9

The Judiciary

In the summer of 2005, President George W. Bush was given an opportunity to shape the future of the U.S. Supreme Court. The death of Chief Justice William H. Rehnquist, who had presided over the Court for over twenty-five years, left an important vacancy on the high Court. To fill Chief Justice Rehnquist's seat, President Bush nominated an appeals court judge named John Roberts. Roberts's record in the lower courts had been conservative, and observers expected that his ideology would deviate little from that of his predecessor. Less clear was the new chief justice's ability to lead his fellow justices in a similar direction.

Ten years after his nomination, the legacy of the Roberts Court is taking shape. Despite the more recent additions of Justices Sonia Sotomayor and Elena Kagan—both of whom are moderate-to-liberal females appointed by a Democratic president—the Roberts Court is building a reputation as a conservative body dedicated to expanding the institutional power of the Supreme Court.

This legal strategy with an eye toward judicial power has prompted many Court-watchers to draw comparisons between Chief Justice Roberts and one of the Court's most legendary leaders, Chief Justice John Marshall. Chief Justice Marshall, who served on the Court in the early 1800s, is said to have done more for the power and the legacy of the Court and the federal government than any other justice before or since his tenure.

Only time will tell whether the Roberts Court is able to continue on its current trajectory. The personalities and politics of the eight other justices, who are appointed by the president and serve for life terms with good behavior, certainly, will play significant roles. But, if recent decisions on health care, criminal rights, and campaign finance, just to name a few, are any indication, the Roberts Court is forming its own identity, one that is quite separate from that of the chief justices who have immediately preceded him.

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IDEOLOGY ISN'T THE ONLY THING THAT HAS CHANGED Above, members of the liberal Warren Court (1953–1969), which decided a host of civil rights and liberties cases. Below, members of the modern, conservative Roberts Court, which has been especially active in economic and criminal procedure cases.

jurisdiction
Authority vested in a particular court to hear and decide the issues in a particular case.

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

• • •

In 1787, when writing *The Federalist Papers,* Alexander Hamilton urged support for the U.S. Constitution. He firmly believed that the judiciary would prove to be "the least dangerous" branch of government. The judicial branch seemed so inconsequential that when the young national government made its move to the District of Columbia in 1800, Congress actually forgot to include any space to house the justices of the Supreme Court! Last-minute conferences with Capitol architects led to the allocation of a small area in the basement of the Senate wing of the Capitol building for a courtroom. Noted one commentator, "A stranger might traverse the dark avenues of the Capitol for a week, without finding the remote corner in which justice is administered to the American Republic."[1]

Today, the role of the courts, particularly the Supreme Court of the United States, differs significantly from what the Framers envisioned. The "least dangerous branch" now is perceived by many people as having too much power.

Historically, Americans have remained unaware of the political power held by the courts. As part of their upbringing, they learned to regard the federal courts as above the fray of politics. That, however, has never been the case. Elected presidents nominate judges to the federal courts and justices to the Supreme Court, and elected senators ultimately confirm (or decline to confirm) presidential nominees to the federal bench. The process by which cases ultimately get heard—if they are heard at all—by the Supreme Court often is political as well. Interest groups routinely seek out good test cases to advance their policy positions. Even the U.S. government, generally through the Department of Justice and the U.S. solicitor general (a political appointee in that department), seeks to advance its position in court. Interest groups then often line up on opposing sides to advance their positions, much in the same way lobbyists do in Congress.

We offer a note on terminology: in referring to the "Supreme Court," the "Court," or the "high Court" here, we always mean the U.S. Supreme Court, which sits at the pinnacle of the federal and state court systems. The Supreme Court is referred to by the name of the chief justice who presided over it during a particular period. For example, the Marshall Court is the Court presided over by John Marshall from 1801 to 1835, and the Roberts Court is the current Court that began in 2005. When we use the term "courts," we refer to all federal or state courts unless otherwise noted.

Roots of the Federal Judiciary

9.1 Trace the development of the federal judiciary and the origins of judicial review.

The detailed notes James Madison took at the Constitutional Convention in Philadelphia make it clear that the Framers devoted little time to writing Article III, which created the judicial branch of government. The Framers believed that a federal judiciary posed little threat of tyranny. One scholar has even suggested that, for at least some delegates to the Constitutional Convention, "provision for a national judiciary was a matter of theoretical necessity . . . more in deference to the maxim of separation [of powers] than in response to clearly formulated ideas about the role of a national judicial system and its indispensability."[2]

The Framers also debated the need for any federal courts below the Supreme Court. Some argued in favor of deciding all cases in state courts, with only appeals going before the Supreme Court. Others argued for a system of federal courts. A compromise left the final choice to Congress, and Article III, section 1, begins simply by vesting "The judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Article III, section 2, specifies the judicial power of the Supreme Court. It also discusses the types of cases the Court can hear, or its **jurisdiction** (see Table 9.1). Courts have two types of jurisdiction: original and appellate. **Original jurisdiction**

TABLE 9.1 WHAT KINDS OF CASES DOES THE U.S. SUPREME COURT HEAR?

The following are the types of cases the Supreme Court was given the jurisdiction to hear as initially specified in Article III, section 2, of the Constitution:
All cases arising under the Constitution and laws or treaties of the United States
All cases of admiralty or maritime jurisdiction
Cases in which the United States is a party
Controversies between a state and citizens of another state (later modified by the Eleventh Amendment)
Controversies between two or more states
Controversies between citizens of different states
Controversies between citizens of the same state claiming lands under grants in different states
Controversies between a state, or the citizens thereof, and foreign states or citizens thereof
All cases affecting ambassadors or other public ministers

refers to a court's authority to hear disputes as a trial court; these courts determine the facts of a case. The Supreme Court has original jurisdiction in cases involving the state governments or public officials. **Appellate jurisdiction** refers to a court's ability to review and/or revise cases already decided by a trial court. The Supreme Court has appellate jurisdiction in all other cases. This section also specifies that all federal crimes, except those involving impeachment, shall be tried by jury in the state in which the crime was committed. The third section of the article defines treason and mandates that at least two witnesses appear in such cases.

Had the Framers viewed the Supreme Court as the potential policy maker it is today, they most likely would not have provided for life tenure with "good behavior" for all federal judges in Article III. The Framers agreed on this feature because they did not want the justices (or any federal judges) subject to the whims of politics, the public, or politicians. Moreover, Alexander Hamilton argued in *Federalist No. 78* that the "independence of judges" was needed "to guard the Constitution and the rights of individuals."

The Constitution nonetheless did include some checks on the power of the judiciary. One such check gives Congress the authority to alter the Court's ability to hear certain kinds of cases. Congress can also propose constitutional amendments that, if ratified, can effectively reverse judicial decisions, and it can impeach and remove federal judges. In one further check, it is the president who, with the "advice and consent" of the Senate, appoints all federal judges.

The Court can, in turn, check the presidency by presiding over presidential impeachment. Article I, section 3, notes in discussing impeachment, "When the President of the United States is tried, the Chief Justice shall preside."

The Judiciary Act of 1789 and the Creation of the Federal Judicial System

In spite of the Framers' intentions, the pervasive role of politics in the judicial branch quickly became evident with the passage of the Judiciary Act of 1789. Congress spent nearly the entire second half of its first session deliberating the various provisions of the act to give form and substance to the federal judiciary. As one early observer noted, "The convention has only crayoned in the outlines. It left it to Congress to fill up and colour the canvas."[3]

The **Judiciary Act of 1789** established the basic three-tiered structure of the federal court system. At the bottom were the federal district courts—at least one in each state. If people participating in a lawsuit (called litigants) were unhappy with the district court's verdict, they could appeal their case to the circuit courts, constituting the second tier. Each circuit court, initially created to function as a trial court for important cases, originally comprised one district court judge and two Supreme Court justices who met as a circuit court twice a year. Not until 1891 did circuit courts (or, as we know them today, courts of appeals) take on their exclusively appellate function and begin to focus solely on reviewing the findings of lower courts. The third tier of the federal judicial system defined by the Judiciary Act of 1789 was the Supreme Court of the United

appellate jurisdiction
The power vested in particular courts to review and/or revise the decision of a lower court.

Judiciary Act of 1789
Legislative act that established the basic three-tiered structure of the federal court system.

The Living Constitution

The Judges both of the supreme and inferior Courts, shall . . . receive for their services, a compensation, which shall not be diminished during their continuance in office. —ARTICLE III, SECTION 1

This section of Article III guarantees that the salaries of all federal judges will not be reduced during their service on the bench. At the Constitutional Convention, considerable debate raged over how to treat the payment of federal judges. Some believed that Congress should have an extra check on the judiciary by being able to reduce their salaries. This provision was a compromise after James Madison suggested that Congress have the authority to bar increases as well as decreases in the salaries of these unelected jurists. The delegates recognized that decreases, as well as no opportunity for raises, could negatively affect the perks associated with life tenure.

This clause of the Constitution has not elicited much controversy. When the federal income tax was first enacted, some judges unsuccessfully challenged it as a diminution of their salaries. Much more recently, Chief Justices William H. Rehnquist and John Roberts repeatedly urged Congress to increase salaries for federal judges. As early as 1989, Rehnquist noted that "judicial salaries are the single greatest problem facing the federal judiciary today." Roberts, in his first state of the judiciary message, pointed out that the comparatively low salaries earned by federal judges drive away many well-qualified and diverse lawyers, compromising the independence of the American judiciary.

Increasing numbers of federal judges are leaving the bench for more lucrative private practice. While a salary of $255,500 (for the chief justice) or $244,400 (for the other justices) may sound like a lot to most people, lawyers in large urban practices routinely earn more than double and triple that amount annually. Supreme Court clerks, moreover, now regularly receive $250,000 signing bonuses (in addition to large salaries) from law firms anxious to pay for their expertise.

CRITICAL THINKING QUESTIONS

1. How does prohibiting Congress from diminishing the salaries of judges reduce political influences on the judiciary?
2. How do justices' salaries compare to the average income of a worker in your area? Do you agree with Chief Justice Roberts's contention that judges are underpaid? Why or why not?

States. Although the Constitution mentions "the supreme Court," it did not designate its size. In the Judiciary Act, Congress set the size of the Supreme Court at six—the chief justice plus five associate justices. After being reduced to five members in 1801, Congress expanded and contracted the Court's size until it was fixed at nine in 1869.

When the justices met in their first public session in New York City in 1790, they were garbed magnificently in black and scarlet robes in the English fashion. The elegance of their attire, however, could not compensate for the relative ineffectiveness of the Court. Its first session—presided over by John Jay, who was appointed chief justice of the United States by President George Washington—initially had to be adjourned when fewer than half the justices attended. Later, once a sufficient number of justices assembled, the Court decided only one major case. Moreover, as an indication of its lowly status, one associate justice left the Court to become chief justice of the South Carolina Supreme Court. (Although today we might consider such a move as a step down, keep in mind that in the early years of the United States, many people viewed the states, and thus their courts, as more important than the national government.)

Hampered by frequent changes in personnel, limited space for its operations, no clerical support, and no system of reporting its decisions, the early Court did not impress many people. From the beginning, the circuit court duties of the Supreme Court justices presented problems for the prestige of the Court. Few good lawyers were willing to accept nominations to the high Court because circuit court duties entailed a substantial amount of travel—most of it on horseback over poorly maintained roads. Southern justices often rode as many as 10,000 miles a year on horseback. President George Washington tried to prevail on several friends and supporters to fill vacancies on the Court, but most refused the "honor." John Adams, the second president of the United

States, ran into similar problems. When Adams asked John Jay to resume the position of chief justice after Jay resigned to become governor of New York, Jay declined the offer.

In spite of these problems, in its first decade, the Court took several actions to mold the new nation. First, by declining to give George Washington advice on the legality of some of his actions, the justices attempted to establish the Supreme Court as an independent, nonpolitical branch of government. Although John Jay frequently gave the president private advice, the Court refused to answer questions Washington posed to it concerning the construction of international laws and treaties.

The early Court also tried to advance principles of nationalism and to maintain the national government's supremacy over the states. As circuit court jurists, the justices rendered numerous decisions on such matters as national suppression of the Whiskey Rebellion, which occurred in 1794 after imposition of a national excise tax on whiskey, and the constitutionality of the Alien and Sedition Acts, which made it a crime to criticize national governmental officials or their actions.

During the ratification debates, Anti-Federalists had warned that Article III extended federal judicial power to controversies "between a State and Citizens of another State"—meaning that a citizen of one state could sue any other state in federal court, a prospect unthinkable to defenders of state sovereignty. Although Federalists, including Alexander Hamilton and James Madison, had scoffed at the idea, the nationalist Supreme Court quickly proved them wrong in *Chisholm* v. *Georgia* (1793). In *Chisholm,* the justices interpreted the Court's jurisdiction under Article III, section 2, to include the right to hear suits brought by a citizen against a state in which he did not reside. Writing in *Chisholm,* Justice James Wilson denounced the "haughty notions of state independence, state sovereignty, and state supremacy."[4] The states' reaction to this perceived attack on their authority led to passage and ratification in 1798 of the Eleventh Amendment to the Constitution, which specifically limited judicial power by stipulating that the authority of the federal courts could not "extend to any suit . . . commenced or prosecuted against one of the United States by citizens of another State."

The Marshall Court: *Marbury* v. *Madison* (1803) and Judicial Review

John Marshall, who headed the Court from 1801 to 1835, brought much-needed respect and prestige to the Court. President John Adams appointed Marshall chief justice in 1800, three years after he declined to accept a nomination as associate justice. An ardent Federalist, Marshall is considered the most important justice to serve on the high Court. Part of his reputation results from the duration of his service and the historical significance of this period in our nation's history.

As chief justice, Marshall helped to establish the role and power of the Court. The Marshall Court, for example, discontinued the practice of *seriatim* (Latin for "in a series") opinions, which was the custom of the King's Bench in Great Britain. Prior to the Marshall Court, the justices delivered their individual opinions in order of seniority. For the Court to take its place as an equal branch of government, Marshall believed, the justices needed to speak as a Court and not as six individuals. In fact, during Marshall's first four years in office, the Court routinely spoke as one, and the chief justice wrote twenty-four of its twenty-six opinions.

The Marshall Court also established the authority of the Supreme Court over the judiciaries of the various states.[5] In addition, the Court established the supremacy of the federal government and Congress over state governments through a broad interpretation of the necessary and proper clause in *McCulloch* v. *Maryland* (1819).[6]

Finally, the Marshall Court claimed the right of **judicial review**, the power of the courts to review acts of other branches of government and of the states. The Supreme Court derives much of its day-to-day power and impact on the policy process from this right. This claim established the Court as the final arbiter of constitutional questions, with the right to declare congressional acts void.[7]

Alexander Hamilton first publicly endorsed the idea of judicial review in *Federalist No. 78,* noting, "Whenever a particular statute contravenes the Constitution, it will be

judicial review
Power of the courts to review acts of other branches of government and the states.

WHY IS JOHN MARSHALL IMPORTANT TO THE DEVELOPMENT OF JUDICIAL AUTHORITY?

A single person can make a major difference in the development of an institution. Such was the case with John Marshall (1755–1835), who dominated the Supreme Court during his thirty-four years as chief justice. More of a politician than a lawyer, Marshall served as a delegate to the Virginia legislature and played an instrumental role in Virginia's ratification of the U.S. Constitution in 1787. He became secretary of state in 1800 under John Adams. When Oliver Ellsworth resigned as chief justice of the United States in 1800, Adams nominated Marshall. Marshall served on the Court until the day he died, participating in more than 1,000 decisions and authoring more than 500 opinions.

9.1 9.2 9.3 9.4 9.5 9.6

***Marbury* v. *Madison* (1803)**
Case in which the Supreme Court first asserted the power of judicial review by finding that the congressional statute extending the Court's original jurisdiction was unconstitutional.

trial court
Court of original jurisdiction where cases begin.

appellate court
Court that generally reviews only findings of law made by lower courts.

constitutional courts
Federal courts specifically created by the U.S. Constitution or by Congress pursuant to its authority in Article III.

legislative courts
Courts established by Congress for specialized purposes, such as the Court of Appeals for Veterans Claims.

the duty of the judicial tribunals to adhere to the latter and disregard the former." Nonetheless, because the U.S. Constitution does not mention judicial review, the actual authority of the Supreme Court to review the constitutionality of acts of Congress was an unsettled question. But, in ***Marbury* v. *Madison* (1803)**, Chief Justice John Marshall claimed this sweeping authority for the Court by asserting that the Constitution's supremacy clause implies the right of judicial review.[8]

Marbury v. *Madison* arose amid a sea of political controversy. In the final hours of his administration, John Adams appointed William Marbury as the justice of the peace for the District of Columbia. But, in the confusion of winding up matters, Adams's secretary of state failed to deliver Marbury's commission. Marbury then asked James Madison, Thomas Jefferson's secretary of state, for the commission. Under direct orders from Jefferson, who was irate over the Adams administration's last-minute appointment of several Federalist judges (quickly confirmed by the Federalist Senate), Madison refused to turn over the commission. Marbury and three other Adams appointees who were in the same situation then filed a writ of *mandamus* (a legal motion) asking the Supreme Court to order Madison to deliver their commissions.

Political tensions ran high as the Court met to hear the case. Jefferson threatened to ignore any order of the Court. Marshall realized that a refusal of the executive branch to comply with the decision could devastate both him and the prestige of the Court. Responding to this challenge, in a brilliant opinion that in many sections reads more like a lecture to Jefferson than a discussion of the merits of Marbury's claim, Marshall concluded that although Marbury and the others were entitled to their commissions, the Court lacked the power to issue the writ sought by Marbury. In *Marbury* v. *Madison,* Marshall further ruled that those parts of the Judiciary Act of 1789 that extended the original jurisdiction of the Court to allow it to issue writs of *mandamus* were inconsistent with the Constitution and therefore unconstitutional.

Although the immediate effect of the decision was to deny power to the Court, its long-term effect was to establish the implied power of judicial review. Said Marshall, writing for the Court, "it is emphatically the province and duty of the judicial department to say what the law is." Since *Marbury,* the Court has routinely exercised the power of judicial review to determine the constitutionality of acts of Congress, the executive branch, and the states.

The Federal Court System

9.2 Explain the organization of the federal court system.

The judicial system in the United States can best be described as a dual system consisting of the federal court system and the judicial systems of the fifty states. Cases may arise in either system. Both systems are basically three-tiered. At the bottom of the system are **trial courts**, where litigation begins. In the middle are **appellate courts**; these courts generally review only findings of law made by trial courts. At the top of both the federal and state court systems sits a court of last resort (see Figure 9.1). In the federal court system, trial courts are called district courts, appellate courts are termed courts of appeals, and the Supreme Court is the court of last resort.

The federal district courts, courts of appeals, and the Supreme Court are called **constitutional (or Article III) courts** because Article III of the Constitution either established them or authorized Congress to establish them. The president nominates (with the advice and consent of the Senate) judges who preside over these courts, and they serve lifetime terms, as long as they engage in "good behavior."

In addition to constitutional courts, **legislative courts** are set up by Congress, under its implied powers, generally for special purposes. The U.S. territorial courts (which hear federal cases in the territories) and the U.S. Court of Appeals for Veterans

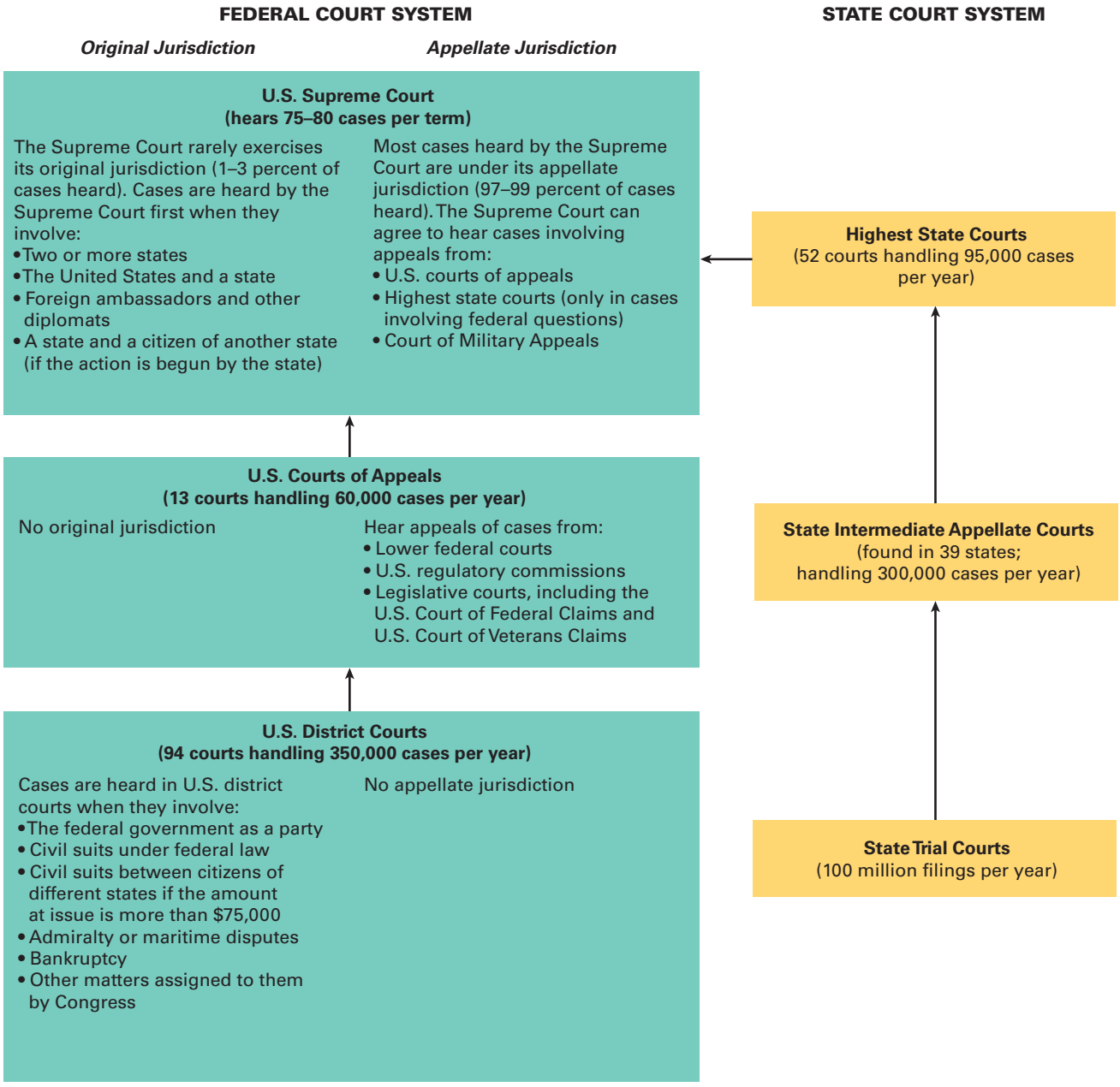


FIGURE 9.1 HOW IS THE AMERICAN JUDICIAL SYSTEM STRUCTURED?

The American judicial system is a dual system consisting of the federal court system and the judicial systems of the fifty states. In both the federal court system and the judiciaries of most states, there are both trial and appellate courts. The U.S. Supreme Court sits at the top of both court systems and has the power to hear appeals from both federal and state courts as long as they involve a federal question.

Claims are examples of legislative courts, or what some call Article I courts. The president appoints (subject to Senate confirmation) the judges who preside over these federal courts; they serve fixed, fifteen-year renewable terms.

The District Courts

As we have seen, Congress created U.S. district courts when it enacted the Judiciary Act of 1789. District courts are federal trial courts. Currently, the federal district courts number ninety-four. No district court cuts across state lines. Every state has at least one federal district court, and the most populous states—California, Texas, and New York—each have four (see Figure 9.2).[9]

Federal district courts, in which the bulk of the judicial work takes place in the federal system, have original jurisdiction over only specific types of cases. Although

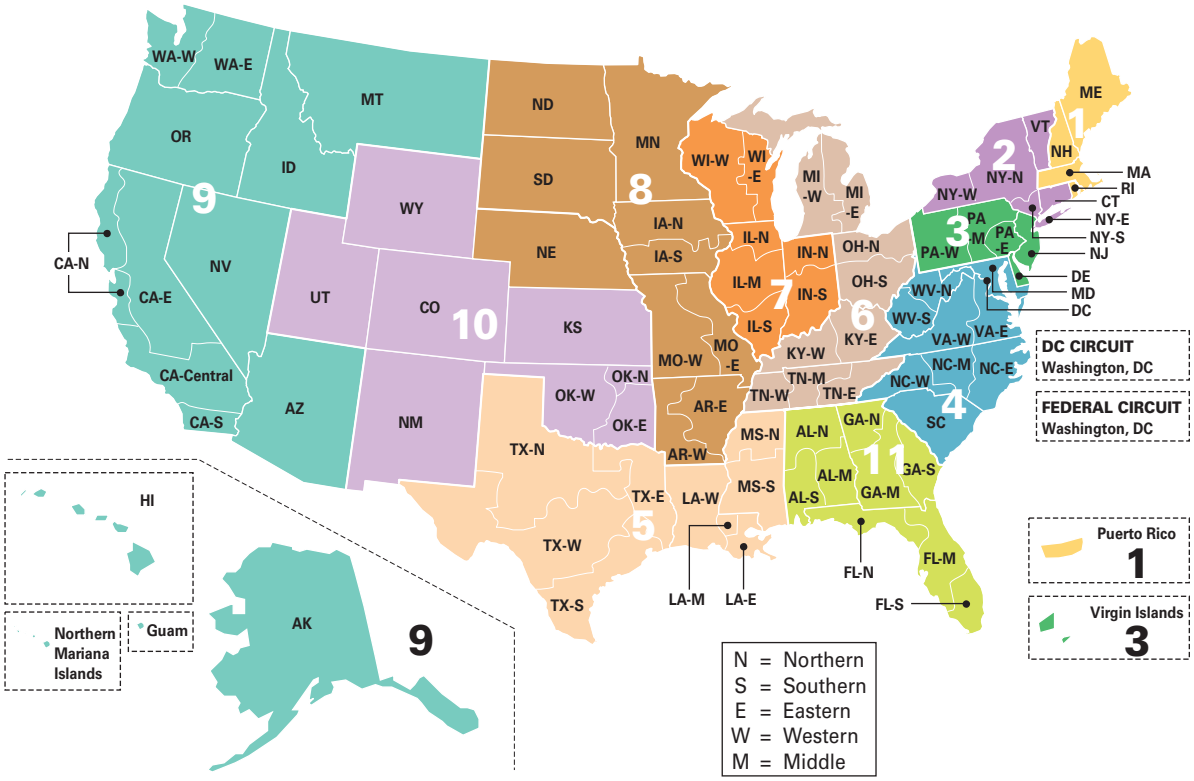


FIGURE 9.2 WHAT ARE THE BOUNDARIES OF FEDERAL DISTRICT COURTS AND COURTS OF APPEALS?

This map shows the location of each U.S. court of appeals and the boundaries of the federal district courts in states with more than one district. Note that there are eleven numbered and two unnumbered courts of appeals. The unnumbered courts of appeals serve Washington, D.C. and the federal circuit; the latter court has national jurisdiction. There are also ninety-four district courts. States are divided into between one and four districts; no district court crosses state lines.

rules governing district court jurisdiction can be complex, cases, which are heard in federal district courts by a single judge (with or without a jury), generally fall into one of three categories:

1. They involve the federal government as a party.
2. They present a federal question based on a claim under the U.S. Constitution, a treaty with another nation, or a federal statute. This is called federal question jurisdiction and it can involve criminal or civil law.
3. They involve civil suits in which citizens are from different states, and the amount of money at issue is more than $75,000.[10]

Each federal judicial district has a U.S. attorney, nominated by the president and confirmed by the Senate. The U.S. attorney in each district is that district's chief law enforcement officer. U.S. attorneys have a considerable amount of discretion regarding whether they pursue criminal or civil investigations or file charges against individuals or corporations. They also have several assistants to help them in their work. The number of assistant U.S. attorneys in each district depends on the amount of litigation.

The Courts of Appeals

The losing party in a case heard and decided in a federal district court can appeal the decision to the appropriate court of appeals. The U.S. courts of appeals (known as the circuit courts of appeals prior to 1948) are the intermediate appellate courts in the federal system and were established in 1789 to hear appeals from federal district courts. Currently, eleven numbered courts of appeals exist. A twelfth, the U.S. Court of Appeals for the D.C. Circuit, handles most appeals involving federal regulatory commissions

and agencies including the National Labor Relations Board and the Securities and Exchange Commission. The thirteenth federal appeals court is the U.S. Court of Appeals for the Federal Circuit, which deals with patents and contract and financial claims against the federal government.

The number of judges within each court of appeals varies—depending on the workload and the complexity of the cases—and ranges from six to nearly thirty. Supervising each court is a chief judge, the most senior judge in terms of service below the age of sixty-five, who can serve no more than seven years. In deciding cases, judges are divided into rotating three-judge panels, made up of the active judges within the court of appeals, visiting judges (primarily district judges from the same court), and retired judges. In rare cases, all the judges in a court of appeals may choose to sit together (*en banc*) to decide a case of special importance by majority vote.

The courts of appeals have no original jurisdiction. Rather, Congress has granted these courts appellate jurisdiction over two general categories of cases: appeals from criminal and civil cases from the district courts, and appeals from administrative agencies. Criminal and civil case appeals constitute about 90 percent of the workload of the courts of appeals; those from administrative agencies constitute about 10 percent.

Once a federal court of appeals makes a decision, a litigant no longer has an automatic right to an appeal. The losing party may submit a petition to the U.S. Supreme Court to hear the case, but the Court grants few of these requests. The courts of appeals, then, are the courts of last resort for almost all federal litigation. Keep in mind, however, that most cases, if they actually go to trial, go no further than the district court level.

In general, courts of appeals try to correct errors of law and procedure that have occurred in lower courts or administrative agencies. Courts of appeals hear no new testimony; instead, lawyers submit written arguments in what is called a **brief** (also submitted in trial courts), and they then appear to present and argue the case orally to the court. Decisions of any court of appeals are binding on only the courts within its geographic confines.

brief
A document containing the legal written arguments in a case filed with a court by a party prior to a hearing or trial.

precedent
A prior judicial decision that serves as a rule for settling subsequent cases of a similar nature.

stare decisis
In court rulings, a reliance on past decisions or precedents to formulate decisions in new cases.

The Supreme Court

The U.S. Supreme Court is often at the center of highly controversial issues that the political process has yet to resolve successfully. It reviews cases from the U.S. courts of appeals and state supreme courts (as well as other courts of last resort) and acts as the final interpreter of the U.S. Constitution.

Since 1869, the U.S. Supreme Court has consisted of eight associate justices and one chief justice, whom the president nominates specifically for that position. The number nine holds no special significance, and the Constitution does not specify the size of the Court. Between 1789 and 1869, Congress periodically altered the size of the Court. The lowest number of justices on the Court was six; the most, ten. Through December 2014, only 112 justices had served on the Court, with only seventeen chief justices.

Compared with the president or Congress, the Supreme Court operates with few support staff. Along with the four clerks each justice employs, the Supreme Court has only about 400 staff members.

Decisions of the U.S. Supreme Court, however, are binding throughout the nation and establish national **precedents**, or rules for settling subsequent cases of similar nature. This reliance on past decisions or precedents to formulate decisions in new cases is called ***stare decisis*** (a Latin phrase meaning "let the decision stand"). The principle of *stare decisis* allows for continuity and predictability in our judicial system. Although *stare decisis* can be helpful in predicting decisions, at times judges carve out new ground and ignore, decline to follow, or even overrule precedents to reach a different conclusion in a case involving similar circumstances. This is a major reason why so much litigation exists in America today. Parties to a suit know that the outcome of a case is not always predictable; if such prediction were possible, there would be little reason to go to court.

Explore Your World

Judiciaries enjoy a unique role in the political systems of many states. They are the ultimate arbiters of the law and the Constitution, and wield significant power in determining innocence, guilt, and liability. Judges also play an important role in maintaining the rule of law and enforcing appropriate punishments for crimes committed. It is only appropriate, then, that judicial officers around the world are outfitted in a way that conveys the honor and responsibility of the position they hold. Most judicial robes are red or black. This tradition may have its roots in the mourning robes worn to pay respect during medieval times.

American Chief Justice William H. Rehnquist, seen here presiding over the 1999 impeachment trial of President Bill Clinton, added embellishments to his traditional black robe in the form of four gold stripes on each sleeve.

Judicial dress is a contentious issue in Pakistan. Some Pakistani judges, such as the one shown at right in this photo, dress in the English tradition and wear robes with wigs. Others, especially Muslim judges, choose to wear more traditional Nehru-style jackets with hats.

Red robes are traditional on the German Federal Constitutional Court. These robes are based on those worn by Italian judges during the Renaissance. Though the hat is officially part of the uniform, it has largely been eliminated in recent years.

CRITICAL THINKING QUESTIONS

1. How does each of these modes of dress reflect the culture and traditions of the countries they represent?
2. How might you expect judges in other countries—for example, Australia or Italy—to dress? What influences your expectation?
3. Does requiring a particular "uniform" accord judges additional power and respect? Should other political leaders, such as members of the legislature, wear uniform dress?

How Federal Court Judges Are Selected

9.3 Outline the criteria and process used to select federal court judges.

senatorial courtesy
A process by which presidents generally allow senators from the state in which a judicial vacancy occurs to block a nomination by simply registering their objection.

The selection of federal judges is often a highly political process with important political ramifications because the president must nominate judges and the U.S. Senate must confirm them. Presidents, in general, try to select well-qualified men and women for the bench. But, these appointments also provide a president with the opportunity to put his philosophical stamp on the federal courts (see Table 9.2).

In selecting his nominees, the president may look for guidance from members of Congress, advisers, confidantes, or other high-ranking party officials.[11] The U.S. Constitution, for example, mandates that presidents receive advice and consent from the Senate. Historically, presidents have screened their nominees through a process known as **senatorial courtesy**. This is the process by which presidents generally allow senators from the state in which a judicial vacancy occurs to block a nomination by simply registering their objection. One way senators may voice their opposition is through an informal process known as the "blue slip." When a judicial nomination is forwarded to the Senate Judiciary Committee, senators from the state in which a vacancy occurs are sent a letter, usually printed on light blue paper, asking them to register their support or opposition to a nominee. How seriously senators take the blue slips varies from one Congress to the next.[12]

Who Are Federal Judges?

Typically, federal district court judges have held other political offices, such as state court judge or prosecutor. Most have been involved in politics, which is what usually brings them into consideration for a position on the federal bench. Griffin Bell, a former federal court of appeals judge (who later became U.S. attorney general in the Carter administration), once remarked, "For me, becoming a federal judge wasn't very difficult. I managed John F. Kennedy's presidential campaign in Georgia."[13]

TABLE 9.2 HOW DOES A PRESIDENT AFFECT THE FEDERAL JUDICIARY?

President	Appointed to Supreme Court	Appointed to Courts of Appeals	Appointed to District Courts[a]	Total Appointed	Total Number of Judgeships[b]	Percentage of Judgeships Filled by President
Carter (1977–1981)	0	56	203	259	657	39
Reagan (1981–1989)	3	83	290	376	740	50
Bush (1989–1993)	2	42	148	192	825	22
Clinton (1993–2001)	2	66	305	373	841	44
G.W. Bush (2001–2009)	2	62	261	325	866	37
Obama (2009–)[c]	2	53	223	278	874	32

[a]Includes district courts in the territories.
[b]Total judgeships authorized in president's last year in office.
[c]Barack Obama data through October 2014.

SOURCE: "Imprints on the Bench," *CQ Weekly Report* (January 19, 2001): 173. Reprinted by permission of Copyright Clearance Center on behalf of Congressional Quarterly, Inc. Updated by authors. Obama data from Federal Judicial Center, http://www.fjc.gov/history/home.nsf/page/research_categories.html.

Most recent nominees have had prior judicial experience. White males continue to dominate the federal courts, but since the 1970s, most presidents have pledged (with varying degrees of success) to do their best to appoint more African Americans, Hispanics, women, and other underrepresented groups to the federal bench.

Nomination Criteria

Justice Sandra Day O'Connor once remarked that "You have to be lucky" to be appointed to the judiciary.[14] Although luck certainly factors in, over the years a variety of reasons have accounted for nominations to the bench. Depending on the timing of a vacancy, a president may or may not have a list of possible candidates or even a specific individual in mind. Until recently, presidents often looked within their circle of friends or their administration to fill a vacancy. Nevertheless, whether the nominee is a friend or someone known to the president only by reputation, at least six criteria are especially important: experience, ideology or policy preferences, rewards, pursuit of political support, religion, and race and gender.

EXPERIENCE Most nominees have had at least some judicial, legal, or governmental experience. For example, John Jay, the first chief justice, was one of the authors of *The Federalist Papers* and was active in New York politics. In 2014, all nine sitting Supreme Court justices but one—former Solicitor General Elena Kagan—had prior judicial experience (see Table 9.3). Many of the sitting justices also served as law professors; notably, Justice Kagan was dean of the Harvard Law School.

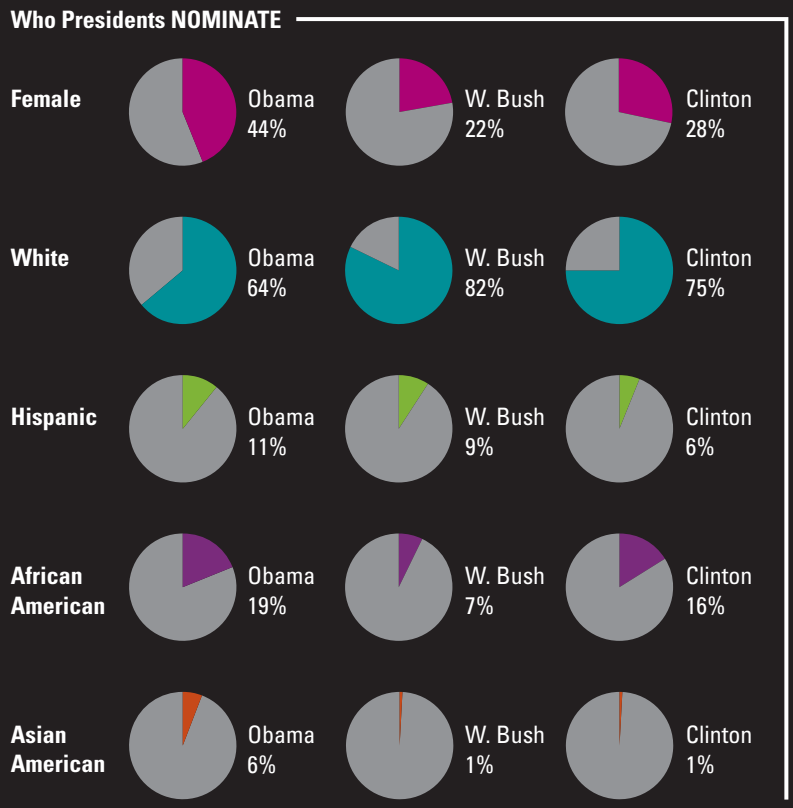
IDEOLOGY OR POLICY PREFERENCES Most presidents also seek to appoint individuals who share their policy preferences, and almost all have political goals in mind when they appoint a judge or justice. To optimize these goals, most presidents select judges and justices of their own party affiliation and/or who have been active in party politics. Chief Justice John Roberts and Justice Samuel Alito, for example, both Republicans, worked in the Department of Justice during the Reagan and George Bush administrations. Roberts also served as associate White House counsel under Reagan.

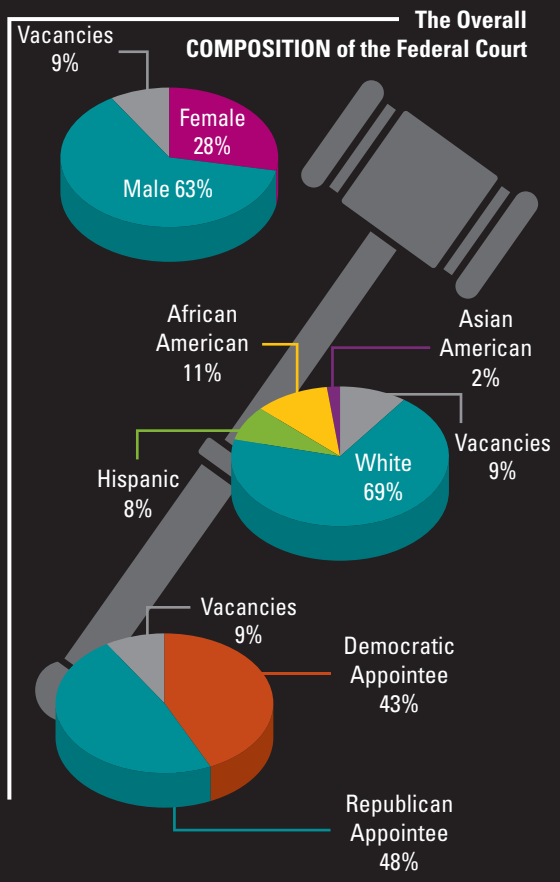
TABLE 9.3 WHO ARE THE JUSTICES OF THE SUPREME COURT IN 2014?

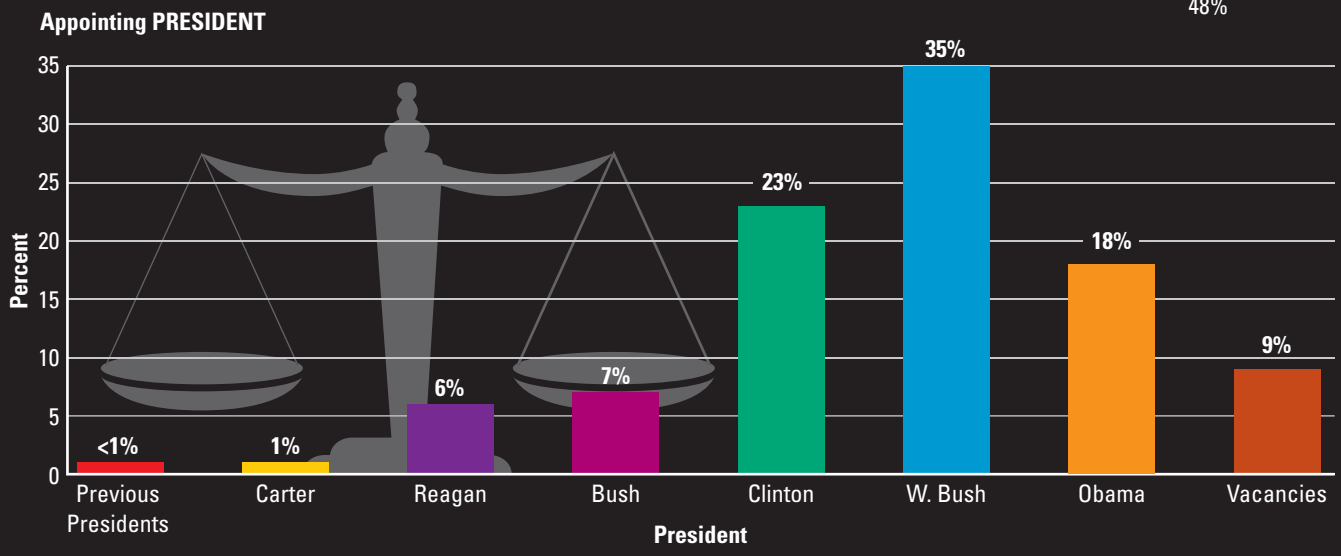
Justice	Year of Birth	Year Appointed	Political Party	Law School	Appointing President	Religion	Prior Judicial Experience	Prior Government Experience
John Roberts	1955	2005	R	Harvard	G. W. Bush	Roman Catholic	U.S. Court of Appeals	Dept. of Justice, associate White House counsel
Antonin Scalia	1936	1986	R	Harvard	Reagan	Roman Catholic	U.S. Court of Appeals	Assistant attorney general, Office of Legal Counsel
Anthony Kennedy	1936	1988	R	Harvard	Reagan	Roman Catholic	U.S. Court of Appeals	None
Clarence Thomas	1948	1991	R	Yale	Bush	Roman Catholic	U.S. Court of Appeals	Chair, Equal Employment Opportunity Commission
Ruth Bader Ginsburg	1933	1993	D	Columbia/ Harvard	Clinton	Jewish	U.S. Court of Appeals	None
Stephen Breyer	1938	1994	D	Harvard	Clinton	Jewish	U.S. Court of Appeals	Chief counsel, Senate Judiciary Committee
Samuel Alito	1950	2006	R	Yale	G. W. Bush	Roman Catholic	U.S. Court of Appeals	Dept. of Justice, U.S. attorney
Sonia Sotomayor	1954	2009	D	Yale	Obama	Roman Catholic	U.S. Court of Appeals	Assistant attorney general, City of New York
Elena Kagan	1960	2010	D	Harvard	Obama	Jewish	None	U.S. solicitor general, associate White House counsel

Who Are Federal Judges?

Judicial appointments provide presidents with an opportunity to make a lasting impact on public policy. Recent presidents, including Bill Clinton, George W. Bush, and Barack Obama, have also used them as an opportunity to increase the diversity of individuals serving at the highest levels of the U.S. government and to curry favor with traditionally underrepresented groups. Though a diverse federal judiciary has a definite symbolic effect on American politics, its policy impact is less clear.







SOURCE: Data from Federal Judicial Center, Biographical Directory of Federal Judges

CRITICAL THINKING QUESTIONS

1. Which groups are over and underrepresented in the federal judiciary?
2. What differences, if any, exist between judges nominated by Republican presidents and those appointed by Democratic presidents?
3. Should gender, race, and ethnicity matter in the federal courts? Why or why not?

REWARDS Historically, many of those appointed to the judiciary have been personal friends of presidents. Lyndon B. Johnson, for example, appointed his longtime friend Abe Fortas to the bench.

PURSUIT OF POLITICAL SUPPORT During Ronald Reagan's successful campaign for the presidency in 1980, some of his advisers feared that the gender gap would hurt him. Polls repeatedly showed that he was far less popular with female voters than with men. To gain support from women, Reagan announced during his campaign that should he win, he would appoint a woman to fill the first vacancy on the Supreme Court. When Justice Potter Stewart, a moderate, announced his retirement from the bench, under pressure from women's rights groups, President Reagan nominated Sandra Day O'Connor of the Arizona Court of Appeals to fill the vacancy.

RELIGION Through late 2014, of the more than one hundred justices who have served on the Court, almost all have been members of traditional Protestant faiths. Fewer than fifteen have been Roman Catholic, and fewer than ten have been Jewish.[15] Today, more Catholics—Roberts, Scalia, Kennedy, Thomas, Alito, and Sotomayor—serve on the Court than at any other point in history. Three Jewish justices—Breyer, Ginsburg, and Kagan—round out the Court. At one time, no one could have imagined that Catholics would someday make up a majority of the Court, or that no members of any Protestant faiths would serve.

RACE, ETHNICITY, AND GENDER Through 2014, only two African Americans and four women had served on the Court. Race was undoubtedly a critical issue in the appointment of Clarence Thomas to replace Thurgood Marshall, the first African American justice. But, President George Bush refused to acknowledge his wish to retain a black seat on the Court. Instead, he announced that he was "picking the best man for the job on the merits," a claim that was met with considerable skepticism by many observers.

As the ethnic diversity of the United States increased, presidents also faced greater pressure to nominate a Hispanic justice to the Supreme Court. Early in his presidency, President Barack Obama fulfilled these expectations by nominating Sonia Sotomayor. A Puerto Rican and self-proclaimed "wise Latina woman" who grew up in the Bronx, New York, Sotomayor became the first Hispanic Supreme Court justice at the height of a fierce immigration debate.

As the number of women in the legal profession grew, presidents also made conscious efforts to appoint more women to the federal bench. These efforts began in the late 1970s with President Jimmy Carter, and have only increased over time. Today, more women—three—serve on the Supreme Court than at any other time in history. There are also significant percentages of female judges in the lower federal courts.

The Confirmation Process

The Constitution gives the Senate the authority to approve all nominees to the federal bench. Ordinarily, nominations are referred to the Senate Judiciary Committee. This committee investigates the nominees, holds hearings, and votes on its recommendation for Senate action. At this stage, the committee may reject a nominee or send the nomination to the full Senate for a vote. The full Senate then deliberates on the nominee before voting. A simple majority vote is required for confirmation.

INVESTIGATION As a president proceeds to narrow the list of possible nominees for a judicial vacancy, White House staff begin an investigation into their personal and professional backgrounds. The Federal Bureau of Investigation also receives names of potential nominees for background checks. In addition, the names are forwarded to the American Bar Association (ABA), the politically powerful organization that represents

the interests of the legal profession. Republican President Dwight D. Eisenhower started this practice, believing it helped "insulate the process from political pressure."[17] After its own investigation, the ABA rates each nominee, based on his or her qualifications, as Well-Qualified (previously "Highly Qualified"), Qualified, or Not Qualified.

After a formal nomination is made and sent to the Senate, the Senate Judiciary Committee embarks on its own investigation. To start, the Senate Judiciary Committee asks each nominee to complete a lengthy questionnaire detailing previous work (dating as far back as high school summer jobs), judicial opinions written, judicial philosophy, speeches, and even all interviews ever given to members of the press. Committee staffers also contact potential witnesses who might offer testimony concerning the nominee's fitness for office.

LOBBYING BY INTEREST GROUPS Many organized interests show keen interest in the nomination process. Interest groups are particularly active in Supreme Court nominations. In 1987, for example, the nomination of Judge Robert H. Bork to the Supreme Court led liberal groups to launch an extensive radio, TV, and print media campaign against the nominee. These interest groups decried Bork's actions as solicitor general, especially his firing of the Watergate special prosecutor at the request of President Richard M. Nixon, as well as his political beliefs. As a result of this outcry, the Senate rejected Bork's nomination by a 42–58 vote (see Table 9.4).

More and more, interest groups are also involving themselves in district court and court of appeals nominations. They recognize that these appointments increasingly pave the way for future nominees to the Supreme Court. For example, a coalition of conservative evangelical Christian organizations, including Focus on the Family and the Family Research Council, have held a series of "Justice Sunday" events featuring televangelists and politicians promoting the confirmation of judges with politically conservative and religious records.

THE SENATE COMMITTEE HEARINGS AND SENATE VOTE Not all nominees inspire the kind of intense reaction that kept Bork from the Court and almost blocked the confirmation of Clarence Thomas. Until 1929, all but one Senate Judiciary Committee hearing on a Supreme Court nominee were conducted in executive session—that is, closed to the public. The 1916 hearings on Louis Brandeis, the first Jewish justice, took place in public and lasted nineteen days, although Brandeis

TABLE 9.4 HOW MANY INTEREST GROUPS SUBMIT TESTIMONY TO THE SENATE JUDICIARY COMMITTEE?

Nominee	Year	Support	Oppose	ABA Rating	Senate Vote
O'Connor	1981	7	4	Well-Q	99–0
Scalia	1986	10	14	Well-Q	98–0
Bork	1987	21	17	Well-Q[a]	42–58
Kennedy	1987	10	14	Well-Q	98–0
Souter	1990	20	17	Well-Q	90–9
Thomas	1991	21	32	Q[b]	52–48
Ginsburg	1993	4	6	Well-Q	96–3
Breyer	1994	3	3	Well-Q	87–9
Roberts	2005	19	50	Well-Q	78–22
Alito	2005	6	66	Well-Q	58–42
Sotomayor	2009	210	8	Well-Q	68–31
Kagan	2010	48	8	Well-Q	63-37

[a]Four ABA committee members evaluated him as Not Qualified.
[b]Two ABA committee members evaluated him as Not Qualified.

SOURCE: Amy Harder and Charlie Szymanski, "Sotomayor in Context: Unprecedented Input from Interest Groups," *National Journal* (August 5, 2009), ninthjustice.nationaljournal.com/2009/08/sotomayor-in-context-recordbre.php. Updated by the authors.

WHAT ROLE DOES THE SENATE JUDICIARY COMMITTEE PLAY IN THE JUDICIAL NOMINATION PROCESS?

The Senate Judiciary Committee plays an important role in the process of advice and consent on presidential nominees to the judiciary. As part of this process, they hold confirmation hearings where potential justices appear before the committee. Here, Clarence Thomas testifies before the committee following his nomination in 1991. He was subsequently confirmed to serve on the Supreme Court.

himself never was called to testify. In 1925, Harlan Fiske Stone became the first nominee to testify before the committee.

Since the 1980s, it has become standard for senators to ask the nominees probing questions. Most nominees have declined to answer many of these questions on the grounds that the issues raised ultimately might come before the courts.

After the conclusion of hearings, the Senate Judiciary Committee usually makes a recommendation to the full Senate. Any rejections of presidential nominees to the Supreme Court generally occur only after the Senate Judiciary Committee has recommended against a nominee's appointment. Few recent confirmations have been close, although current Supreme Court Justices Clarence Thomas and Samuel Alito were confirmed by margins of less than ten votes.

Appointments to the U.S. Supreme Court

Justice Oliver Wendell Holmes once remarked that a justice should be a "combination of Justinian, Jesus Christ and John Marshall."[18] However, as with other federal court judges, the president must nominate and the Senate must confirm the justices of the Supreme Court. Presidents always have realized the importance of Supreme

Court appointments to their ability to achieve all or many of their policy objectives. But, even though most presidents have tried to appoint jurists with particular political or ideological philosophies, they often have erred in their assumptions about their appointees. President Dwight D. Eisenhower, a moderate conservative, for example, was appalled by the liberal opinions written by his appointee to chief justice, Earl Warren, concerning criminal defendants' rights.

Historically, because of the critical role the Supreme Court enjoys in our constitutional system, its nominees have encountered more opposition than have district court or court of appeals nominees. As the role of the Court has expanded over time, so, too, has the amount of attention given to nominees. With this increased attention has come greater opposition, especially to nominees with controversial views.

The Supreme Court Today

9.4 Evaluate the Supreme Court's process for accepting, hearing, and deciding cases.

Given the judicial system's vast size and substantial, although often indirect, power over so many aspects of our lives, it is surprising that so many Americans know very little about the judicial system in general and the U.S. Supreme Court in particular.

Even after the attention the Court received surrounding many of its recent controversial decisions, two-thirds of those Americans surveyed in 2012 could not name one member of the Court. Virtually no one could name all nine members of the Court. As revealed in Table 9.5, Chief Justice John Roberts was the best-known justice. Still, only about 20 percent of those polled could name him.

While the American public's lack of interest can take the blame for much of this ignorance, the Court has also taken great pains to ensure its privacy and sense of decorum. The Court's rites and rituals contribute to its mystique and encourage a "cult of the robe."[19] Consider, for example, the way the Supreme Court conducts its proceedings. Oral arguments are not televised, and utmost secrecy surrounds deliberations concerning the outcome of cases. In contrast, C-SPAN brings us daily coverage of various congressional hearings and floor debate on bills and important national issues, and CNN and sometimes other networks provide extensive coverage of many important state court trials. The Supreme Court, however, remains adamant in its refusal to televise its proceedings—including public oral arguments, although it now allows the release of same-day audio recordings of oral arguments.

TABLE 9.5 CAN AMERICANS NAME THE JUSTICES OF THE SUPREME COURT?

Supreme Court Justice	Percentage Who Could Name
John Roberts	20
Clarence Thomas	16
Antonin Scalia	16
Ruth Bader Ginsburg	13
Sonia Sotomayor	13
Anthony Kennedy	10
Samuel Alito	5
Elena Kagan	4
Stephen Breyer	3

SOURCE: © 2012 Findlaw & Thomson Reuters business.

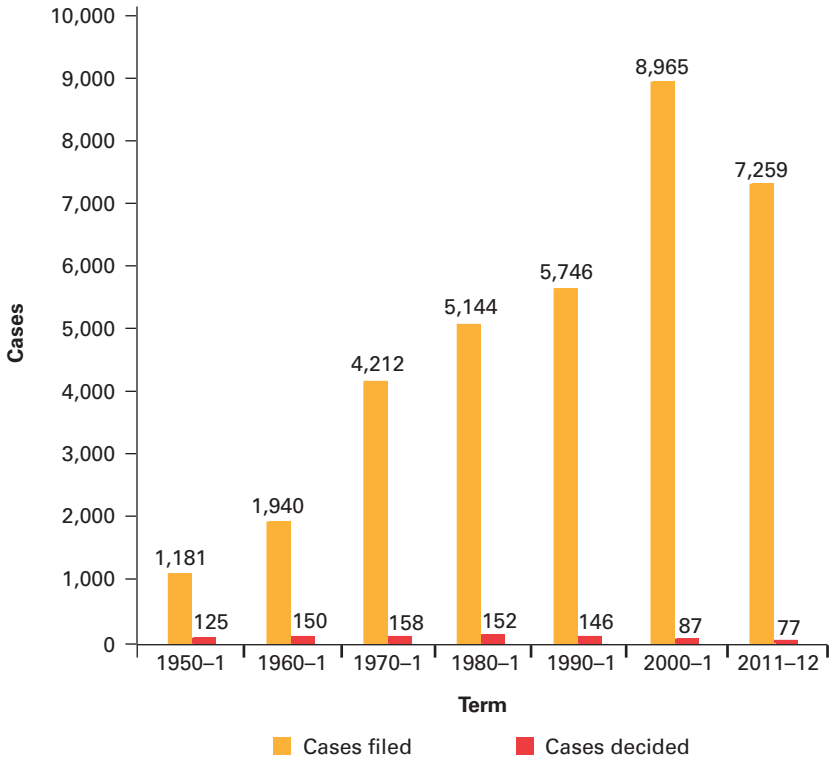


FIGURE 9.3 HOW MANY CASES DOES THE SUPREME COURT HANDLE?

The modern Supreme Court is asked to hear over 7,000 cases per year (represented by orange bars); of these cases, it reaches a final decision in about 1 percent, or 77 cases (represented by red bars). This is about half of the total number of decisions the Court handed down twenty years ago.

SOURCE: Administrative Office of the Courts; Supreme Court Public Information Office.

writ of *certiorari*
A request for the Supreme Court to order up the records from a lower court to review the case.

Deciding to Hear a Case

More than 7,000 cases are filed at the Supreme Court each term; approximately 80 cases are orally argued and decided. In contrast, from 1790 to 1801, the Court received only 87 total cases under its appellate jurisdiction. In the Court's early years, most of the justices' workload involved their circuit-riding duties.[20] As recently as the 1940s, fewer than 1,000 cases were filed annually. Filings increased at a dramatic rate until the mid-1990s, shot up again in the late 1990s, and generally have now leveled off (see Figure 9.3).

The content of the Court's docket is every bit as significant as its size. During the 1930s, cases requiring the interpretation of constitutional law began to account for a growing portion of the Court's workload, leading the Court to assume a more important role in the policy-making process. At that time, only 5 percent of the Court's cases involved questions concerning the Bill of Rights. By the late 1950s, one-third of filed cases involved such questions; by the 1960s, half did.[21]

Justices can also exercise a significant role in policy making and politics by opting not to hear a case. In early 2012, for example, the Supreme Court refused to revisit a case concerning prayer in school. The "Doe" family sued the Indian River School Board for including Christian prayer during the school day, at graduation, and during meetings. When the school board attempted to return to the Court, the justices refused, allowing the prior ruling to continue to govern precedent regarding prayer in school.[22]

WRITS OF *CERTIORARI* AND THE RULE OF FOUR Since 1988, nearly all appellate cases that have gone to the Supreme Court arrived there on a petition for a **writ of *certiorari*** (from the Latin "to be informed"), which is a request for the Supreme Court—at its discretion—to order up the records of the lower courts for purposes of review (see Figure 9.4).

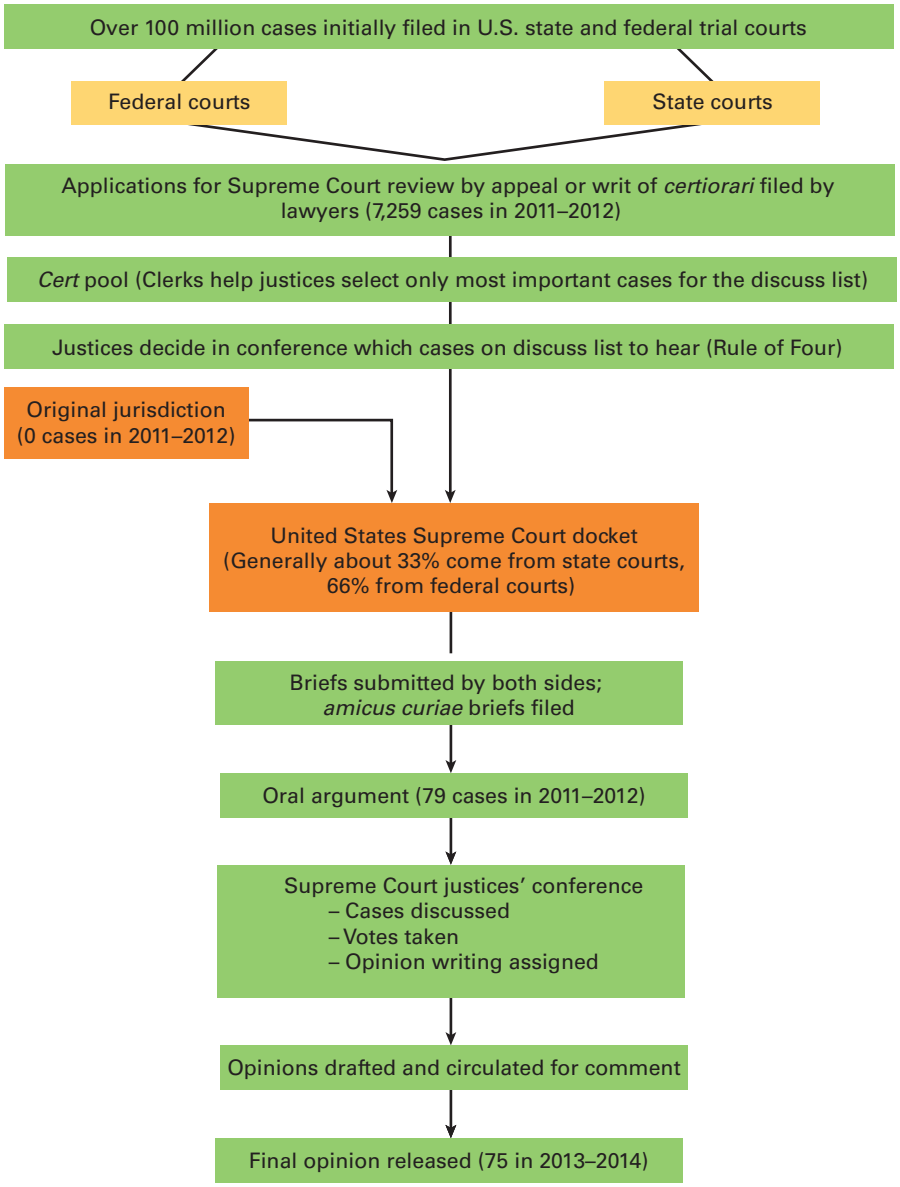


FIGURE 9.4 HOW DOES A CASE GET TO THE SUPREME COURT?

This figure illustrates both how cases get on the Court's docket and what happens after a case is accepted for review. A case may take several years to wind its way through the federal judiciary and another year or two to be heard and decided by the Supreme Court, if the justices decide to grant *certiorari*.

The Supreme Court controls its own caseload through the *certiorari* process, deciding which cases it wants to hear and rejecting most cases that come to it. All petitions, or writs of *certiorari,* must meet two criteria:

1. The case must come from a U.S. court of appeals, a court of military appeals, district court, or a state court of last resort.
2. The case must involve a federal question. Thus, the case must present questions of federal constitutional law or involve a federal statute, action, or treaty. The reasons that the Court should accept the case for review and legal argument supporting that position are set out in the petitioner's writ of *certiorari.*

The clerk of the Court transmits petitions for writs of *certiorari* first to the chief justice's office, where his clerks review the petitions, and then to the individual justices' offices. On the Roberts Court, all of the justices except Justice Samuel Alito (who allows his clerks great individual authority in selecting the cases for him to review) participate in what is called the *cert* pool. Pool participants review their assigned fraction of petitions and share their notes with each other. Those cases deemed noteworthy by the justices then make it onto what is called the discuss list prepared by the chief

Rule of Four
At least four justices of the Supreme Court must vote to consider a case before it can be heard.

justice's clerks and are circulated to the chambers of the other justices. All other petitions are dead listed and go no further. Only about 30 percent of submitted petitions make it to the discuss list. During one of their weekly conference meetings, the justices review the cases on the discuss list. The chief justice speaks first, then the rest of the justices, according to seniority. The decision process ends when the justices vote, and by custom, *certiorari* is granted according to the **Rule of Four**—when at least four justices vote to hear a case.

The cases the Court chooses to hear—or not to hear—make a powerful statement about the justices' policy priorities. Cases the Court decides to hear may establish new national policy standards or clarify the decisions of lower courts. When the Court chooses not to hear a case, it allows the decision of the lower court to stand, effectively making another type of statement on public policy.

THE ROLE OF CLERKS As early as 1850, the justices of the Supreme Court beseeched Congress to approve the hiring of a clerk to assist each justice. Congress denied the request, so when Justice Horace Gray hired the first law clerk in 1882, he paid the clerk himself. Justice Gray's clerk was a top graduate of Harvard Law School whose duties included cutting Justice Gray's hair and running personal errands. Finally, in 1886, Congress authorized each justice to hire a stenographer clerk for $1,600 a year.

Clerks typically are selected from candidates at the top of the graduating classes of prestigious law schools. They perform a variety of tasks, ranging from searching arcane facts to playing tennis or taking walks with the justices. Clerks spend most of their time researching material, reading and summarizing cases, and helping justices write opinions. Clerks also make the first pass through the petitions that come to the Court, undoubtedly influencing which cases get a second look. They often help draft opinions and serve as informal conduits for communication between the justices' chambers. Just how much assistance they provide in the writing of opinions is unknown.[23] However,

WHY ARE SUPREME COURT CLERKSHIPS IMPORTANT?

Supreme Court clerkships are awarded to a small number of elite law school graduates each year. In addition to providing valuable experience at the Court, clerkships can open doors to opportunities in government and private practice. Justice Elena Kagan (right, seated with former Justice Sandra Day O'Connor) served as a law clerk to Justice Thurgood Marshall. She later went on to serve as White House counsel, Harvard Law School dean, solicitor general, and, ultimately, Supreme Court justice.

it is noteworthy that as the number of clerks has grown, so has the length of the Court's written opinions.[24]

How Does a Case Survive the Process?

It can be difficult to determine why the Court decides to hear a particular case. The Court does not offer reasons, and "the standards by which the justices decide to grant or deny review are highly personalized and necessarily discretionary," noted former Chief Justice Earl Warren.[25] Political scientists nonetheless have attempted to determine the characteristics of the cases the Court accepts. Among the cues are the following:

- The federal government is the party asking for review.
- The case involves conflict among the courts of appeals.
- The case presents a civil rights or civil liberties question.
- The case involves the ideological or policy preferences of the justices.
- The case has significant social or political interest, as evidenced by the presence of interest group *amicus curiae* briefs.

solicitor general
The fourth-ranking member of the Department of Justice; responsible for handling nearly all appeals on behalf of the U.S. government to the Supreme Court.

amicus curiae
"Friend of the court"; *amici* may file briefs or even appear to argue their interests orally before the court.

FEDERAL GOVERNMENT One of the most important cues for predicting whether the Court will hear a case is the solicitor general's position. The **solicitor general**, appointed by the president, is the fourth-ranking member of the Department of Justice and is responsible for handling nearly all appeals on behalf of the U.S. government to the Supreme Court. The solicitor's staff resembles a small, specialized law firm within the Department of Justice. But, because this office has such a special relationship with the Supreme Court, even having a suite of offices within the Supreme Court building, the solicitor general often is called the Court's "ninth and a half member."[26] Moreover, the office of the solicitor general, on behalf of the U.S. government, appears as a party or as an ***amicus curiae,*** or friend of the court, in more than 50 percent of the cases heard by the Court each term.

This special relationship helps to explain the overwhelming success the solicitor general's office enjoys before the Supreme Court. The Court generally accepts 70 to 80 percent of cases in which the U.S. government is the petitioning party, compared with about 5 percent of all others.[27] But, because of this special relationship, the solicitor general often ends up playing two conflicting roles: representing in Court both the president's policy interests and the broader interests of the United States. At times, solicitors may find these two roles difficult to reconcile. Former Solicitor General Rex E. Lee (1981–1985), for example, noted that on more than one occasion he refused to make arguments in Court that had been advanced by the Reagan administration (a stand that ultimately forced him to resign from his position).[28]

CONFLICT AMONG THE COURTS OF APPEALS Conflict among the lower courts is another reason justices take cases. When interpretations of constitutional or federal law are involved, justices seem to want consistency throughout the federal court system. Often these conflicts occur when important civil rights or civil liberties questions arise. Political scientists have noted that justices' ideological leanings play a role.[29] It is not uncommon to see conservative justices voting to hear cases to overrule liberal lower court decisions, or vice versa. Justices also take cases when several circuit courts disagree over a main issue.

INTEREST GROUP PARTICIPATION A quick way for justices to gauge the ideological ramifications of a particular civil rights or liberties case is by the nature and amount of interest group participation. Richard C. Cortner has noted that "Cases do not arrive on the doorstep of the Supreme Court like orphans in the night."[30] Instead,

most cases heard by the Supreme Court involve interest group participation. This participation may come in a number of forms.

Well-funded liberal groups, such as the American Civil Liberties Union, People for the American Way, or the NAACP Legal Defense and Educational Fund, and conservative groups, including the Washington Legal Foundation, Concerned Women for America, and the American Center for Law and Justice, routinely sponsor cases before the Supreme Court. Sponsorship implies that a group has helped to devise the legal strategy, pay the costs of litigation, and shepherd the case through the court system. It can be very costly and time-consuming.

Other groups participate as *amicus curiae*, or a friend of the Court. *Amicus* participation has increased dramatically since the 1970s. Because litigation is so expensive, few individuals have the money, time, or interest to sponsor a case all the way to the U.S. Supreme Court. All sorts of interest groups, then, find that joining ongoing cases through *amicus* briefs is a useful way to advance their policy preferences. Major cases addressing issues of great national importance, such as campaign finance, health care, or affirmative action attract large numbers of *amicus* briefs as part of interest groups' efforts to lobby the judiciary and bring about desired political objectives (see Table 9.6).[31]

The *amicus curiae* briefs filed by interested parties, especially interest groups or other parties potentially affected by the outcome of the case, often echo or expand the positions of both parties in a case and often provide justices with additional information about the potential consequences of a case. Research by political scientists has found that "not only does [an *amicus*] brief in favor of *certiorari* significantly improve the chances of a case being accepted, but two, three, and four briefs improve the chances even more."[32] Clearly, it's the more the merrier, whether the briefs are filed for or against granting review.

Finally, interest groups also support litigants' efforts by holding practice oral arguments during mock court sessions. In these sessions, the lawyer who will argue the case

TABLE 9.6 WHICH GROUPS PARTICIPATED AS *AMICUS CURIAE* IN *CITIZENS UNITED* V. *FEC* (2010)?

For the Petitioner (Committee for Truth in Politics)		
Alliance Defense Fund	Cato Institute	Michigan Chamber of Commerce
American Civil Liberties Union	Center for Competitive Politics	National Rifle Association
American Civil Rights Union	Center for Constitutional Jurisprudence	Pacific Legal Foundation
AFL-CIO	Fidelis Center	Reporters Committee for Freedom of the Press
American Justice Partnership	Former FEC Commissioners	Senator Mitch McConnell
California Broadcasters Association	Free Speech Defense & Education Fund	Seven Former Chairmen and One Former Commissioner of the Federal Election Commission
California First Amendment Coalition	Institute for Justice	U.S. Chamber of Commerce
Campaign Finance Scholars	Judicial Watch	Wyoming Liberty Group et al.
For the Respondent (Center for Political Accountability et al.)		
American Independent Business Alliance	Justice at Stake	Norman Ornstein
Campaign Legal Center et al.	League of Women Voters	Rep. Chris Van Hollen et al.
Center for Independent Media et al.	Program on Corporations, Law & Democracy et al.	Senator John McCain et al.
Committee for Economic Development	Public Good	The Sunlight Foundation
Democratic National Committee		
For Neither Party		
Former Officials of the American Civil Liberties Union	Independent Sector	Montana et al.
Hachette Book Group, Inc., and HarperCollins Publishers L.L.C.		

before the justices participates in several complete rehearsals, with prominent lawyers and law professors role playing the various justices.

Hearing and Deciding the Case

Once the Court accepts a case for review, a flurry of activity begins. Lawyers on both sides of the case prepare their written arguments for submission to the Court. In these briefs, lawyers cite prior case law and make arguments regarding why the Court should find in favor of their client.

ORAL ARGUMENTS After the Court accepts a case and each side has submitted briefs and *amicus* briefs, oral argument takes place. The Supreme Court's annual term begins the first Monday in October, as it has since the late 1800s, and generally runs through mid-June. Justices hear oral arguments from the beginning of the term until early April. Special cases, such as *U.S.* v. *Nixon* (1974)—which involved President Richard M. Nixon's refusal to turn over tapes of Oval Office conversations to a special prosecutor investigating a break-in at the Democratic Party headquarters in the Watergate complex—have been heard even later in the year.[33] During the term, "sittings," periods of about two weeks in which cases are heard, alternate with "recesses," also about two weeks long. Justices usually hear oral arguments Monday through Wednesday.

Generally, only the immediate parties in the case take part in oral argument, although it is not uncommon for the U.S. solicitor general or one of his or her deputies to make an appearance to argue orally as an *amicus curiae*. Oral argument at the Court is fraught with time-honored tradition and ceremony. At precisely ten o'clock every morning when the Court is in session, the Court marshal, dressed in a formal morning coat, emerges to intone "Oyez! Oyez! Oyez!" as the nine justices emerge from behind a reddish-purple velvet curtain to take their places on the raised and slightly angled bench. The chief justice sits in the middle. The remaining justices sit to the left and right, alternating in seniority.

Almost all attorneys are allotted one half-hour to present their cases, including the time required to answer questions from the bench. As a lawyer approaches the mahogany lectern, a green light goes on, indicating that the attorney's time has begun. A white light flashes when five minutes remain. When a red light goes on, Court practice mandates that counsel stop immediately. One famous piece of Court lore told to all attorneys concerns a counsel who continued talking and reading from his prepared argument after the red light went on. When he looked up, he found an empty bench—the justices had risen quietly and departed while he continued to talk. On another occasion, Chief Justice Charles Evans Hughes stopped a leader of the New York Bar in the middle of the word "if."

Although many Court watchers have tried to figure out how a particular justice will vote based on the questioning at oral argument, most researchers find that the nature and number of questions asked do not help much in predicting the outcome of a case. Nevertheless, oral argument has several important functions. First, it is the only opportunity for even a small portion of the public (who may attend the hearings) and the press to observe the workings of the Court. Second, it assures lawyers that the justices have heard the parties' arguments, and it forces lawyers to focus on arguments believed important by the justices. Third, it provides the Court with additional information, especially concerning the Court's broader political role, an issue not usually addressed in written briefs. For example, the justices can ask how many people might be affected by its decision or where the Court (and country) would be heading if a case were decided in a particular way. Finally, Justice Stephen Breyer also notes that oral arguments are a good way for the justices to try to highlight certain issues for other justices.

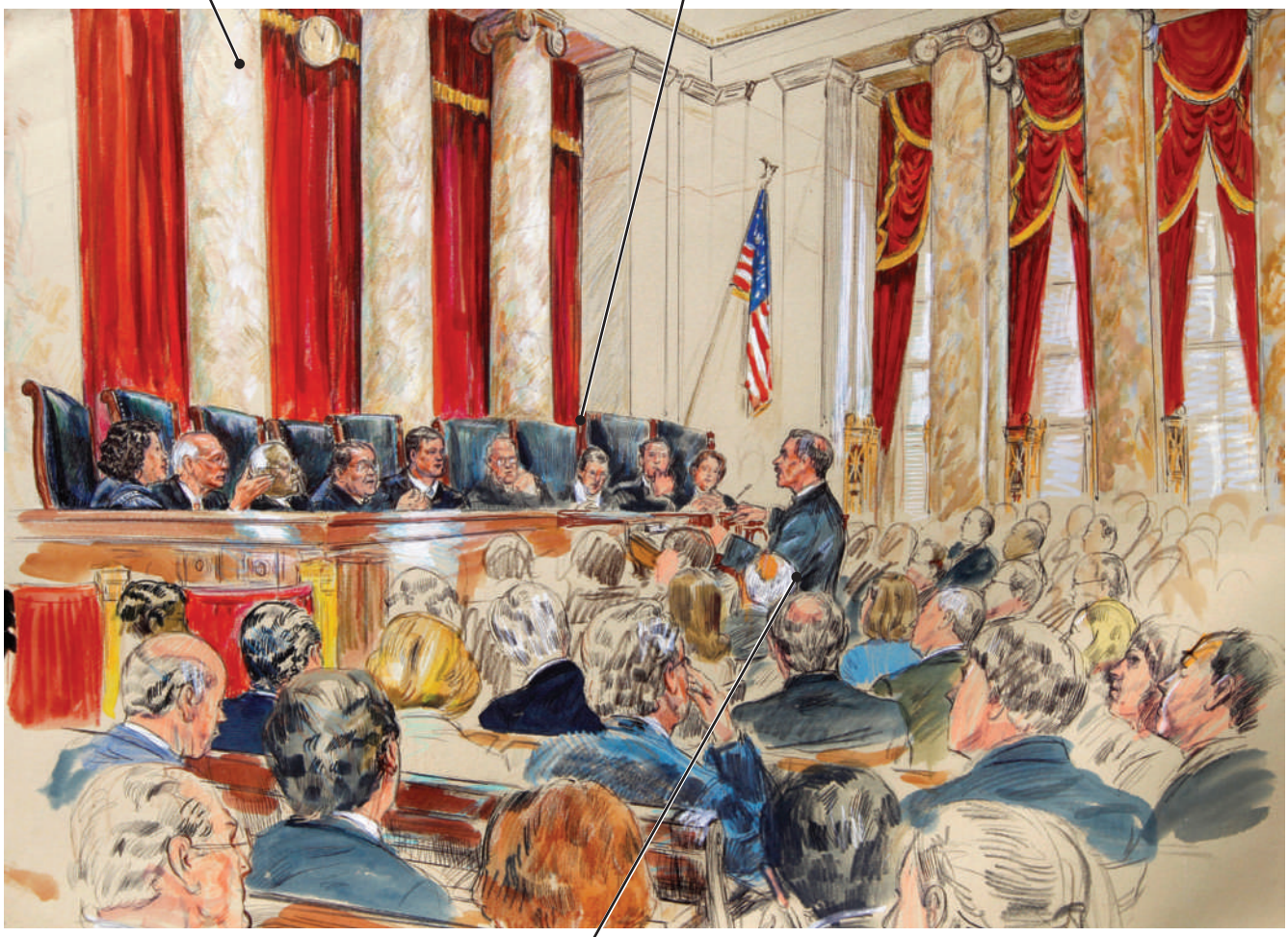
THE CONFERENCE AND THE VOTE The justices meet in closed conference twice a week when the Court is hearing oral arguments. Since the ascendancy of Chief Justice Roger B. Taney to the Court in 1836, the justices have begun each conference session

Take a Closer Look

The Supreme Court hears oral argument in most cases in which it reaches a final decision. Scholars have found that oral argument serves a number of important functions. For example, it provides an opportunity for the justices to highlight important case themes and to ask questions about the impact of a case that go beyond what is detailed in the party or *amicus curiae* briefs. Review the illustration of arguments before the Supreme Court during one of the 2012 cases that decided the constitutionality of the health care reform bill.

No cameras are allowed in the Supreme Court during oral arguments. Thus, we have only illustrations of what oral arguments look like in our nation's highest court.

The justices are seated on a curved bench at the front of the courtroom in order of seniority. The chief justice sits in the center, with the most senior associate justice at his right hand side. The second most senior associate justice sits on the chief's left hand side, and so on.



Lawyers are typically allowed to present thirty minutes of oral argument before the Court. However, this time is usually more like a question-and-answer session with the justices than a prepared speech.

CRITICAL THINKING QUESTIONS

1. Why do oral arguments remain important to the Court? How might a discussion between the justices and the parties' attorneys advance and improve judges' decision making?
2. How might the attorney representing a party in a case affect the case's outcome?
3. Should the Supreme Court allow cameras and video recordings in the courtroom? Why or why not?

with a round of handshaking. Once the door to the conference room closes, no others are allowed to enter. The justice with the least seniority acts as the doorkeeper for the other eight, communicating with those waiting outside to fill requests for documents, water, and any other necessities.

Conferences highlight the importance and power of the chief justice, who presides over them and makes the initial presentation of each case. Each individual justice then discusses the case in order of his or her seniority on the Court, with the most senior justice speaking next. Most accounts of the decision-making process reveal that at this point some justices try to change the minds of others, but that most enter the conference room with a clear idea of how they will vote on each case.

During the Rehnquist Court, the justices generally voted at the same time they discussed each case, with each justice speaking only once. Initial conference votes were not final, and justices were allowed to change their minds before final votes were taken later. The Roberts Court is much more informal than the Rehnquist Court. The justices' regular conferences now last longer and, unlike the conferences headed by Rehnquist, Roberts encourages discussion.[34]

WRITING OPINIONS After the Court has reached a decision in conference, the justices must formulate a formal opinion of the Court. If the chief justice is in the majority, he selects the justice who will write the opinion. This privilege enables him to wield tremendous power and is a very important strategic decision; the author of the decision may determine the tone and content of the Court's opinion. If the chief justice is in the minority, the assignment falls to the most senior justice in the majority.

The opinion of the Court can take several different forms. Most decisions are reached by a majority opinion written by one member of the Court to reflect the views of at least five justices. This opinion usually sets out the legal reasoning justifying the decision, and this legal reasoning becomes a precedent for deciding future cases. The reasoning behind any decision is often as important as the outcome. Under the system of *stare decisis,* both are likely to be relied on as precedent later by lower courts confronted with cases involving similar issues.

In the process of creating the final opinion of the Court, informal caucusing and negotiation often take place, as justices may hold out for word changes or other modifications as a condition of their continued support of the majority opinion. This negotiation process can lead to divisions in the Court's majority. When this occurs, the Court may be forced to decide cases by plurality opinions, which attract the support of three or four justices. While these decisions do not have the precedential value of majority opinions, they nonetheless have been used by the Court to decide many major cases. Justices who agree with the outcome of the case, but not with the legal rationale for the decision, may file concurring opinions to express their differing approach.

Justices who do not agree with the outcome of a case file dissenting opinions. Although these opinions have little direct legal value, they can be an important indicator of legal thought on the Court and are an excellent platform for justices to note their personal and legal disagreements with other members of the Court.

Judicial Philosophy and Decision Making

9.5 Analyze the factors that influence judicial decision making.

Justices do not make decisions in a vacuum. Principles of *stare decisis* dictate that the justices follow the law of previous cases in deciding cases at hand. But, a variety of legal and extra-legal factors have also been found to affect Supreme Court decision making.

judicial restraint
A philosophy of judicial decision making that posits courts should allow the decisions of other branches of government to stand, even when they offend a judge's own principles.

judicial activism
A philosophy of judicial decision making that posits judges should use their power broadly to further justice.

strict constructionist
An approach to constitutional interpretation that emphasizes interpreting the Constitution as it was originally written and intended by the Framers.

Judicial Philosophy, Original Intent, and Ideology

One of the primary issues concerning judicial decision making focuses on judicial philosophy, particularly what is called the activism/restraint debate. Advocates of **judicial restraint** argue that courts should allow the decisions of other branches to stand, even when they offend a judge's own principles. Restraintists defend their position by asserting that unelected judges make up the federal courts, which renders the judicial branch the least democratic branch of government. Consequently, the courts should defer policy making to other branches of government as much as possible.

Restraintists refer to *Roe* v. *Wade* (1973), the case that liberalized abortion laws, as a classic example of **judicial activism** run amok. They maintain that the Court should have deferred policy making on this sensitive issue to the states or to the elected branches of the federal government.

Advocates of judicial restraint generally agree that judges should be **strict constructionists**; that is, they should interpret the Constitution as the Framers wrote and originally intended it. They argue that in determining the constitutionality of a statute or policy, the Court should rely on the explicit meanings of the clauses in the document, which can be clarified by looking at founding documents.

Advocates of judicial activism contend that judges should use their power broadly to further justice. Activists argue that it is appropriate for courts to correct injustices committed by other branches of government. Implicit in this argument is the notion that courts need to protect oppressed minorities.[35]

Although judicial activists are often considered politically liberal and restraintists politically conservative, in recent years a new brand of conservative judicial activism has become prevalent. Liberal activist decisions often expanded the rights of political and legal minorities. But, conservative activist judges view their positions as an opportunity to issue broad rulings that impose their own political beliefs and policies on the country at large.

Public Opinion

Many political scientists have examined the role of public opinion in Supreme Court decision making. Not only do the justices read legal briefs and hear oral arguments, but they also read newspapers, watch TV, and have some knowledge of public opinion—especially on controversial issues.

Whether or not public opinion actually influences justices (see Table 9.7), it can act as a check on the power of the courts. Activist periods on the Supreme Court generally have corresponded to periods of social or economic crisis. For example, in the early, crisis-ridden years of the republic, the Marshall Court supported a strong national

TABLE 9.7 DO SUPREME COURT DECISIONS ALIGN WITH THE VIEWS OF THE AMERICAN PUBLIC?

Issues	Case	Court Decision	Public Opinion Before Decision
Is the death penalty constitutional?	*Gregg* v. *Georgia* (1976)	Yes	Yes (72% favor)
Should homosexual relations between consenting adults be legal?	*Lawrence* v. *Texas* (2003)	Yes	Maybe (50% favor)
Should state and local governments be able to pass laws that ban the possession or sale of handguns?	*McDonald* v. *City of Chicago* (2010)	No	Maybe (50% oppose)
Is donating money a form of free speech protected by the First Amendment?	*Citizens United* v. *FEC* (2010)	Yes	Yes (62% favor)
Is the Patient Protection and Affordable Care Act constitutional?	*National Federation of Independent Businesses* v. *Sebelius* (2012)	Yes	No (48% oppose)

SOURCE: Lexis-Nexis RPOLL.

government, much to the chagrin of a series of pro-states' rights Democratic-Republican presidents. Similarly, the Court capitulated to political pressures and public opinion when, after 1936, it reversed many of its earlier decisions that had blocked President Franklin D. Roosevelt's New Deal programs.

The courts, especially the Supreme Court, also can be the direct target of public opinion. When *Webster* v. *Reproductive Health Services* (1989) was about to come before the Supreme Court, unprecedented lobbying of the Court took place as groups and individuals on both sides of the abortion issue marched and sent appeals to the Court. Mail at the Court, which usually averaged about 1,000 pieces a day, rose to an astronomical 46,000 pieces per day, virtually paralyzing normal lines of communication.

The Supreme Court also appears to affect public opinion. Political scientists have found that the Court's initial rulings on controversial issues such as abortion or capital punishment positively influence public opinion in the direction of the Court's opinion. However, this research also finds that subsequent decisions have little effect.[36]

The Court also is dependent on the public for its prestige as well as for compliance with its decisions. In times of war and other emergencies, for example, the Court frequently has decided cases in ways that commentators have attributed to the sway of public opinion and political exigencies. In *Korematsu* v. *U.S.* (1944), for example, the high court upheld the obviously unconstitutional internment of Japanese, Italian, and German American citizens during World War II.[37] Moreover, Chief Justice William H. Rehnquist once suggested that the Court's restriction on presidential authority in *Youngstown Sheet & Tube Co.* v. *Sawyer* (1952), which invalidated President Harry S Truman's seizure of the nation's steel mills, was largely attributable to Truman's unpopularity in light of the Korean War.[38]

Public confidence in the Court, as with other institutions of government, has ebbed and flowed. Public support for the Court was highest after the Court issued *U.S.* v. *Nixon* (1974).[39] At a time when Americans lost faith in the presidency because of the Watergate scandal, they could at least look to the Supreme Court to do the right thing. Although the percentage of Americans with confidence in the courts has fluctuated over time, in 2014, an all-time low of 44 percent of Americans approved of the way the Supreme Court was doing its job.[40]

Toward Reform: Power, Policy Making, and the Court

9.6 Assess the role of the Supreme Court in the policy-making process.

All judges, whether they recognize it or not, make policy. The decisions of the Supreme Court, in particular, have a tremendous impact on American politics and policy. Over the past 250 years, the justices have helped to codify many of the major rights and liberties guaranteed to the citizens of the United States. Although justices need the cooperation of the executive and legislative branches to implement and enforce a good number of their decisions, it is safe to say that many policies we take for granted in the United States would not have come to fruition without support of the Supreme Court.[41] These include the right to privacy and equal rights for African Americans, women, Hispanics, gays and lesbians, and other minority groups.

Several Courts have played particularly notable roles in the development of the judiciary's policy-making role. As discussed earlier in the chapter, the Marshall Court

played an important role in establishing the role and power of the Supreme Court, including the power of judicial review in *Marbury* v. *Madison* (1803). The Warren Court decided a number of civil rights cases that broadly expanded civil and political rights. These decisions drew a great deal of criticism but played a major role in broadening public understanding of the Court as a policy maker. The Rehnquist Court made numerous decisions related to federalism, which caused observers to take note of the Court's ability to referee conflicts between the federal government and the states. And, the Roberts Court reversed the general trend of the Court's agreement with executive actions during times of war by finding in 2008 that the Bush administration's denial of *habeas corpus* rights to prisoners being held at Guantanamo Bay was an unconstitutional exercise of presidential power.[42]

Policy Making

One measure of the power of the courts and their ability to make policy is that more than one hundred federal laws have been declared unconstitutional. Although many of these laws have not been particularly significant, others have. In 2012, for example, the Roberts Court struck down portions of an Arizona state law regulating immigration on the grounds that it violated the Constitution's supremacy clause.[43]

DO UNPOPULAR SUPREME COURT RULINGS THREATEN THE NATION?

The Warren Court's broad expansions of civil and political rights led to a great deal of criticism, including a movement to impeach the chief justice. Here, two California billboards present contrasting views of Warren's performance.

Another measure of the policy-making power of the Supreme Court is its ability to overrule itself. Although the Court generally abides by the informal rule of *stare decisis,* by one count, it has overruled itself in more than 200 cases.[44] *Brown* v. *Board of Education* (1954), for example, overruled *Plessy* v. *Ferguson* (1896), thereby reversing years of constitutional interpretation concluding that racial segregation was not a violation of the Constitution. Moreover, in the past few years, the Court repeatedly has reversed earlier decisions in the areas of criminal defendants' rights, reproductive rights, and free speech, revealing its powerful role in determining national policy.

A measure of the growing power of the federal courts is the degree to which they now handle issues that had been considered political questions more appropriately settled by the other branches of government. Prior to 1962, for example, the Court refused to hear cases questioning the size (and population) of congressional districts, no matter how unequal they were.[45] The boundary of a legislative district was considered a political question. Then, in *Baker* v. *Carr* (1962), Justice William Brennan, writing for the Court, concluded that simply because a case involved a political issue, it did not necessarily involve a political question. This opened the floodgates to cases involving a variety of issues that the Court formerly had declined to address.[46]

judicial implementation
How and whether judicial decisions are translated into actual public policies affecting more than the immediate parties to a lawsuit.

Implementing Court Decisions

President Andrew Jackson, annoyed about a particular decision handed down by the Marshall Court, is alleged to have said, "John Marshall has made his decision; now let him enforce it." Jackson's statement raises a question: how do Supreme Court rulings translate into public policy? In fact, although judicial decisions carry legal and even moral authority, all courts must rely on other units of government to carry out their directives. If the president or members of Congress, for example, do not like a particular Supreme Court ruling, they can underfund programs needed to implement a decision or seek only lax enforcement. **Judicial implementation** refers to how and whether judicial decisions are translated into actual public policies affecting more than the immediate parties to the lawsuit.

How well a decision is implemented often depends on how well crafted or popular it is. Hostile reaction in the South to *Brown* v. *Board of Education* (1954) and the absence of precise guidelines to implement the decision meant that the ruling went largely unenforced for years. The *Brown* experience also highlights how much the Supreme Court needs the support of both federal and state courts as well as other governmental agencies to carry out its judgments. For example, you probably graduated from high school after 1992, when the Supreme Court ruled that public middle school and high school graduations could not include a prayer, yet your own commencement ceremony may have included one.[47]

The implementation of judicial decisions involves what political scientists call an implementing population and a consumer population.[48] The implementing population consists of those people responsible for carrying out a decision. Depending on the policy and issues in question, the implementing population can include lawyers, judges, public officials, police officers and police departments, hospital administrators, government agencies, and corporations. In the case of school prayer, the implementing population could include teachers, school administrators, or school boards. The consumer population consists of those people who might be directly affected by a decision—in this case, students and parents.

For effective implementation of a judicial decision, the first requirement is for members of the implementing population to show they understand the original decision. For example, the Supreme Court ruled in *Reynolds* v. *Sims* (1964) that every person should have an equally weighted vote in electing governmental representatives.[49] This "one person, one vote" rule might seem simple enough at first

glance, but in practice it can be very difficult to understand. The implementing population in this case consists chiefly of state legislatures and local governments, which determine voting districts for federal, state, and local offices. If a state legislature draws districts in such a way that African American or Hispanic voters are spread thinly across a number of separate constituencies, the chances are slim that any particular district will elect a representative who is especially sensitive to minority concerns. Does that violate "equal representation"? (In practice, courts and the Department of Justice have intervened in many cases to ensure that elected officials would include minority representation, only ultimately to be overruled by the Supreme Court.)

The second requirement is that the implementing population actually must follow Court policy. Thus, when the Court ruled that men could not be denied admission to a state-sponsored nursing school, the implementing population—in this case, university administrators and the state board of regents governing the nursing school—had to enroll qualified male students.[50]

Implementation of judicial decisions is most likely to be smooth if a few highly visible public officials, such as the president or a governor, shoulder the responsibility of seeing to the task. By the same token, these officials also can thwart or impede judicial intentions. Recall, for example, the effect of Governor Orval Faubus's initial refusal to allow black children to attend all-white public schools in Little Rock, Arkansas.

The third requirement for implementation is for the consumer population to be aware of the rights that a decision grants or denies them. Teenagers seeking an abortion, for example, are consumers of the Supreme Court's decisions on abortion and contraception. They need to know that most states require them to inform their parents of their intention to have an abortion or to get parental permission to do so. Similarly, criminal defendants and their lawyers are consumers of Court decisions and need to know, for instance, the implications of recent Court decisions for evidence presented at trial, sentencing guidelines, and prison reform.

Review the Chapter

Roots of the Federal Judiciary

9.1 Trace the development of the federal judiciary and the origins of judicial review, p. 248.

Many Framers viewed the judicial branch of government as little more than a minor check on the other two branches, ignoring Anti-Federalist concerns about an unelected judiciary and its potential for tyranny. The Judiciary Act of 1789 established the basic federal court system we have today. It was the Marshall Court (1801–1835), however, that interpreted the Constitution to include the Court's major power, that of judicial review.

The Federal Court System

9.2 Explain the organization of the federal court system, p. 252.

The federal court system is made up of constitutional and legislative courts. Federal district courts, courts of appeals, and the Supreme Court are constitutional courts.

How Federal Court Judges Are Selected

9.3 Outline the criteria and process used to select federal court judges, p. 257.

District court, court of appeals, and Supreme Court justices are nominated by the president and must also win Senate confirmation. Important criteria for selection include competence, ideology, rewards, pursuit of political support, religion, race, ethnicity, and gender.

The Supreme Court Today

9.4 Evaluate the Supreme Court's process for accepting, hearing, and deciding cases, p. 263.

Several factors influence the Court's decision to hear a case. Not only must the Court have jurisdiction, but at least four justices must vote to hear the case. Cases with certain characteristics are most likely to be heard. Once a case is set for review, briefs and *amicus curiae* briefs are filed and oral argument is scheduled. The justices meet in conference after oral argument to discuss the case; votes are taken; and opinions are written, circulated, and then announced.

Judicial Philosophy and Decision Making

9.5 Analyze the factors that influence judicial decision making, p. 271.

Judges do not make decisions in a vacuum. In addition to following the law of previous cases, other factors, including personal philosophy and ideology, have an extraordinary impact on how judges decide cases. Public opinion may also play a role in some cases.

Toward Reform: Power, Policy Making, and the Court

9.6 Assess the role of the Supreme Court in the policy-making process, p. 273.

The Supreme Court is an important participant in the policy-making process. The power to interpret laws gives the Court a tremendous policy-making power never envisioned by the Framers. However, if the president or members of Congress oppose a particular Supreme Court ruling, they can underfund programs needed to implement a decision or seek only lax enforcement.

Learn the Terms

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

amicus curiae, p. 267
appellate court, p. 252
appellate jurisdiction, p. 249
brief, p. 255
constitutional courts, p. 252
judicial activism, p. 272
judicial implementation, p. 275
judicial restraint, p. 272
judicial review, p. 251
Judiciary Act of 1789, p. 249
jurisdiction, p. 248
legislative courts, p. 252
Marbury v. *Madison* (1803), p. 252
original jurisdiction, p. 248
precedent, p. 255
Rule of Four, p. 266
senatorial courtesy, p. 257
solicitor general, p. 267
stare decisis, p. 255
strict constructionist, p. 272
trial court, p. 252
writ of *certiorari*, p. 264

Test Yourself

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

1. Which of the following is NOT one of Congress's constitutional powers over the judiciary?

a. Authority to alter the Court's jurisdiction
b. Impeach and remove federal judges
c. Veto a Supreme Court decision
d. Offer advice and consent on presidential appointments
e. Propose constitutional amendments

2. Which of the following paved the way for the courts to become a co-equal branch?

a. Writ of *certiorari*
b. *McCulloch* v. *Maryland* (1819)
c. The Judiciary Act of 1789
d. Judicial review
e. *Federalist No. 78*

3. Courts of original jurisdiction are most often known as:

a. appellate courts.
b. courts of appeals.
c. trial courts.
d. legislative courts.
e. constitutional courts.

4. Which of the following types of courts handles the bulk of the caseload in the federal system?

a. District courts
b. Courts of appeals
c. Special purpose courts
d. Legislative courts
e. Supreme Court

5. Which of the following is NOT true of the courts of appeals?

a. Cases may be heard by multiple judges.
b. Judges try to correct errors in law.
c. They are the highest courts in the federal system.
d. Judges hear no new testimony.
e. Their decisions are binding only within their geographic confines.

6. According to the Constitution, who must offer advice and consent on a presidential appointment to the Supreme Court?

a. Current justices
b. Constituents
c. President
d. Senate
e. House of Representatives

7. All of the following are criteria that would help get a case heard by the Supreme Court EXCEPT:

a. The case presents a civil rights question.
b. The federal government is the party asking for review.
c. The case involves a conflict among the courts of appeals.
d. The case has significant social or political issues.
e. The case presents a lack of evidence.

8. What does it mean if the Court grants a petition for a writ of *certiorari*?

a. They have decided to review a lower court's decision.
b. They are throwing out a case.
c. They have decided that a case is unconstitutional.
d. They have reached a unanimous decision.
e. The court cannot come to a clear decision.

9. Which of the following does NOT appear to affect Supreme Court justices' decisions?

a. *Stare decisis*
b. Political circumstances
c. Judicial philosophy
d. Public opinion
e. Economic impact

10. Which of the following is the best way to measure the power of the courts in policy making?

a. The number of cases heard
b. How many days the court is in session
c. How long justices serve on the court
d. The number of laws declared unconstitutional
e. Popularity of judicial decisions