadlock, and inconsistency.

▣ The Scope of Judicial Power

The courts, Alexander Hamilton wrote in the *Federalist Papers*, “will be least in capacity to annoy or injure” the people and their liberties.⁶⁰ Throughout American history, critics of judicial power have disagreed. They see the courts as too powerful for their own—or the nation’s—good. Yesterday’s critics focused on John Marshall’s “usurpations” of power, on the proslavery decision in *Dred Scott*, or on the efforts of the “nine old men” to kill off Franklin D. Roosevelt’s New Deal legislation. Today’s critics are never short of arguments to show that courts go too far in making policy.⁶¹

Courts make policy on both large and small issues. In the past few decades, courts have made policies on major issues involving school busing, abortion, affirmative action, nuclear power, legislative redistricting, bilingual education, prison conditions, counting votes in the 2000 presidential election, and many other key issues.⁶²

There are strong disagreements about the appropriateness of the courts playing a prominent policymaking role. Many scholars and judges favor a policy of **judicial restraint**, in which judges adhere closely to precedent and play minimal policymaking roles, deferring to legislatures by upholding laws whenever possible. These observers stress that the federal courts, composed of unelected judges, are the least democratic branch of government and question the qualifications of judges for making policy decisions and balancing interests. Advocates of judicial restraint believe that decisions such as those on abortion and prayer in public schools go well beyond the “referee” role they say is appropriate for courts in a democracy.

On the other side are proponents of **judicial activism**, in which judges are less deferential to elected officials and sometimes make bold policy decisions, even charting new constitutional ground. Advocates of judicial activism emphasize that the courts may alleviate pressing needs—especially needs of those who are politically or economically weak—left unmet by the majoritarian political process. Americans have never resolved the issue of judicial restraint versus judicial activism, as you can see in “You Are the Policymaker: The Debate over Judicial Activism.”

It is important not to confuse judicial activism or restraint with liberalism or conservatism. In Table 15.4, you can see the varying levels of the Supreme Court’s use of judicial review to void laws passed by Congress in different eras. In the early years of

You Are the Policymaker

The Debate over Judicial Activism

Just what role should the Supreme Court play in American politics? Should it simply provide technical interpretations of legislation and the Constitution, leaving all policy initiatives to the elected branches? Or should it take a more aggressive role in protecting rights, especially of those who fare less well in majoritarian political process?

Republicans, spurred by their opposition to the Supreme Court's liberal decisions on issues such as school prayer, defendants' rights, flag burning, and abortion, usually call for justices to exercise judicial restraint. However, the justices they nominate are often not

deferential to Congress and vote to strike down acts of Congress, furthering conservative goals in the process but undermining judicial restraint. Democrats often favor judicial activism but are highly critical of conservative courts undermining liberal policies, whether in the early years of the New Deal or in the past three decades.

What do you think? The choice here is at the very heart of the judicial process. If you were a justice sitting on the Supreme Court and were asked to interpret the meaning of the Constitution, would you defer to elected officials or would you approach your decisions as a co-equal policymaker? What would *you* do?

the New Deal (falling within the 1930–1936 period in the table), judicial activists were conservatives. During the tenure of Earl Warren as chief justice (1953–1969), activists made liberal decisions. The Courts under Chief Justices Warren Burger (1969–1986), William Rehnquist (1986–2005), and John Roberts (2005–), composed of mostly conservative nominees of Republican presidents, marked the most active use in the nation's history of judicial review to void congressional legislation.⁶³

The problem remains of reconciling the American democratic heritage with an active policymaking role for the judiciary. The federal courts have developed a doctrine of **political questions** as a means to avoid deciding some cases, principally those that involve conflicts between the president and Congress. The courts have shown no willingness, for example, to settle disputes regarding the constitutionality of the War Powers Resolution, which Congress designed to constrain the president's use of force.

Similarly, judges typically attempt, whenever possible, to avoid deciding a case on the basis of the Constitution, preferring less contentious "technical" grounds. They also employ issues of jurisdiction, mootness (whether a case presents a real controversy in which a judicial decision can have a practical effect), standing, ripeness (whether the issues of a case are clear enough and evolved enough to serve as the basis of a decision), and other conditions to avoid adjudication of some politically charged cases.⁶⁴ The Supreme Court refused to decide, for example, whether it was legal to carry out the war in Vietnam without an explicit declaration of war from Congress.

As you saw in the discussion of *Marbury v. Madison*, from the earliest days of the Republic, federal judges have been politically astute in their efforts to maintain the legitimacy of the judiciary and to conserve their resources. (Remember that judges are typically recruited from political backgrounds.) They have tried not to take on too many politically controversial issues at one time. They have also been much more likely to find state and local laws unconstitutional (about 1,100) than federal laws (fewer than 200, as shown in Table 15.4).

Another factor that increases the acceptability of activist courts is the ability to overturn their decisions. First, the president and the Senate determine who sits on the federal bench. Second, Congress, with or without the president's urging, can begin the process of amending the Constitution to overcome a constitutional decision of the Supreme Court. Although this process does not occur rapidly, it is a safety valve. The Eleventh Amendment in 1795 reversed the decision in *Chisolm v. Georgia*, which permitted an

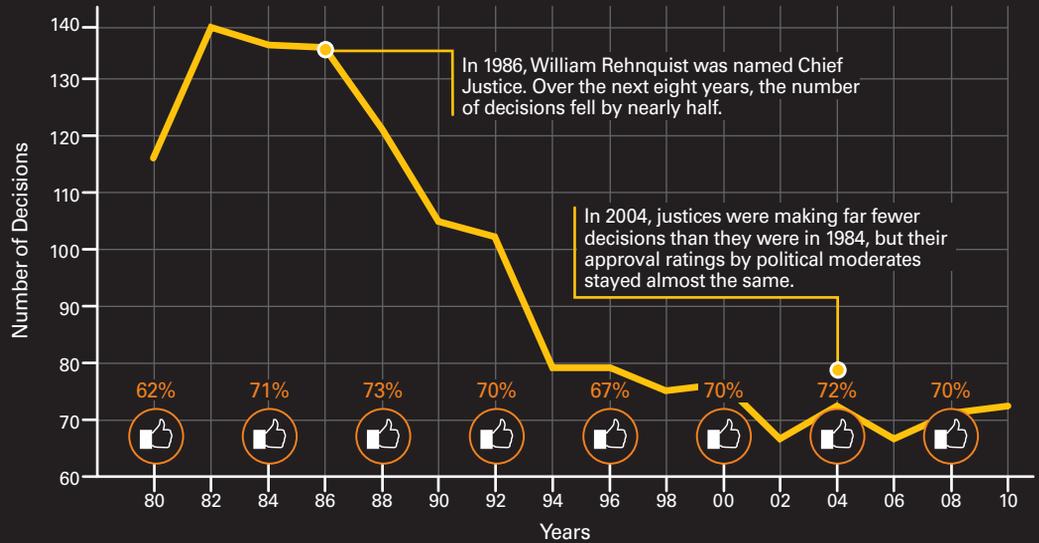
political questions

A doctrine developed by the federal courts and used as a means to avoid deciding some cases, principally those involving conflicts between the president and Congress.

Who Are the Activist Judges?

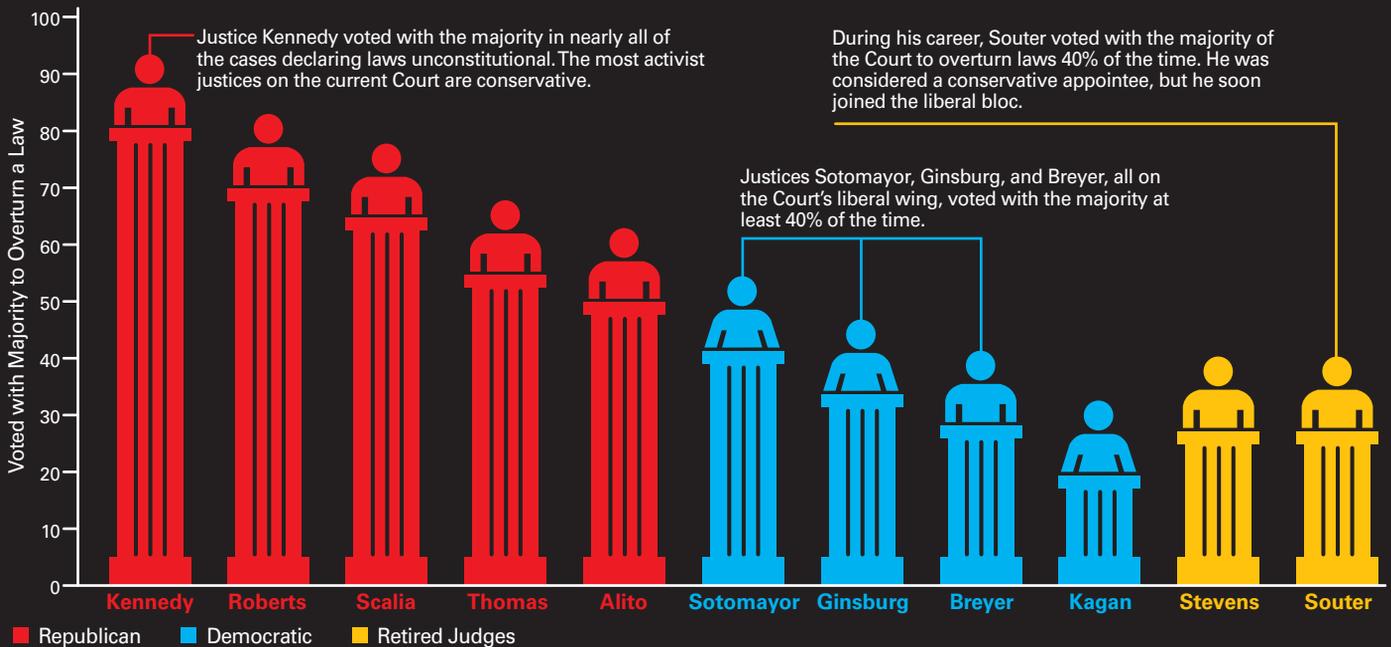
In practice, an activist judge—liberal or conservative—is one who is more willing than average to overturn laws as unconstitutional. Even though the current Supreme Court hands down fewer decisions than in the past, 19 out of its 408 decisions between 2005 and 2010 declared laws unconstitutional. The data below show which justices are most responsible for these controversial decisions.

Supreme Court Decisions



Supreme Court Approval Rating by Moderates

Judicial Activism on the Roberts Court



SOURCE: Data from the United States Supreme Court and the General Social Survey, 1980–2010.

Investigate Further

Concept Why is judicial activism controversial? In declaring a law unconstitutional, the Court overturns the products of elected officials. It may set precedents on controversial or divisive issues, and may limit future legislation.

Connection Does judicial activism affect public confidence? Over two-thirds of American moderates continued to express confidence in the Court, even as it became less active and more conservative in the 2000s.

Cause Is judicial activism conservative or liberal? On the Roberts Court, activism is associated with conservative justices. However, at other points in time, liberals have been activists.

TABLE 15.4 SUPREME COURT RULINGS IN WHICH FEDERAL STATUTES^a HAVE BEEN FOUND UNCONSTITUTIONAL^b

Period	Statutes Voided
1798–1864	2
1864–1900	21 (22) ^c
1901–1910	9
1911–1920	11
1921–1930	13
1931–1940	14
1941–1952	3
1953–1969	23
1970–1986	33
1987–2004	39
2005–present	9
Total	177

^aIn some cases, provisions of multiple statutes have been found unconstitutional. In other instances, decisions in several cases have found different parts of the same statutes unconstitutional.

^bIn whole or in part.

^cAn 1883 decision in the *Civil Rights Cases* consolidated five different cases into one opinion declaring one act of Congress void. In 1895, *Pollock v. Farmers Loan and Trust Co.* was heard twice, with the same result both times.

SOURCE: U.S. Senate, *The Constitution of the United States of America: Analysis and Interpretation* and biannual supplements. Updated by authors.

individual to sue a state in federal court; the Fourteenth Amendment in 1868 reversed the decision in *Scott v. Sandford*, which held African Americans not to be citizens of the United States; the Sixteenth Amendment in 1913 reversed the decision in *Pollock v. Farmer's Loan and Trust Co.*, which prohibited a federal income tax; and the Twenty-sixth Amendment in 1971 reversed part of *Oregon v. Mitchell*, which voided a congressional act according 18- to 20-year-olds the right to vote in state elections.

Even more drastic options are available as well. Just before leaving office in 1801, the Federalists created a tier of circuit courts and populated them with Federalist judges; the Jeffersonian Democrats took over the reins of power and promptly abolished the entire level of courts. In 1869, the Radical Republicans in Congress altered the appellate jurisdiction of the Supreme Court to prevent it from hearing a case (*Ex parte McCardle*) that concerned the Reconstruction Acts. This kind of alteration is rare, but it occurred recently. The George W. Bush administration selected the naval base at Guantánamo as the site for a detention camp for terrorism suspects in the expectation that its actions would not be subject to review by federal courts. In June 2004, however, the Supreme Court ruled that the naval base fell within the jurisdiction of U.S. law and that the *habeas corpus* statute that allows prisoners to challenge their detentions was applicable. In 2005 and again in 2006, Congress stripped federal courts from hearing habeas corpus petitions from the detainees in an attempt to thwart prisoners from seeking judicial relief. In the end, however, the Supreme Court held Congress's actions to be unconstitutional.

Finally, if the issue is one of **statutory construction**, in which a court interprets an act of Congress, then the legislature routinely passes legislation that clarifies existing laws and, in effect, overturns the courts.⁶⁵ In 1984, for example, the Supreme Court ruled in *Grove City College v. Bell* that Congress had intended that when an institution receives federal aid, only the program or activity that actually gets the aid, not the entire institution, is covered by four federal civil rights laws. In 1988, Congress passed a law specifying that the entire institution is affected. Congress may also pass laws with detailed language to constrain judicial decision making.⁶⁶ The description of the judiciary as the “ultimate arbiter of the Constitution” is hyperbolic; all the branches of government help define and shape the Constitution.

statutory construction

The judicial interpretation of an act of Congress. In some cases where statutory construction is an issue, Congress passes new legislation to clarify existing laws.

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Review the Chapter



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The Nature of the Judicial System

15.1 Identify the basic elements of the American judicial system and the major participants in it, p. 509.

The vast majority of cases are tried in state, not federal, courts. Courts can only hear “cases” or “controversies” between plaintiffs and defendants. Plaintiffs must have standing to sue, and judges can only decide justiciable disputes. Attorneys also play a central role in the judicial system. Interest groups sometimes promote litigation and often file *amicus curiae* briefs in cases brought by others.

The Structure of the Federal Judicial System

15.2 Outline the structure of the federal court system and the major responsibilities of each component, p. 511.

The district courts are courts of original jurisdiction and hear most of the federal criminal and civil cases and diversity of citizenship cases, supervise bankruptcy proceedings, and handle naturalization and admiralty and maritime law, and review the actions of some federal administrative agencies. Circuit courts, or courts of appeals, hear appeals from the district courts and from many regulatory agencies. They focus on correcting errors of procedure and law that occurred in the original proceedings of legal cases. The Supreme Court sits at the pinnacle of the system, deciding individual cases, resolving conflicts among the states, maintaining national supremacy in the law, and ensuring uniformity in the interpretation of national laws. Most Supreme Court cases come from the lower federal courts, but some are appeals from state courts and a very few are cases for which the Court has original jurisdiction.

The Politics of Judicial Selection

15.3 Explain the process by which judges and justices are nominated and confirmed, p. 516.

The president nominates and the Senate confirms judges and justices. Senators from the relevant state play an important role in the selection of district court judges, as a result of senatorial courtesy, while the White House has more discretion with appellate judges and, especially, Supreme Court justices. Although the Senate confirms most judicial nominations, it has rejected or refused to act on many in recent years, especially for positions in the higher courts.

The Backgrounds of Judges and Justices

15.4 Describe the backgrounds of judges and justices and assess the impact of background on their decisions, p. 521.

Judges and justices are not a representative sample of the American people. They are all lawyers and are disproportionately white males. They usually share the partisan and ideological views of the president who nominated them, and these views are often reflected in their decisions, especially in the higher courts. Other characteristics such as race and gender are also seen to influence decisions.

The Courts as Policymakers

15.5 Outline the judicial process at the Supreme Court level and assess the major factors influencing decisions and their implementation, p. 525.

Accepting cases is a crucial stage in Supreme Court decision making, and the Court is most likely to hear cases on major issues, when it disagrees with lower court decisions, and when the federal government, as represented by the solicitor general, asks for a decision. Decisions, announced once justices have written opinions and taken a final vote, in most cases follow precedent, but the Court can overrule precedents, and decisions where the precedents are less clear often reflect the justices’ values and ideologies. The implementation of Court decisions depends on an interpreting population of judges and lawyers, an implementing population ranging from police officers and school boards to state legislatures and the president, and a consumer population of citizens affected by the decision.

The Courts and Public Policy: A Historical Review

15.6 Trace the Supreme Court’s use of judicial review in major policy battles in various eras of American history, p. 532.

Since its astute first overturning of a congressional statute in *Marbury v. Madison*, the Court has exercised judicial review to play a key role in many of the major policy battles in American history. Until the Civil War, the dominant questions before the Court concerned slavery and the strength and legitimacy of the federal government, with the latter questions resolved in favor of the supremacy of the federal

government. From the Civil War until 1937, questions of the relationship between the federal government and the economy predominated, with the Court restricting the government's power to regulate the economy. From 1938 until the present, the paramount issues before the Court have concerned personal liberty and social and political equality. In this era, the Court has enlarged the scope of personal freedom and civil rights and has removed many of the constitutional restraints on the regulation of the economy. In recent years, the Court has been less aggressive in protecting civil rights for minorities but has constrained the federal government's power over the states.

Understanding the Courts

15.7 Assess the role of unelected courts and the scope of judicial power in American democracy, p. 536.

Judges and justices are not elected and are difficult to remove, but they are not completely insulated from politics and often have acted to promote openness in the political system. They also have a number of tools for avoiding making controversial decisions, which they often employ, and there are a number of means more democratically selected officials can use to overturn Court decisions.

Learn the Terms

 **Study** and **Review** the **Flashcards**

standing to sue, p. 510
class action suits, p. 510
justiciable disputes, p. 510
amicus curiae briefs, p. 511
original jurisdiction, p. 512
appellate jurisdiction, p. 512
district courts, p. 512
courts of appeals, p. 513

Supreme Court, p. 514
senatorial courtesy, p. 516
solicitor general, p. 526
opinion, p. 527
stare decisis, p. 528
precedent, p. 528
originalism, p. 529
judicial implementation, p. 530

Marbury v. Madison, p. 533
judicial review, p. 534
judicial restraint, p. 538
judicial activism, p. 538
political questions, p. 539
statutory construction, p. 541

Test Yourself

 **Study** and **Review** the **Practice Tests**

- Who can challenge a law in an American court?
 - Any citizen can challenge any law.
 - Any tax-paying citizen can challenge any law.
 - Only a person who has a serious interest in a case can challenge a law.
 - Only a person who is included in a class action suit can challenge a law.
 - Only a lawyer can challenge a law.
- Which of the following is NOT a civil case?
 - A company's CEO is charged with embezzlement of funds.
 - An employee of a business brings discrimination charges against his superior.
 - A wife sues her husband for child support.
 - A merger of two firms is investigated for its legality.
 - A married couple files for divorce.
- Access to lawyers and quality legal counsel has become more equal over time.
True ____ False ____
- What role do interest groups play in the American judicial system? In your opinion, is this involvement of interest groups more of a positive or a negative? Explain your answer.
- Which of the following was actually specified in the U.S. Constitution?
 - constitutional courts
 - the federal courts system
 - the Court of Military Appeals
 - the Tax Court
 - the U.S. Supreme Court
- Suppose a person commits murder in a national park. Where would this murder case first be heard?
 - the U.S. Supreme Court
 - the U.S. Court of Appeals for the Federal Circuit
 - a U.S. district court in the district where the crime took place
 - a legislative court
 - the U.S. Court of Appeals in the circuit where the crime took place
- Only a small percentage of people convicted of federal crimes in the federal district courts actually have a trial.
True ____ False ____
- Why is jurisdiction important to the structure of the federal judicial system? In your answer, be sure to identify each federal court level and explain the type or types of jurisdiction each court has.
- Which of the following is true about the norm of senatorial courtesy for district court nominees?
 - The Senate invokes this courtesy only when a majority of senators agrees to invoke it.
 - The Senate invokes this courtesy if a nominee is opposed by a senator of the president's party from the state in which the nominee is to serve.

- c. The Senate invokes this courtesy only when a majority of the Senate judiciary committee agrees to invoke it.
- d. The Senate invokes this courtesy when the president encourages the Senate to do so.
- e. The Senate is less likely to invoke this courtesy for district court nominees than it is to invoke it for appellate court nominees.

10. Summarize the different criteria that have been used for selecting judges and justices to the federal courts. What is the primary criterion used to select judges and justices? How has the relative importance of the criteria changed as politics has become more partisan? In your opinion, on what basis should federal judges and justices be selected, and why? What criteria do you think should not be the basis for judicial selection? Explain your answer.

- 11.** All EXCEPT which of the following are true of the backgrounds of federal judges?
- a. They typically have been white males.
 - b. They typically have been from the appointing president's region of the country.
 - c. They typically share the appointing president's political party affiliation.
 - d. They typically share the appointing president's ideology.
 - e. They typically have held administrative or judicial positions.

12. The decision of Congress to create new judgeships is related strongly to whether the majority party in Congress is the same as the party of the president.

True ____ False ____

13. Why is it difficult to predict the future policy decisions of federal judges and Supreme Court justices? Based on your understanding of the role the courts play in our system of checks and balances, how might this actually be good for American democracy? Do you think that the system should be changed to make judicial behavior more predictable? Explain.

- 14.** Under which of the following scenarios is the Court most likely to decide to accept a case?
- a. when at least three justices decide the case has merit
 - b. when the justices have additional clerks to help read numerous appeals
 - c. when the case is appealed from a state supreme court
 - d. when the Solicitor General's Office decides to appeal a case the government has lost in lower court
 - e. when the attorneys for the parties in the case make a personal appeal for a hearing

15. At least six justices must participate in a case before the U.S. Supreme Court.

True ____ False ____

16. Most cases reaching appellate courts are settled on the principle of *stare decisis*.

True ____ False ____

17. Based on what you know about the Supreme Court and American politics, what are three possible reasons why the Court might decide to overturn a previous decision? Do you think the Supreme Court's tendency to overturn precedent helps or hurts its authority? Explain your answer.

18. Explain the three separate populations—implementing population, the interpreting population, and the consumer population—that carry out judicial decisions. Why are each of these populations necessary for judicial implementation and how might each hinder the successful implementation of a decision?

- 19.** A historical review of the Supreme Court reveals that the Court
- a. has expanded the power of the federal government to regulate the economy.
 - b. has expanded the scope of civil liberties afforded to U.S. citizens.
 - c. has expanded its use of judicial review primarily after the New Deal.
 - d. has expanded its own use by being politically astute in exercising power over other branches.
 - e. All of the above are true.

20. The Rehnquist and Roberts Courts have mostly leaned in a liberal direction in their decisions concerning civil rights and liberties.

True ____ False ____

21. Explain the concept of judicial review, including how and when it was first established and how it has been used at different periods in U.S. history.

22. How have historical eras defined the role of the U.S. Supreme Court in our system of government? Take two historical eras and explain the main issues considered by the Court and how the Court generally decided these cases.

- 23.** Which of the following statements is correct?
- a. Federal courts operate entirely independently of popular preferences.
 - b. Interest groups have no role in influencing the Supreme Court.
 - c. Contemporary conservative Supreme Court justices are known for their judicial restraint.
 - d. Unelected judges may promote democratic pluralism.
 - e. In statutory construction, the courts focus on the constitutionality of laws.

24. What are the central arguments made by supporters of judicial activism and judicial restraint? Which side do you agree with more, and why?

25. In your opinion, what are three pros and three cons of federal judges and justices holding what essentially amounts to lifetime positions? Would you change this system? Why, or why not?

Explore Further

WEB SITES

www.supremecourtus.gov

Official site of the U.S. Supreme Court, with information about its operations.

www.fjc.gov

Federal Judicial Center Web site, with information on all federal judges, landmark legislation, and other judicial matters.

www.oyez.org

Web site that allows you to hear oral arguments before the Supreme Court. Also provides information on the Supreme Court and its docket.

www.uscourts.gov

Explains the organization, operation, and administration of federal courts.

www.justice.gov/olp/judicialnominations112.htm

Information on current judicial nominations.

bjs.ojp.usdoj.gov

Bureau of Justice Statistics provides data on all aspects of the U.S. judicial system.

FURTHER READING

Abraham, Henry J. *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II*, 5th ed. Lanham, MD: Rowman & Littlefield, 2008. A readable history of the relationships between presidents and the justices they appointed.

Bailey, Michael A., and Forrest Maltzman. *The Constrained Court: Law, Politics, and the Decisions Justices Make*. Princeton, NJ: Princeton University Press, 2011. Shows how the Supreme Court is constrained by legal principles and other branches of government.

Baum, Lawrence. *The Supreme Court*, 10th ed. Washington, DC: CQ Press, 2010. An excellent work on the operations and impact of the Court.

Binder, Sarah A., and Forrest Maltzman. *Advice and Dissent: The Struggle to Shape the Federal Judiciary*. Washington, DC: Brookings Institution, 2009. The best work on the process of judicial confirmations.

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Segal, Jeffrey A., and Harold J. Spaeth. *The Supreme Court and the Attitudinal Model*. Cambridge, MA: Cambridge University Press, 1993. Examines how the attitudes and values of justices affect their decisions.

Sunstein, Cass R., David Schkade, Lisa M. Ellman, and Andrews Sawicki. *Are Judges Political?* Washington, DC: Brookings Institution, 2006. An analysis of politics on the federal courts of appeals.