Chapter 8

The Judicial Branch

I. IMPORTANT DOCUMENTS

A. ARTICLE III OF THE CONSTITUTION

1. Article III states that "[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."
2. The Supreme Court is the only court formally created by the Constitution.
3. Congress is granted the power to create other lower federal courts as it sees fit.
4. Federal judges are appointed by the president and confirmed by a majority vote in the Senate. (Appointments Clause in Article II, Section 2)
5. Federal judges hold their positions "during good Behaviour." This means that federal judges serve for life, unless they voluntarily retire, and can only be removed through impeachment and conviction. Also, their salaries may not be reduced while serving.
6. The Supreme Court hears cases under two types of jurisdiction (authority to hear a case).
    a. The Court has original jurisdiction (i.e., it hears a case for the first time or conducts a trial) in cases involving federal officials, international issues, and cases in which a state is named as a party.
    b. The Court has appellate jurisdiction (the authority to decide cases on appeal) in all other cases involving federal law or the Constitution.
7. Article III, Section 2 also guarantees the right to a jury trial for all crimes. Additionally, it requires that trials take place in the state in

which the crime was committed. Jury trial jurisprudence is covered more extensively in Chapter 9, Civil Liberties.

8. Article III, Section 3 defines treason ("levying war against [the United States] or in adhering to their Enemies, giving them Aid and Comfort") and requires the testimony of two witnesses for conviction. The Framers took care to define treason narrowly, so as to not inhibit political speech.

The term "Court" with a capital "C" is always shorthand for the Supreme Court. The Court is also frequently referred to as SCOTUS (the Supreme Court of the United States).

B. "FEDERALIST NO. 78"

1. "Federalist Paper No. 78" was written by Alexander Hamilton to describe and defend the proposed structure of the federal judiciary.
2. Hamilton argued that, of the three branches, the courts would be the weakest because they would have no way to enforce their judgments, lacking both military and financial authority. The courts would be

> the least dangerous to the political rights of the Constitution . . . The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, does not influence either the sword or the purse. . . . It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

3. Hamilton argued persuasively for life tenure of federal judges, pointing out that

> "[i]ndependence and permanency in office" would be necessary to compensate for the inherent weakness of the courts generally. Concerning their role as guardians of the Constitution, he pointed out that the security of life tenure would ensure their freedom and independence to defend the Constitution, which embodies the will of the people, against political forces and the power of the other branches.

> If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

4. A critical power of the courts not explicitly addressed in the Constitution is that of judicial review, the power of the courts to determine the constitutionality of acts of the federal government or any state government. The objection to the courts having the power of judicial review was that it would give them too much power over the other branches by allowing them to invalidate the actions of the other branches. Hamilton made several counterarguments:
   a. The Constitution, which would be adopted through an exceptionally deliberative process, represents the will of the people more profoundly than do laws.
   b. It is the domain of the courts to determine the meaning of laws and whether a law conflicts with the Constitution.
   c. Courts must necessarily have the power in order to enforce constitutional limits on the power of the legislative and executive branches.
   d. Courts are necessary to safeguard individual liberties against the power of the legislature.

C. MARBURY v. MADISON (1803)

1. **Facts of the Case:** President John Adams, a Federalist, lost the election of 1800 to Thomas Jefferson, a Democratic-Republican. Two days before departing office, Adams appointed several dozen Federalists to newly created judicial positions in an attempt to extend the party's power. Due to the rushed nature of the appointments, several of the commissions were not delivered to the newly appointed judges before Adams left office and Jefferson took over. Jefferson saw no need to deliver the appointments, and instructed his Secretary of State, James Madison, not to do so. Marbury, one of the appointees who did not receive his appointment, sued, asking the Court to issue a *writ of mandamus* (an order from a court requiring a government official to perform a duty) instructing Madison to deliver his commission.

2. **Constitutional Issue(s):**
   a. Is Marbury entitled to his commission?
   b. Is Marbury entitled to a remedy in the courts?
   c. Should the Court grant a writ of mandamus, the remedy sought by the plaintiffs?
3. **Holding(s):**
   a. Yes, Marbury is entitled to his commission.
   b. Yes, Marbury is entitled to a judicial remedy.
   c. No, Section 13 of the Judiciary Act of 1789, giving the Supreme Court original jurisdiction to issue writs of mandamus, was unconstitutional.
4. **Reasoning:** The significance of the case is found in the third ruling, in which Chief Justice John Marshall, writing for the Court, held that Section 13 of the Judiciary Act conflicted with the Constitution, and was, therefore, void. The Constitution defines and limits the Court's original jurisdiction to those involving certain federal officials and those in which a state is a party. According to the Supremacy Clause, constitutional provisions cannot be altered by acts of Congress. The Constitution is superior to federal law, so Section 13 was unconstitutional. Marshall cleverly avoided conflict with the Jefferson administration while at the same time claiming for the Court, unquestionably, the power of judicial review.

D. JUDICIAL REVIEW

1. Judicial review is the power of the courts to determine the constitutionality of any act of government. It may be applied to any act of the legislative or executive branches.
2. Although Hamilton does not use the term *judicial review* in "Federalist No. 78," it is clearly his understanding that courts must hold this power.
3. The Constitution does not explicitly grant this power to the courts, but Chief Justice Marshall made clear in *Marbury* that the Court does hold the power of judicial review.
4. While it is broadly accepted that the Court holds this power, the decision has not gone unchallenged. The question of enforcement has been left to the executive branch.

Judicial review is based on the understanding that the Supreme Court is the highest authority on the Constitution. This is coupled with the Supremacy Clause (Article VI, Clause 2), stating that federal laws and treaties are superior to state and local laws. When a state or local law conflicts with a federal law, treaty, or the Constitution, it is void. The Supreme Court, using the power of judicial review, may invalidate acts of the other branches of the federal government, as well as actions of state governments.

II. THE JUDICIAL SYSTEM

A. WHAT THE COURTS DO

1. Court systems exist to resolve disputes between parties, which may be individuals, businesses, or government entities.
2. Cases begin in trial courts, where the facts of the case are presented.
   a. Cases are filed, and disputes are resolved.
   b. Evidence is presented, and witnesses testify.
   c. Juries or judges determine the outcome of cases.
3. Criminal law consists of the statutes (legislation) defining crimes as actions against the community.
   a. The parties to a criminal case are the state (or government) and the defendant. (The government is a party to every criminal case.)
   b. Crimes are punishable by serious penalties, including incarceration and, possibly, capital punishment (death penalty).
   c. Most criminal cases are resolved without going to trial through an agreement called a plea bargain, in which the defendant agrees to plead guilty to a crime, often a lesser charge, in exchange for a reduced sentence.
4. Civil law is the broad area of law encompassing non-criminal cases. It is commonly understood as the body of law relating to private rights. Examples include torts (personal injury or property damages) and contract violations.

a. The parties to a civil case are the plaintiff, or the person bringing the action (lawsuit), and the defendant. The government may be a party to a civil case.

b. The consequences for a defendant are limited to monetary payments or requirements for action.

c. Most civil cases are settled by agreement between the parties without going to trial.

B. THE COURT SYSTEM

1. The United States has a dual court system consisting of the federal court system and 50 state court systems.
2. The federal and state court systems share similar characteristics, including a pyramidal structure, with the largest number of trial courts at the base of the pyramid, a middle tier consisting of a smaller number of appellate-level courts, and a single supreme court at the top.
3. The Federal Courts
   a. The Supreme Court is the only court established by the Constitution. Congress is given the power to establish lower federal courts by legislation, and has, over the course of our history, created an extensive system of federal courts.
   b. The federal trial courts are the district courts.
      - ➤ There are 94 federal districts, or geographic areas, from which the district courts hear cases.
      - ➤ Each state has at least one, and district court boundaries do not cross state lines.
   c. The federal courts of appeals are called the circuit courts.
      - ➤ There are 13 federal circuits, including 12 based on geographic regions and one handling certain matters of international law.
      - ➤ Each circuit court hears cases from the trial courts within its geographic boundaries.
4. The Attorney General is the head of the U.S. Department of Justice and the chief legal officer of the nation, charged with enforcement of federal law.

5. The Solicitor General is the official in the Department of Justice who represents the federal government before the Supreme Court in all cases in which the United States is a party. He or she is also charged with filing *amicus curiae* briefs on behalf of the government when appropriate.

C. APPEALS

1. A party that has lost at trial may apply for review by a higher court. This procedure is called an appeal.
   a. Appeals must be based on a perceived error of law made by the judge at trial. This is often referred to as having grounds for appeal. Simply disagreeing with a verdict is not sufficient to request an appeal.
   b. Appellate cases only involve arguments about the legality of rulings made at trial. No new evidence or witnesses are introduced.
   c. A party that loses at trial has a right to appeal the decision to a higher court, with one important exception. The government may not appeal a loss in a criminal trial because the Fifth Amendment prohibits double jeopardy, or trying a defendant more than once for a crime.
   d. An appellate court may affirm or overturn a trial court's verdict, and remand (send back) the case to the trial court. (If a criminal conviction is overturned on appeal, the remedy is generally a new trial for the defendant. This is not considered a double jeopardy violation, since the defendant is the one requesting the second trial.)
2. When an appellate court makes a decision, it is creating public policy by making a rule that impacts the application of the law to citizens, which lower courts must follow in future cases.

The term* jurisdiction *refers to the authority of a court to hear a particular case. Trial courts have* original jurisdiction*; they hear cases for the first time. Appellate courts have* appellate jurisdiction*; they hear appeals from lower courts. Jurisdiction may also be based on geography and subject matter. Most courts hear cases that arise in particular geographic areas, and some courts hear cases that deal with a particular subject, regardless of geography, such as the United States Tax Court.

III. THE SUPREME COURT

A. OVERVIEW

1. The Supreme Court is the country's highest court.
2. The number of judges, called "justices," on the Court is currently nine. This number is set by Congress according to the Constitution and may be changed. It has been set at nine since 1869.
3. The Supreme Court has original jurisdiction in two specific situations (although it rarely conducts trials):
   a. cases involving ambassadors or federal officials
   b. certain cases to which a state is a party
4. Most cases reach the Supreme Court through its appellate jurisdiction. The Court hears cases from the federal appellate courts and state supreme courts in cases involving federal law or the Constitution (a federal question). A case that does not involve federal law or the Constitution may not be appealed to the Supreme Court.

B. PROCEDURES

1. The Supreme Court is not required to hear all of the cases that are appealed to it.
   a. More than 7,000 cases are appealed to the Court each year; it issues full opinions in fewer than 100.
   b. The justices decide which cases to accept according to the rule of four. That is, four of the nine justices must vote to take the case.
   c. In theory, the Court accepts only the most important cases, those involving pressing questions of national importance. These may involve any area of law. Cases frequently involve civil liberties, but most decisions involve other issues, such as business or regulatory questions.
   d. The Court will often accept cases involving an issue that has been considered by different federal courts of appeals and in which those circuit courts have reached different conclusions.
2. In order to bring suit (file a case) in a court, a party must have standing. *Standing* is a legal doctrine requiring that a party to a case must have a significant personal stake in its outcome, not a mere interest as a member of the public.

3. When the Court decides to take a case, it issues a *writ of certiorari* (Latin for "to be informed of"), a legal order to the lower court to provide the case records for review. This is commonly referred to as "granting cert." (much easier to pronounce!)
4. The case is then added to the Court's docket, a calendar of upcoming cases to be heard.
5. Parties submit briefs (summaries of facts and legal arguments) to the Court and are typically allowed thirty minutes of oral argument on the day their case is heard. During oral argument, attorneys make statements and answer questions from the nine assembled justices. Justices can sometimes be aggressive in asking questions, and often signal their opinion of a case by the questions they ask.
6. *Amicus curiae* (Latin for "friend of the court") briefs are advisory briefs submitted to the Court by individuals or groups that are not parties to the case, but who can provide expertise or insight on key issues to assist the Court in reaching a decision.

Amicus curiae briefs (often shortened to "amicus briefs") are frequently filed by interest groups and are one of the ways that these groups attempt to influence public policy. For example, in a Second Amendment case involving restrictions on gun purchases, amicus briefs might be filed by the National Rifle Association (NRA) and Everytown for Gun Safety. Numerous amicus briefs may be filed in important cases.

7. Following oral arguments, the justices meet, discuss, and vote on the case. The chief justice, or the senior justice in the majority, assigns one of the justices to write the majority opinion, the document announcing the Court's decision and detailing the legal reasoning behind its conclusions.
8. A justice who disagrees with the majority may write a dissenting opinion, in which he or she argues that the reasoning of the majority is in error and sets out an alternative argument.
9. A justice who agrees with the outcome of the majority opinion, but who arrives at this conclusion by following a different line of legal reasoning, may write a concurring opinion to clarify what he or she believes the correct analysis to be.
10. Given the ideological variation of the Court, one might expect most decisions to produce split opinions. In fact, the opposite is true. Although it varies by term, it is typical for a majority of

decisions to be unanimous. Reasons for this may be that many cases do not center on politically divisive issues, but on technical legal problems, and the fact that the law is generally stable and precedent is often fairly clear.

Although Supreme Court decisions may include multiple opinions, only the majority opinion is considered precedent and must be followed in subsequent cases. Concurring and dissenting opinions may be helpful in understanding the complex issues involved in a case and the arguments for the losing side, but they are not considered precedent. Dissents may also be useful in overturning precedent if it is revisited in a future case.

IV. JUDICIAL DECISION-MAKING

A. HOW COURTS MAKE LAW

1. Appellate decisions, including Supreme Court decisions, are important because they carry the weight of law. Lower courts must follow all appellate court decisions within their jurisdiction in future cases. Because the Supreme Court is the highest court, all court decisions, state and federal, must conform to Supreme Court precedent.
    a. Decisions made by appellate courts are called *precedents*. A precedent is a legal decision that must be applied in future cases involving substantially similar facts and law.
    b. *Stare decisis* (Latin for "let the decision stand") is the legal doctrine requiring courts to follow precedents in subsequent cases.
    c. Lower (inferior) courts must follow the precedent from higher courts.

Be sure you know the difference between common law and statutory law. **Common law,** ***also called case law, refers to a law that is created by judicial decision, called precedent. For example, in the case of*** **Baker v. Carr (1962)** ***the Supreme Court's ruling led to the common law requirement that legislative districts must contain roughly equal populations.*** **Statutory law** ***refers to laws that are passed by legislatures, such as Congress.*** **Statutes** ***are laws enacted by legislatures. For example, the Voting Rights Act of 1965 outlawed literacy tests for voting.***

B. FACTORS IN JUDICIAL DECISION-MAKING

1. The Justices

a. There are no constitutional requirements for qualifications of Supreme Court justices, although all have had legal training.

b. Federal justices hold life tenure and may only be removed by impeachment proceedings.

2. Judicial Appointments

a. Supreme Court justices are appointed by the president and confirmed by the Senate (by majority vote).

b. Supreme Court vacancies give presidents opportunities to install powerful policymakers who will serve life terms. Presidents, therefore, appoint justices who share their political ideologies. Whether an appointee is more moderate or extreme in his or her views is related to the composition of the Senate. If the president's party holds a majority in the Senate, he or she has more latitude in selecting an appointee who is more ideologically pronounced. If the opposing party controls the Senate, appointees are likely to be more moderate in order to be acceptable to the opposition.

3. How Judges Decide Cases

a. The interpretation of federal law and the Constitution is complex. The language of statutes (laws passed by Congress) is often unclear when applied to situations that arise in the

real world. The Constitution is even more vague, frequently by design. It was written in a different era, and the Framers left many aspects of government to be defined by future leaders. Today, much of what we understand the Constitution to mean is the product of judicial decisions, and not the language of the document itself.

b. Justices, with the assistance of their law clerks, analyze the facts and arguments contained in the parties' briefs, their oral arguments, and amicus curiae briefs.

c. Justices rely on precedent.

d. As noted, justices come to the bench with political philosophies that are reflected in their decisions. Justices may be more liberal or conservative, and this is frequently evident in their opinions.

4. **Judicial Activism and Judicial Restraint**

a. Some justices may adhere to the philosophy of judicial restraint. This is the idea that the judicial branch should defer to the judgment of the elected branches of government when possible, and should use the power of judicial review to invalidate laws or executive actions only when absolutely necessary.

b. Alternatively, a justice may practice judicial activism, a philosophy that recognizes that the legislative and executive branches may not always act fairly precisely because they are elected. This philosophy holds that the judiciary should freely use the power of judicial review to protect the rights and liberties of individuals and minorities.

c. To some extent, the terms *judicial activism* and *judicial restraint* may be overly simplistic. The practice of interpreting and applying the Constitution and federal laws is complicated, and decisions will always involve some degree of innovation, or they would not be necessary. Furthermore, a judge's view of an issue may determine whether he or she takes a more restrained or more activist view of a case.

Don't confuse judicial restraint and judicial activism with political conservatism and liberalism. The AP® exam will require you to understand the terms* liberal *and* conservative, *as well as* judicial restraint *and* judicial activism. *Students often mistakenly believe that these terms are correlated, with liberal judges being more "activist," and conservative judges being more "restrained." This is* not *the case. Judges may be politically liberal but practice judicial restraint, believing that judicial review should be sparingly used and that courts should defer to the legislature and the executive. Judges may, likewise, be politically conservative but activist, believing in the broad use of judicial power to advance their political beliefs.

5. **Strict vs. Loose Construction**
   a. A strict constructionist believes that the federal government may only act in ways that the Constitution specifically says it can. This involves taking a close or narrow interpretation of the Constitution and is related to the idea of judicial restraint.
   b. A loose constructionist believes the federal government may take actions not specified in the Constitution as long as they are not directly forbidden. This involves taking a broad interpretation of the Constitution to adapt to a modern world and is related to the idea of judicial activism.
6. **The Court and Public Opinion**
   a. Justices of the Supreme Court are appointed for life and therefore lack the accountability to the public faced by legislators and officials in the executive branch.
   b. The justices meet and make their decisions in secret, not in public like Congress, whose proceedings are open to public observation.
   c. For these reasons, the Court has often been criticized for overreaching—using its power in ways that the Framers did not intend by contradicting the will of the people's elected representatives.
   d. Although the Court is insulated from public opinion in that justices are not elected, public opinion is a factor in how the Court decides high-profile cases. If the Court made decisions that were exceedingly counter-majoritarian, its prestige would be harmed. Its decisions would be viewed as lacking

legitimacy, possibly resulting in executive or congressional action to limit the Court's power. The Court, therefore, tends to limit the scope of important decisions and avoid extreme holdings.

7. **Overturning Precedent**

   a. The Supreme Court may reverse itself, or overturn its own precedent. This is rare, but the Court has overturned precedent when it felt a previous decision was wrongly decided or circumstances have changed to make a previous result unsound under modern conditions. The best example of this is *Brown v. Board of Education of Topeka* (1954). In *Plessy v. Ferguson* (1896), the Court ruled that separate facilities for whites and African Americans were constitutional, but later reversed itself in *Brown*, ruling that segregation violated the Equal Protection Clause of the Fourteenth Amendment.

   b. The Court may overturn precedent. It most often does so under one of two circumstances (or a combination of the two): either the ideological composition of the Court has changed, or the culture of the nation has changed. An example of the latter would be the Supreme Court decision granting same-sex marriage.

V. THE COURT: CHECKS AND BALANCES

A. JUDICIAL REVIEW

1. The Court's primary check over the other two branches is judicial review.
2. The Court also exerts some control over the other branches through the interpretation of statutes and regulations.

B. CHECKS ON THE COURT

1. The executive branch has several important checks over the judicial branch, but the president's most significant check over the courts is the appointment of federal judges (subject to Senate confirmation). He or she may also grant pardons, commutations, and reprieves, and may choose to enforce case law rulings less aggressively.
2. Congress holds several important checks over the courts, including approval of judicial appointments, impeachment of judges, and passage of basic legislation.

3. Judicial implementation is the process by which judicial decisions are put into practice.
   a. The Court relies on the legislature for funding of its directives and on the executive for enforcement.
   b. Although it is generally accepted that the Court's decisions require compliance by the parties involved, several presidents have declined to enforce the Court's decisions.
   c. President Andrew Jackson, for example, refused to enforce the Court's decision in *Worcester v. Georgia* (1832), upholding certain rights of Native American tribes to sovereignty over their own lands. Lincoln also ignored a Supreme Court decision invalidating his suspension of habeas corpus rights.
   d. Overall, however, presidents have tended to use their power to enforce decisions, as when President Dwight Eisenhower used the military in 1957 to implement racial integration of schools in Little Rock, Arkansas.

Checks on the Courts

Congressional Checks on the Court	Executive Checks on the Courts
– approval of judicial appointments by Senate majority vote – refusing or limiting funding for implementation of judicial decisions – rewrite or revise legislation found unconstitutional – pass new laws to limit impact of judicial decisions – change the (appellate) jurisdiction of the Supreme Court (*jurisdiction stripping*) – change number of justices on Supreme Court – create and define jurisdiction of lower federal courts – impeachment (House of Representatives majority vote) and conviction and removal from office (Senate two-thirds vote) of federal judges – introduce constitutional amendments to change or clarify the Constitution concerning Court decisions with a two-thirds vote of each chamber	– nominates Supreme Court justices and appoints all lower federal judges – refusing to enforce or limiting enforcement of judicial decisions – rewrite or revise executive orders found unconstitutional – grants pardons, commutations, and reprieves