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 20th 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.

CHAPTER OUTLINE

I. Introduction

- Alexander Hamilton saw the courts as being "the least dangerous" branch of **government because it could not "command the sword" as the president, nor** "command the purse strings" like Congress.
- By the middle of the 19th century, the Supreme Court had begun to declare many federal and scores of state laws to be unconstitutional.
- Necessary and proper clause, elastic clause, abortion laws and so on.
- Courts have become not the least dangerous, but the most powerful.

II. Judicial Review

- Only in the United States do judges play so large a role in policy making
  - Judicial review: the right of the federal courts to rule on the constitutionality of laws and executive actions
    - Chief judicial weapon in the checks and balances system
    - Since 1789, the Supreme Court has declared over 160 federal laws unconstitutional
  - Few other countries have such a power
    - In Britain, Parliament is supreme.
    - Judicial review is effective in only a few other countries with stable federal systems that have history of judicial independence (for example, Australia, Canada, Germany, India).
- Debate is over how the Constitution should be interpreted.

- Judicial restraint approach (strict-constructionist): judges are bound by wording of Constitution
- Activist approach: judges should look to underlying principles of Constitution
  - Not a matter of liberal versus conservative
    - A judge can be both conservative and activist, or liberal and strict constructionist.
    - Today, most activists tend to be liberal; most strict constructionists tend to be conservative.

III. The Development of the Federal Courts (THEME A: THE HISTORY OF THE FEDERAL JUDICIARY)

- Founders' view
  - Most Founders probably expected judicial review but did not expect federal court to play such a large role in policy making.
  - Traditional view: judges find and apply existing law
  - Activist judges would later respond that judges also make law.
  - Traditional view made it easy for Founders to predict courts would be neutral and passive in public affairs.
  - Hamilton: Courts are the least dangerous branch; their authority only limits the legislature.
  - But federal judiciary evolved toward judicial activism, shaped by political, economic, ideological forces of three historical eras.

A. NATIONAL SUPREMACY AND SLAVERY: 1789 to 1861

- *Marbury v. Madison* (1803) and *McCulloch v. Maryland* (1819)
  - Supreme Court could declare a congressional act unconstitutional.
  - Power granted to federal government should be construed broadly
  - Federal law is supreme over state law.
- Other cases: interstate commerce clause is placed under the authority of federal law; state law conflicting with federal law was declared void
- *Dred Scott v. Sandford* (1857): blacks were not, and could not become, free citizens of the United States; federal law (Missouri Compromise) prohibiting slavery in northern territories was unconstitutional.

B. GOVERNMENT AND THE ECONOMY: 1865 TO 1936

- Dominant issues of the period
  - Under what circumstances could the state governments regulate the economy?
  - When could the federal government do so?
- Private property held to be protected by the Fourteenth Amendment
- Judicial activism was born as the Supreme Court began to assess the constitutionality of governmental regulation of business or labor.
- Supreme Court was supportive of private property, but could not develop a principle distinguishing between reasonable and unreasonable regulation of business.
- The Court interpreted the Fourteenth and Fifteenth Amendments narrowly as applied to blacks; it upheld segregation and permitted blacks to be excluded from voting in many states.

C. GOVERNMENT AND POLITICAL LIBERTY: 1936 TO THE PRESENT

- Court establishes tradition of deferring to the legislature in economic regulation cases.
- Court shifts attention to personal liberties and is active in defining rights.
- Failed court-packing plan (FDR); "the switch in time that saved nine"
- Warren Court provided a liberal protection of rights and liberties against government trespass.

D. THE REVIVAL OF STATE SOVEREIGNTY

- Beginning in 1992, the Supreme Court began to rule that the states have the right to resist some federal action.
- Reassertion of limits to federal supremacy in cases involving gun control, Indian tribe lawsuits.
- President Obama's health plan challenged on the grounds that the requirement that all citizens purchase health insurance is an excessive use of the commerce clause and therefore unconstitutional.

IV. The Structure of the Federal Courts

- Two kinds of federal courts were created by Congress to handle cases that the Supreme Court does not need to decide.
  - Constitutional courts exercise judicial powers found in Article III
    - Judges serve during good behavior
    - Salaries not reduced while in office
    - Examples: district courts (94), courts of appeals (12)
  - Legislative courts
    - Created by Congress for specialized purposes
    - Judges have fixed terms
    - Judges can be removed
    - No salary protection
    - Example: Court of Military Appeals

A. SELECTING JUDGES

- Judicial behavior
  - Party background has a strong effect on judicial behavior.
  - Other factors also shape court decisions: facts of the case, prior rulings, and legal arguments.

1. SENATORIAL COURTESY

- Appointees for federal courts are reviewed by senators from that state, if the senators are of the president's party (particularly for U.S. district courts).
- Gives heavy weight to preferences of senators from state in which judge will serve

2. THE "LITMUS TEST"

- Litmus test: a test of ideological purity
- Presidents seek judicial appointees who share their political ideologies.
- Has caused different circuits to come to different rulings about similar cases.
- Raises concerns that ideological tests are too dominant; has led to sharp drop in the percentage of nominees to federal appeals courts who are confirmed
- A judicial nominee's view on abortion is the chief reason for use of a litmus test.
- The threat of a filibuster aimed at blocking Senate confirmation has led to a situation where the nominee must have the support of at least sixty senators to guarantee that a cloture vote would stop a threatened filibuster. This has led to a great deal of legislative maneuvering with controversial nominees.
- In recent years nominees almost always have been judges in lower courts.

V. The Jurisdiction of the Federal Courts

- Dual court system
  - State court systems, federal court system
  - Federal cases listed in Article III and Eleventh Amendment of Constitution
    - Federal question cases: involving U.S. Constitution, federal law, treaties
    - Diversity cases: involving different states, or citizens of different states
  - Some cases can be tried in either federal or state court
    - Example: if both federal and state laws have been broken (dual sovereignty; the Rodney King case)
    - Jurisdiction: each government has right to enact laws and neither can block prosecution out of sympathy for the accused.
  - Some cases that begin in state courts can be appealed to Supreme Court.
  - Controversies between two state governments can be heard only by Supreme Court.
- Route to the Supreme Court
  - Most federal cases begin in district courts
    - Most are straightforward and do not lead to new public policy
    - Volume is huge: About 650 district court judges received over 300,000 cases.
  - Supreme Court picks the cases it wants to hear on appeal.
    - Requires agreement of four justices (or a writ of *certiorari*) to hear case
    - Supreme Court generally only agrees to review certain types of cases, involving:
      - A significant federal or constitutional question
      - Conflicting decisions by circuit courts
      - Constitutional interpretation by one of the highest state courts, about state or federal law
    - Court may consider seven thousand petitions each year, but only about one hundred are granted.
    - Limited number of cases heard results in diversity of constitutional interpretation among appeals courts.

- Increased workload has led to greater influence of law clerks.
  - Help to decide which cases should be heard under a writ of *certiorari*
  - May draft initial opinions for the justices

VI. Getting to Court

- Deterrents to the courts acting as democratic institutions
  - Supreme Court rejects all but a few of the applications for *certiorari*.
  - Costs of appeal are high.
    - Financial costs, including filing, record, and attorney fees, are high, but may be lowered for some.
      - *In forma pauperis:* plaintiff indigent, with costs paid by government
      - Indigent defendant in a criminal trial: legal counsel provided by government at no charge
      - Payment by interest groups (for example, American Civil Liberties Union)
    - Cost in terms of time is also high and cannot be mitigated.

A. FEE SHIFTING

- Usually each party must pay its own legal expenses.
- The losing defendant pays the plaintiff's expenses (fee shifting) in certain cases.

B. STANDING

- Guidelines regarding who is entitled to bring a case
  - There must be a real controversy between adversaries.
  - Personal harm must be demonstrated.
  - Being a taxpayer does not ordinarily constitute entitlement to challenge federal government action; this requirement is relaxed when the First Amendment is involved.
- Sovereign immunity
  - Government must consent to being sued.
  - By statute, government has given its consent to be sued in cases involving contract disputes and negligence.

C. CLASS-ACTION SUITS

- Brought on behalf of all similarly situated persons
- Number of class-action suits increased, because there were financial incentives to bringing suit and because Congress was not meeting new concerns.
- In 1974, Supreme Court tightened rules on these suits for federal courts, though many state courts remain accessible.
- Big class-action suits affect how courts make public policy (such as asbestos, silicone breast implants).

VII. The Supreme Court in Action (THEME B: THE SUPREME COURT IN ACTION)

- Most cases arrive at the Court through a writ of *certiorari*.
- Lawyers then submit briefs: documents that set forth the facts of the case, summarize the lower court decision, give the argument of that side of the case, and discuss other issues.
- Oral arguments by lawyers after briefs submitted
  - Each side has one half-hour.
  - Justices can interrupt with questions.
- Since federal government is a party to almost half the cases, the solicitor general frequently appears before the courts.
  - Solicitor general: federal government's top trial lawyer
  - Decides what cases the government will appeal from lower courts
  - Approves every case presented to the Supreme Court
- A. Justices may also consider other opinions.
  - *Amicus curiae* briefs submitted if both parties agree or Supreme Court grants permission.
  - Other influences on the justices include legal periodicals.
- Conference procedures
  - Role of chief justice: speaking first, voting last
  - Senior judge on winning side selects opinion writer
  - Four kinds of court opinions
    - *Per curiam*: brief and unsigned
    - Opinion of the court: *majority opinion*
    - *Concurring opinion*: agree with the ruling of the majority opinion, but modify the supportive reasoning
    - *Dissenting opinion:* minority opinion
    - About two-fifths of decisions are unanimous. In this case the law is clear and no difficult questions of interpretation exist.
    - The other three-fifths appear to be two main blocs and one swing vote on today's court:
      - *Conservative bloc:* Alito, Roberts, Scalia, and Thomas
      - *Liberal bloc:* Breyer, Ginsburg, Stevens, and probably Sotomayor
      - *Swing vote:* Kennedy

VIII. The Power of the Federal Courts (THEME C: THE POWER OF THE FEDERAL JUDICIARY)

A. THE POWER TO MAKE POLICY

- The courts make policy:
  - by interpretation of the Constitution or law;
  - by extending the reach of existing law; and
  - by designing remedies that involve judges acting in administrative or legal ways
- Measures of power
  - Number of laws declared unconstitutional (over 160)
  - Number of prior cases overturned; not following *stare decisis* (over 260 cases since 1810)
  - Extent to which judges will handle cases once left to the legislature (political questions)

- Most significant indicator is kinds of remedies imposed; judges often impose remedies that affect large populations
- Basis for sweeping orders can come either from the Constitution or from court interpretation of federal laws.

B. VIEWS OF JUDICIAL ACTIVISM

- Supporters
  - Courts should correct injustices when other branches or state governments refuse to do so.
  - Courts are the last resort for those without the power or influence to gain new laws.
- Critics
  - Judges lack expertise in designing and managing complex institutions.
  - Initiatives require balancing policy priorities and allocating public revenues.
  - Courts are not accountable, because judges are not elected.
- Possible reasons for activism
  - Adversary culture, emphasizing individual rights and suspicion of government power.
  - Easier to get standing in courts

C. LEGISLATION AND THE COURTS

- Laws and the Constitution are filled with vague language, which increase courts' opportunities to design remedies.
- Federal government is increasingly on the defensive in court cases; laws induce court challenges.
- Attitudes of federal judges affect their decisions when the law gives them latitude.

IX. Checks on Judicial Power

- Basic restraints on judicial power
  - Judges have no enforcement mechanisms (police force or army); thus, their decisions can be resisted or ignored (for instance, Bible reading in schools, segregation in schools).
  - Resistance depends on visibility of disobedience.

A. CONGRESS AND THE COURTS

- Confirmation and impeachment proceedings gradually alter composition of courts, though impeachment is an extraordinary and unusual event.
- Changing the number of judges gives president more or fewer appointment opportunities.
- Supreme Court decisions can be undone by:
  - Revising legislation
  - Amending the Constitution
  - Altering jurisdiction of the Court
  - Restricting Court remedies

B. PUBLIC OPINION AND THE COURTS

- Defying public opinion—especially the opinion of the elites—may destroy the legitimacy of the institution.
- Opinion in realigning eras may energize Court.
- Public confidence in the Supreme Court since 1966 has varied with popular support for the government, generally.
- No overt attempts to curb judicial activism
    - Activism has increased because government does more, and courts must interpret the laws.
    - Activist ethos of judges is now more widely accepted.