

CHAPTER 14

The Courts

LEARNING OBJECTIVES

After reading this chapter you should be able to

- Define the key terms at the end of the chapter.
- Explain the concept of judicial review and how it was established in *Marbury v. Madison*.
- Sketch the basic organization of the federal court system.
- Explain the role of the federal district courts and federal appeals courts.
- Describe two ways in which judges exercise a policymaking role.
- Outline the routes by which cases come to the Supreme Court.
- Describe the formal procedures at the Supreme Court's biweekly conferences.
- Explain ways in which justices, particularly the chief justice, influence court decisions.
- Describe the process of appointment to the federal judiciary.
- Evaluate the Supreme Court as an instrument of pluralist or majoritarian democracy.

THE COURTS AND THE CHALLENGE OF DEMOCRACY

In the American system, the courts interpret the law. Courts are made up of judges, and judges bring their own value systems with them to the job. Each judge will give a different weight to freedom, order, and equality. Since federal judges hold lifetime appointments to insulate them from politics, a president's judicial appointees will continue to make decisions long after he leaves office. They may do so without regard for the will of the majority. The decision of the Supreme Court in the 2000 election overturned the ruling of the Florida Court and set aside a constitutional crisis, raising the question of partisanship on the part of the Supreme Court.

When judges interpret laws and precedents loosely, in ways that are heavily influenced by their own values, they are said to be judicial activists. When they stick closely to the letter of the law and let their own preferences intrude as little as possible, they are said to exercise judicial restraint. Is judicial activism compatible with democracy? Sometimes it has promoted democratic ends—as in the “one person, one vote” decisions, for example. But the judiciary itself is the least democratic branch of government. Its members are protected from popular control, because they are appointed, not elected, to serve life terms. Through judicial review, the Supreme Court may, and has, overruled acts of the popularly elected Congress. The power of the Supreme Court in the 2000 presidential election posed a problem for democratic theory, which is based on the right of the people to determine their elected officials.

CHAPTER OVERVIEW

In American democracy, the court system is involved in many decisions. Yet, the courts themselves are largely beyond democratic control. Judges are limited by statutes and precedents, but they still have substantial leeway in deciding how to interpret them. Thus their own values often influence their interpretations, setting the stage for judicial restraint or judicial activism.

National Judicial Supremacy

The founders could not agree on the details concerning the structure of the federal judiciary. So after creating a single Supreme Court, they left most of the details up to the First Congress. By the Judiciary Act of 1789, Congress established a system made up of district courts, circuit courts, and the Supreme Court.

Under Chief Justice John Marshall, the Supreme Court developed into a powerful branch of government that could check the power of other branches through its use of judicial review. Judicial review was interpreted from the *Marbury v. Madison* case, where the Court established itself as the final authority on the meaning of the Constitution.

The Organization of the Courts

The American court system is complex. In addition to a national system, there are separate court systems operating in each state. The main entry points for cases into the national judicial system are the 94 federal district courts, which hear criminal cases involving violations of federal law, civil cases brought under federal law, cases in which the federal government is the plaintiff or defendant, and civil cases between citizens of different states when more than \$75,000 is at issue.

Federal courts handle far fewer cases than do state courts, but the number of cases in federal courts has grown and is generally related to the overall level of social, political, and economic activity in the nation.

Judges exert a policymaking function by applying rules (precedents) established in prior decisions (common or “judge-made” law) and by interpreting legislative acts (through a process of “statutory construction”).

Appeals may be carried from federal district courts to one of the thirteen courts of appeals. Judges in the appeals courts sit in panels of three. They write and publish opinions on the cases they hear. These opinions establish legal precedents that serve as a basis for continuity and stability, following the principle of *stare decisis*.

Since relatively few cases are ever actually brought to the Supreme Court, the decision of a lower court is usually the final word. The decentralization of the system allows for individual judges in various district or circuit courts to interpret laws differently; this lack of uniformity may cause difficulties until discrepancies are resolved by a Supreme Court decision.

The Supreme Court

The Supreme Court makes national policies—its decisions affect the nation as a whole. The Court’s caseload includes a few cases that it hears as part of its original jurisdiction under the Constitution, but the main body of cases comes to the Court on appeal from lower courts or state courts.

The Court controls its docket and hears very few cases, less than 100 a year. Cases usually come to it only after all other avenues have been exhausted and must concern a substantial federal question. At least four justices must agree to hear a case, or it is not argued before the Court.

In deciding which cases to review, the Court often takes cues from the solicitor general, the Department of Justice official who represents the government before the Court. The solicitor general performs a dual role as an advocate for the president's policy preferences, and as an officer of the Court, defending the institutional interests of the federal government.

After a case has been heard, the nine judges meet in conference to discuss their positions. A formal vote decides the outcome. As they approach cases, justices may differ in their view of their role. Some may practice judicial restraint, trying to stick closely to the intent of the legislators who made the law and to previous decisions of the courts. Other justices may take on the role of judicial activist, interpreting the law more loosely and in accord with their own policy preferences. In recent history, as a result of many activist judges' support for liberal ideas, judicial activism has been associated with liberalism. But the decision in the case of *Bush v. Gore* proves that conservative judges can also become judicial activists. Although justices may agree on what the particular result of a case should be, they may not agree fully on the legal reason for the decision. In the Supreme Court's policymaking, both the Court's decision and the reasons offered for it are important. The opinion, or explanation of reasons for a decision, is critical. Sometimes justices may shift their votes if they do not believe an opinion is based on legal reasoning they are able to support.

Justices will try to win the support of their fellow justices in conference and also through their opinion writing. They may also try to influence the selection of personnel for the Court.

The chief justice is particularly well-placed to exercise leadership on the Court. He or she directs the conference and, by tradition, speaks first and votes last in court deliberations. When voting with the majority, the chief justice assigns the opinion. Astute use of these powers can make the chief justice an intellectual leader, a social leader, and a policy leader, although perhaps only Chief Justice Marshall ever fully filled all three roles.

Judicial Recruitment

There are no formal constitutional qualifications for federal judgeships, though a set of standards has evolved. By law, judges must be approved by the Senate. Over the years, an informal practice known as "senatorial courtesy" has given the senior senator of the president's party a substantial amount of control over judicial appointments in his state, although this power is not as extensive as it once was. In addition, the American Bar Association screens candidates and ranks them as qualified or unqualified for office, though it has come to play a diminished role in the appointment process.

Presidents generally seek to appoint judges who share their ideological orientation. Thus, while President Carter sought judges who mirrored the population in race and gender, Presidents Reagan and Bush looked for judges who valued order and appointed fewer women and minorities to the federal bench. President Clinton, like President Carter, sought greater diversity in his appointments.

The Consequences of Judicial Decisions

Only a small percent of federal cases wind up in court. Many civil cases end in out-of-court settlements. In criminal cases, defendants often admit guilt and plea bargain.

Although the courts have the power to make judgments, they do not have the power to implement the policies they make. They must rely on the other branches of government for that. Judicial opinions are not always popular. Courts as institutions may appear to be countermajoritarian. Yet, a study of Supreme Court decisions shows that the Court mirrored public opinion in more than 60 percent of its decisions. (Two major exceptions are the abortion issue, where the public is sharply divided, and school prayer, where the public opposes the Court's decisions.) The key reasons for this are that the Courts tends to defer to the law, and the law tends to mirror public opinion. Despite the controversy over the

decision in the election of 2000, the Gallup Poll showed no erosion of public confidence in the Supreme Court.

The Courts and Models of Democracy

The major question in evaluating the role of the courts as creators of policy concerns how far judges stray from existing statutes and precedents. Majoritarians want judges to cling closely to the letter of the law, leaving it to the elected legislature to decide how much emphasis to put on equality or order. Pluralists think the values of judges should come into play to advance the values and interests of the population. Several aspects of the judicial system make it conform to the pluralist model. Among these are the decentralized court system, which offers multiple access points to the legal system, and class action suits, which allow individuals to pool their claims.

KEY TERMS

judicial review

criminal case

civil case

plea bargain

common (judge-made) law

U.S. district courts

U.S. courts of appeals

precedent

stare decisis

original jurisdiction

appellate jurisdiction

federal question

docket

rule of four

solicitor general

amicus curiae brief

judicial restraint

judicial activism

judgment

argument

concurrence

dissent

senatorial courtesy

class action

RESEARCH AND RESOURCES

An excellent starting point for research on the Supreme Court is *Congressional Quarterly's Guide to the U.S. Supreme Court*, 3rd ed. (Washington, D.C.: Congressional Quarterly Press 1996). This hefty volume contains a brief (sixty-page) overview of the origins and development of the Court and detailed analyses of the role of the Court in the federal system, of Court decisions on individual rights, of pressures on the Court, and of the Court at work. It includes brief biographies of every justice who ever served on the Court and short summaries of major decisions.

What if you need more than a brief summary of a case—what if you must examine the actual opinion handed down by the Court? Suppose, for example, that you wanted to find the Supreme Court decision that forced President Nixon to surrender the Watergate tapes. The Internet really simplifies the task. One method would be to use “Findlaw: Internet Legal Resources” at <<http://www.findlaw.com>>. Not only does this site provide information about law schools and a wide array of legal subjects, but it also provides the text of Supreme Court and Circuit Court opinions (back to 1893) and allows you to search using the names of the parties to the case, the citation of the case, or words found in the text of the opinion (start at “U.S. Law: Cases and Codes” under “For Legal Professionals”). At the “Oyez” site, <<http://www.oyez.org/oyez/frontpage>>, you locate cases by selecting from a number of keywords. If you are not able to use the Internet, consult the subject index in the back of *Guenther's United States Supreme Court Decisions*. Look up the word “Watergate” and you will find a reference leading to the place where the case you want appears in the listing in the front of the book. Regardless of the source you use, you will find the case cited as *United States v. Richard M. Nixon*, 418 US 683. This citation for the case refers to where it appears in *U.S. Reports*, the official version of the opinion published by the U.S. Government Printing Office. The number preceding “US” indicates the volume number, while the number following “US” gives the page number where the case is to be found.

Sometimes, if you are working on a project that involves references to eighteenth- and nineteenth-century cases, you will find cases cited in this way:

- *Calder v. Bull* (3 Dall. 386), 1798.
- *Fletcher v. Peck* (6 Cr. 87), 1810.
- *McCulloch v. Maryland* (4 Wheat. 316), 1819.

Until 1875, the official reports of the Supreme Court were designated by the last name of the court reporter who recorded the decisions. The abbreviations in the above examples stand for the first three court reporters, whose names were Dallas, Cranch, and Wheaton. The citation for the *McCulloch* case tells you that it will be found in the fourth volume of Wheaton's reports, on page 316.

Here is a list of the early reporters, their dates, and the redesignations assigned to make each conform to the *U.S. Reports* system:

Early Designation	Abbr.	Dates Covered	U.S. Reports	
1–4	Dallas	(Dall.)	(1790–1800)	1–4
1–9	Cranch	(Cr.)	(1801–1815)	5–13
1–12	Wheaton	(Wheat.)	(1816–1827)	14–25
1–24	Howard	(How.)	(1843–1860)	42–65
1–2	Black	(Black)	(1861–1862)	66–67
1–23	Wallace	(Wall.)	(1863–1874)	68–90

To cite a case in a footnote or bibliography, you should include the official name of the case (usually the names of the two parties to the case), the volume of the report where the case appears (for example,

Cr., Wall., U.S.), the page number where the decision may be found, and the year in which the case was decided.

Other Judicial Sites: In addition to providing access to cases, the “Oyez” mentioned above offers an opportunity to listen to the actual oral arguments of a large selection of cases before the Supreme Court, as well as extensive biographical material on the justices and a virtual tour of the Court building. The Federal Judicial Homepage, <<http://www.uscourts.gov/>>, offers general information about the court system as well as a map showing the circuits at <<http://www.uscourts.gov/links.html>>. The American Judicature Society, which promotes the effective administration of justice and includes judges and lawyers as well as lay people in its membership, can be found on-line at <<http://www.ajs.org>>.

USING YOUR KNOWLEDGE

1. Using the procedures outlined in the Research and Resources section above, locate the following cases:

- the *VMI* case
- cases involving *Hustler* publisher, Larry Flynt
- *Roe v. Wade*

Find each opinion online or on the library shelf, and copy the citation from each opinion.

2. Using the resources outlined in the section above, prepare a list of Supreme Court decisions dealing with each of these subjects:

- executive privilege
- children’s rights
- the Internet
- the veto power

Give a full citation for each case.

3. Listen to the oral argument for at least one of the cases you find in question 1 or 2 above.

GETTING INVOLVED

If you see yourself sitting on the Supreme Court some day, perhaps you would like to take a crack at an internship while you are still in college. Most opportunities to work at the Supreme Court take the form of clerkships and are available only to recent law school graduates. There are, however, a small number of highly competitive internships available to undergraduates. Some background in constitutional law is usually expected. Internships are available in summer, fall, and winter. They are unpaid, although a small scholarship may be available. For further information, contact the Supreme Court of the United States, Judicial Internship Program, Office of the Administrative Assistant to the Chief Justice, Room 5, Washington, D.C. 20543. Telephone: 202-479-3374. See <<http://www.supremecourtus.gov/jobs/jip/jiprogram.pdf>>.

Many local law firms and local courts (county and municipal courts) also offer internship opportunities.

SAMPLE EXAM QUESTIONS

Multiple-Choice Questions

1. When judges interject their own values into their interpretation of cases, what are they practicing?
 - a. liberalism
 - b. conservatism
 - c. judicial restraint
 - d. judicial activism
 - e. stare decisis
2. What do we call the power to declare acts of Congress invalid?
 - a. judicial review
 - b. judicial restraint
 - c. judicial activism
 - d. adjudication
 - e. original jurisdiction
3. Although powerful, the Supreme Court justices can be checked through what process?
 - a. judicial activism
 - b. judicial review
 - c. executive orders
 - d. impeachment
 - e. statutory constructionism
4. What are the Constitutional qualifications to be a U.S. Supreme Court justice?
 - a. 35 years old, American citizen and 10 years experience as a lawyer
 - b. 35 years old and American citizen
 - c. 40 years old and natural born American citizen
 - d. 40 years old and 10 years experience as a lawyer
 - e. None of these
5. Which level of the Federal Courts System only hears NO cases of original jurisdiction?
 - a. federal district courts
 - b. federal tax court
 - c. federal appellate courts
 - d. U.S. Supreme Court
 - e. They all hear cases of original jurisdiction.
6. Which of the following may Congress not change?
 - a. the organization of district and circuit courts
 - b. the Supreme Court's appellate jurisdiction
 - c. the Supreme Court's original jurisdiction
 - d. the number of justices on the Supreme Court
 - e. the number of judges in the district and circuit courts
7. What do we call a court case stemming from a dispute over something of value?
 - a. a crime
 - b. a civil case
 - c. stare decisis
 - d. a criminal case
 - e. plea bargaining

8. What is the term for the bias in favor of precedents or existing decisions?
 - a. rule of four
 - b. tort
 - c. *amicus curiae*
 - d. judicial review
 - e. *stare decisis*
9. Approximately how many new civil and criminal cases did our federal district courts get in 2004?
 - a. 100,000 or so
 - b. 225,000 or so
 - c. 350,000 or so
 - d. 475,000 or so
 - e. over 500,000
10. On what basis are appeals made?
 - a. guilt or innocence
 - b. based on new evidence
 - c. plea bargain
 - d. rulings and procedure
 - e. *amicus curiae*
11. Which of the following is true about the chief justice?
 - a. assigns all opinions
 - b. assigns opinions when voting with the majority
 - c. speaks last in conference
 - d. votes first in conference
 - e. writes all opinions issued by the court
12. *Bush v. Gore* demonstrated that conservative judges may practice which of the following?
 - a. judicial activism
 - b. judicial restraint
 - c. *stare decisis*
 - d. the rule of four
 - e. *amicus curiae*
13. Supreme Court actions to void parts of the Violence against Women Act and the Americans with Disabilities Act are examples of which power of the court?
 - a. judicial activism
 - b. judicial restraint
 - c. *stare decisis*
 - d. majoritarian democracy
 - e. the rule of four
14. In what two cases can the Supreme Court hold original jurisdiction?
 - a. cases involving Government officials and Ambassadors
 - b. cases involving Ambassadors and the Death Penalty
 - c. cases of Civil Liberties and Civil Rights
 - d. cases of which a State is a party and it involves an elected official
 - e. None of these

15. Which of the following are needed to win a seat on the federal bench?
 - a. a presidential nomination and approval by Congress
 - b. an open election and approval by Congress
 - c. a presidential nomination and approval by the House
 - d. a presidential nomination and approval by the Senate
 - e. None of the above
16. What did the Gallup Polls taken a few months after the 2000 election find?
 - a. An erosion in public confidence in the Supreme Court.
 - b. No erosion in confidence in the Supreme Court.
 - c. That a majority of Americans distrust the Supreme Court.
 - d. Long-term changes in the way that Democrats and Republicans view the Supreme Court.
 - e. None of the above
17. What term do we use to describe the petitions sent to the Supreme Court for their consideration?
 - a. writs of habeas corpus
 - b. writs of certiorari
 - c. plea bargaining
 - d. writ of amicus curiae
 - e. None of these
18. What official has the unofficial title of “the tenth justice?”
 - a. Attorney General
 - b. Speaker of the House
 - c. Chief White House Counsel
 - d. President Pro Tempore of the Senate
 - e. Solicitor General
19. Which of the following must be true in order for a state case to come before the Supreme Court?
 - a. Appeals in the state court system must be exhausted.
 - b. It must raise a legal question.
 - c. It must receive approval from the President.
 - d. All of the above must occur
 - e. None of the above are required
20. Who determines the docket of the U.S. Supreme Court?
 - a. the president.
 - b. the Congress.
 - c. the Supreme Court.
 - d. the Solicitor General.
 - e. the Chief Justice of the Supreme Court.
21. From the “Measuring Judicial Activism” chart, which justice tended more towards activism?
 - a. Justice Rehnquist
 - b. Justice Ginsburg
 - c. Justice Breyer
 - d. Justice Thomas
 - e. Justice Scalia
22. What is the term used to describe a justice who disagrees with a judgment?
 - a. dissent
 - b. concurrence
 - c. ex post facto
 - d. stare decisis
 - e. nolo contendere

23. Why do federal judges have life tenure and protected salaries?
 - a. to keep them responsible to the majority of the people
 - b. to keep them responsible to the legislature that confirmed them
 - c. to keep them responsible to the executive who appointed them
 - d. to keep them independent
 - e. to keep them responsible to organized interests who appear before them
24. What political value was directly endorsed by the Supreme Court in *Brown v. Board of Education*?
 - a. equality
 - b. freedom
 - c. order
 - d. judicial restraint
 - e. judicial review
25. Which legal entity had the ability to pre-screen judicial candidates in the past, but still rates them today after their nomination?
 - a. American Civil Liberties Union
 - b. League of Women Voters
 - c. Federal Bar Committee
 - d. American Bar Association
 - e. Independent Judges Union

Essay Questions

1. Distinguish between judicial restraint and judicial activism. Is there a necessary connection between restraint and activism on the one hand and political ideology on the other?
2. What is “judicial review”? Explain how it was established in *Marbury v. Madison*.
3. What are the steps for a case to be decided by the U.S. Supreme Court?
4. How can a chief justice exert leadership on the Supreme Court? Use concrete examples to illustrate your answer.
5. How does the Supreme Court affect policy in the United States? Use concrete examples to illustrate your answer.

ANSWERS TO MULTIPLE-CHOICE QUESTIONS

1. d
2. a
3. d
4. e
5. c
6. c
7. b
8. e
9. c
10. d
11. b
12. a
13. b
14. e
15. d
16. b
17. b
18. e
19. a
20. c
21. d
22. a
23. d
24. a
25. d