

## CHAPTER 16

# The Judiciary

### OVERVIEW

An independent judiciary with the power of judicial review—the power to decide the constitutionality of acts of Congress, the executive branch, and state governments—can be a potent political force. The judicial branch of the United States government has developed its power from the earliest days of the nation, when Marshall and Taney put the Supreme Court at the center of the most important issues of the time.

From 1787 to 1865, the Supreme Court focused on the establishment of national supremacy. From 1865 to 1937, it struggled with defining the scope of the government's power over the economy. In the present era, it has deliberated about personal liberties.

It became easier for citizens and groups to gain access to the federal courts in the mid- to late twentieth century. This is the result of judges' willingness to consider class action suits and *amicus curiae* briefs and to allow fee shifting. The lobbying efforts of interest groups also had a powerful effect. At the same time, the scope of the courts' political influence has increasingly widened as various groups and interests have acquired access to the courts, as the judges have developed a more activist stance, and as Congress has passed more laws containing vague or equivocal language. Still, the Supreme Court controls its own workload and grants certiorari to a very small percentage of appellate cases. As a result, although the Supreme Court is the pinnacle of the federal judiciary, most decisions are made by the twelve circuit courts of appeals and the ninety-four federal district courts.

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### RESEARCH AND DISCUSSION TOPICS

**How adversarial is the courtroom?** Courtroom observations are an excellent way to introduce students to the legal system. Consult with the clerk's office to determine which sessions are open to the general public and be careful to prepare your students. Ask them to observe how the courtroom works, the patterns of interaction and the kinds of expertise demonstrated by the participants, as well as the substance and outcomes of the cases. What are challenges and constraints that characterize the court? What kinds of cooperation make it possible for the cases to be processed? What kinds of comparisons can be drawn across the different courts, from original jurisdiction to appellate?

**Is a trial the best way to resolve a legal dispute?** A number of courts are incorporating various forms of alternative dispute resolution into their procedures. Mediation, for example, is used in a variety of civil courts, including small claims and family court. A wide variety of simulations are available, allowing students to experiment with alternative routes to justice. For an excellent resource on this topic, see Roger Fisher and William Ury's classic work, *Getting to Yes* (New York: Penguin Books).

**Is the judiciary the least dangerous branch?** The Federalists argued that the judiciary would be the least dangerous branch, because it was dependent on the legislative branch for the law and on the executive branch for the implementation of its orders. But has the judiciary become the *most* dangerous branch, given the power of judicial review? And if the judicial branch is the most powerful branch, is that development a problem for the constitutional order? Ask students to think about the ways in which the judiciary has shaped United States politics. Has this been an instance of an aristocracy (the judicial elite) *saving* a democracy?

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### THEME A: THE HISTORY OF THE FEDERAL JUDICIARY

#### Summary

The power of the Supreme Court evolved slowly. The Supreme Court's immediate priority was to establish its institutional legitimacy. This goal was accomplished in a series of developments under the leadership of Chief Justice John Marshall. These included the following:

1. Defeat of the impeachment proceeding, based purely on political charges, against Justice Samuel Chase, which validated the doctrine of judicial independence;
2. Issuance of a single majority opinion that enabled the Court to speak with one authoritative voice in lieu of each justice writing separately; and
3. Assumption of the power of judicial review in *Marbury v. Madison* (1803), making the Supreme Court an equal partner with Congress and the president in the governing process.

Once secure in its position, the Supreme Court turned to the task of adjudication. The history of Supreme Court decision making falls into three eras differentiated by the type of issue that dominated judicial attention.

1. From 1787 to 1865, national supremacy, the legitimacy of the federal government, and slavery were the great issues. In *Martin v. Hunter's Lessee* (1816), the Court asserted its right to impose binding interpretations of federal law upon state courts. Three years later, *McCulloch v. Maryland* (1819) upheld the supremacy of the federal government in a conflict with a state over a matter not clearly assigned to federal authority by the Constitution. Although federal preeminence was written into constitutional theory, it was not until after the Civil War that the theory applied in practice. In fact, the Court played an important role in intensifying regional tensions through its decision in *Dred Scott v. Sandford* (1857), in which federal law (the Missouri Compromise) prohibiting slavery in northern territories was ruled unconstitutional. This decision, moreover, was only the second time that a federal law was declared unconstitutional by the Supreme Court. The Court's reluctance to use judicial review attested to its still uncertain status in the early part of the nineteenth century.
2. From 1865 to 1937, the dominant issue was the relationship between the government and the economy. The Court acted to support property rights and held that the due process clause of the Fourteenth Amendment protected commercial enterprises from some forms of regulation. The justices were merely reflecting the prevailing *laissez-faire* philosophy of the time. The Court, however, was not blind to the injustices of capitalism and upheld state regulations in over 80 percent of such cases between 1887 and 1910. As the justices attempted to balance the public interest against private property rights, their decisions became riddled with inconsistencies in distinguishing reasonable from unreasonable regulation and in separating interstate from intrastate commerce. According to Justice Holmes, the Court had lost sight of its mission by forgetting that "a Constitution is not

intended to embody a particular economic theory.” The necessities of the Great Depression compelled a revision in constitutional theory on economic issues.

3. From 1938 to the present, the Court has switched its focus to the protection of personal liberties. This change was partially prompted by the political pressure generated by Franklin Roosevelt’s unsuccessful effort to pack the Supreme Court with justices favorable to his New Deal programs. As the Court allowed the government a freer hand on economic regulation, it took up the challenges presented by social and political upheaval following World War II, such as free speech and racial integration. Only recently has the number of civil-liberties cases in the Court’s docket begun to shrink, perhaps as a reaction to the conservative majority appointed by Presidents Reagan and Bush.

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### THEME B: THE SUPREME COURT IN ACTION

#### **Summary**

The Supreme Court hears oral arguments beginning at ten in the morning, with each attorney allocated a half-hour. Justices are permitted to interrupt attorneys to ask questions at any time, and the clock is not stopped no matter how long the question. Attorneys are not allowed to read but may use notes. Lights indicate how much time is left—a white one signaling five minutes and a red light notifying attorneys to stop. The proceedings are taped but are not aired on radio or television.

The justices meet in secret conference to discuss and vote on cases. No one is permitted in the room. The associate justice with the least seniority has the responsibility of running errands to obtain books or answering knocks at the door. The conference by tradition commences with a handshake. The chief justice speaks first on cases and is followed by justices in order of seniority; votes are taken in reverse sequence on the assumption that junior members may be intimidated if voting last. If in the majority, the chief justice assigns the writing of the opinion; if in the minority, the associate justice with the most seniority has the duty of assigning the writing of the Court's opinion. The opinion is circulated in draft form to the other justices who may suggest changes, even on the threat of changing their vote. It sometimes happens that what began as a majority opinion may lose enough support to end up as a dissenting opinion. A justice is permitted to change his or her vote until a judgment is announced in open session.

The entire Court is not required to be present to vote on a case. A quorum exists so long as six justices are participating. In a tie vote, the decision of the last court to hear the case prevails but it does not mean that the justices are expressing agreement with the ruling.

The recent trend on the Supreme Court is greater fragmentation in voting. Far fewer decisions are decided unanimously, declining from close to 90 percent in the nineteenth century to 38.7 percent in 1995. Justices are more willing to articulate their own views and are producing a higher rate of both *concurring* and *dissenting* opinions. Concurring opinions are important in establishing whether the Court's decision is creating precedent. "Occasionally," Lawrence Baum explains, "because of disagreement about the rationale, no opinion gains the support of a majority of judges; in this situation, there is a decision but no authoritative interpretation of the legal issues in the case."

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### THEME C: THE POWER OF THE FEDERAL JUDICIARY

#### Summary

Courts play a large role in public policy in the United States. The Supreme Court's chief weapon in the constitutional system of checks and balances is *judicial review*, the power to declare laws of Congress and acts of the executive branch unconstitutional and therefore void. There are two competing views of how judicial review should be exercised. The *strict constructionist approach* holds that judges should confine themselves to applying those rules that are stated in or clearly implied by the language of the Constitution. The *activist approach* argues that judges should discover the general principles underlying the Constitution and amplify those principles on the basis of some moral or economic philosophy. Today judicial activists tend to be liberals, and strict constructionists tend to be conservatives, but seventy years ago just the opposite was the case.

The Founders would be surprised to find the courts so activist. They believed that judges should find and apply existing law, not make new law. Alexander Hamilton wrote in *Federalist* No. 78 that "liberty can have nothing to fear from the judiciary alone," because the courts have neither the power of the purse (which Congress has) nor the use of the military (since the president is commander in chief).

To use the courts to influence public policy, one has to get to court. To do this requires resources and it requires *standing*. The average citizen has no chance of paying the high costs necessary to take a case all the way to the Supreme Court. However, there are numerous ways in which plaintiffs who are of average or even low income can have their interests represented in court. First, indigent persons can file petitions *in forma pauperis* and be heard for nothing. The *Gideon* case was an example. A variety of interest groups (such as the ACLU or the NAACP) will take cases that promote their purposes. State and local governments often raise important issues, and they have their own attorneys. Although the traditional practice in United States courts is that parties to a lawsuit pay their own legal expenses, Congress increasingly has been passing laws that allow individuals to sue government and corporations and, if they win, have their legal fees paid by the defendant. This is called *fee shifting*. Finally, *class action suits* allow a plaintiff to sue someone, not merely on her or his own behalf, but on behalf of all persons in similar circumstances. Some cases of this sort are not filed for economic profit: The NAACP received no money for winning the *Brown* case. However, when money damages can be won on behalf of a large group of people, lawyers can reap huge rewards, so lawyers willing to take on such cases are readily found. The Supreme Court has restricted class action suits since 1974 by requiring that all parties to a case be notified, a condition that substantially increases the cost of filing.

The concept of *standing* is not a constitutional requirement. It was created by judicial interpretation of a provision in Article III that restricts federal courts to "cases and controversies." The problem is defining what constitutes a "case" or a "controversy." According to Chief Justice Warren, "those words limit the business of the federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial

process.” *Standing* is the term used to embody these principles. As currently construed by the Supreme Court, it means a court will decline to hear a case unless the complaining party (plaintiff) proves that a genuine conflict exists between the parties and that she or he has suffered a personal injury to a legally protected right. In other words, federal courts will not hear hypothetical issues. A conflict must be genuine. Moreover, the injury must be personal, not remote. However, since standing is largely a product of judicial invention, it is sometimes ignored when a situation warrants settlement by a court. For example, every abortion case would technically be moot because the pregnancy would long be over by the time an appeal reached the Supreme Court. The doctrine of standing has been relaxed in these appeals on the ground that the issue was “capable of repetition yet evading review.”

Another traditional barrier to the citizen’s right to sue is the doctrine of *sovereign immunity*, which refuses standing to citizens seeking to bring suit against the government for damages. (The Eleventh Amendment prevents a state from being sued in federal court without its consent.) “The doctrine of government immunity,” Harold Grilliot has written, “...originated from the English notion that ‘the king can do no wrong.’” This restriction has been eased in two ways. First, Congress has waived federal immunity from certain lawsuits, including most claims involving torts (since 1946) and contract violations (since 1855). Second, federal officials are not protected by sovereign immunity for conduct that exceeds their lawful authority.

Once a case is taken by a federal court, the outcome can exert profound influence over public policy. Federal judges have at least four avenues for making policy decisions. First, a congressional statute or presidential action can be ruled unconstitutional. Second, national policy can be changed when the Supreme Court decides to overturn precedent. The doctrine of *stare decisis*, or the practice of following precedent, is not inflexible and can be repudiated whenever justice demands a break with prior decisions. As Justice Frankfurter eloquently put it, “Wisdom too often never comes, and so one ought not to reject it merely because it comes late.” Third, the Supreme Court has become less likely to declare issues (such as apportionment and contraception) to be *political questions*, leaving them to other branches to decide. The result has been to place the federal judiciary in the midst of numerous controversial disputes. And fourth, judges retain a great deal of power in fashioning *remedies*, sometimes to the point of assuming administrative or legislative roles. For example, federal Judge Frank Johnson, in correcting conditions at an Alabama mental health institution, required that toilets must be “free of odor” and that each patient must have a “comfortable bed.”

Those who favor judicial activism point to outcomes of which they approve and say that courts provide representation to the poor and powerless. Opponents say that courts have no special expertise in managing complex institutions and have difficulty balancing competing interests in complex cases. Further, if judges make (rather than merely interpret) law, they become unelected legislators, contrary to the intent of the Constitution.

The reasons for judicial activism are many. It is not the case that the courts are powerful because we have so many lawyers. America had more lawyers per capita in 1900, when the courts played a more limited role. Due to *class action* and *Section 1983 suits*, it has become easier for persons to get into court. Increasingly, Congress has passed vague laws that require bureaucratic interpretation. Laws outlaw discrimination or require that agencies operate in the public interest without defining either. Parties adversely affected by decisions under vague laws challenge them in court. If courts once existed solely to settle disputes, today they also exist, in the eyes of their members, to solve problems. Finally, courts have become more powerful as government in general has become more powerful.

There are checks on judicial power. A judge has no police force or army, and people can disobey if the act is not highly visible and if they are willing to risk being charged with contempt of court.

The Senate must confirm judicial nominees and the confirmation process is becoming increasingly contentious. Congress also has the power to impeach federal judges. Congress can change the number of judges either on the Supreme Court or in the lower federal judiciary. Congress and the states can amend the Constitution. Congress can alter the jurisdiction of the federal courts and prevent them from hearing certain kinds of cases. All of these checks have their limits. Amending the Constitution is difficult. Attempts to change the size of the Court, like the Roosevelt court-packing plan, are likely to run into opposition from a public that still accords considerable prestige to the Court. The Supreme Court might rule that attempts to limit the jurisdiction of the courts are unconstitutional. Presidential attempts to tilt the Supreme Court in a particular ideological direction have largely failed.