

**Chapter 6. The Judicial Branch: The Highly Political Non-political Courts**  
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**OUTLINE**

- I. Introduction
- II. The Constitutional Foundation for the Federal Court System—Not Much
  - A. Judicial Independence
  - B. Jurisdiction of the Federal Courts
  - C. Treason
  - D. Size of the Supreme Court—One of Many Things Left Out
- III. Growth of the Federal Court System—Structure and Relationship to State Courts
- IV. Powers—Judicial Review
- V. Caseload in Federal and State Courts and the Judicial Calendar
- VI. Selection of Justices and Judges—More Politics
- VII. How the Supreme Court Decides Cases
  - A. Apply the Constitution—If Only That Easy!
  - B. Precedent—“Stare Decisis”
  - C. Political Predisposition—Judicial Baggage
  - D. Process—Room for Influence and Persuasion
    - 1. Written Briefs
    - 2. Oral Argument
    - 3. Judicial Conference
    - 4. Opinion Writing
    - 5. Announcement and Enforcement

## VIII. Conclusion—A Nation of Laws AND People

### TEXT

#### I. Introduction

You probably know less about the courts than either of the other two branches in our national government. Almost certainly no more than a few students in each class can name the Chief Justice of the Supreme Court or more than a couple of the justices. Many of you think that the Supreme Court has twelve justices rather than the correct number of nine. You may know the names of a couple of famous Court cases, like *Brown v. Board of Education* (1954) and *Roe v. Wade* (1973), but few can name more than three or four cases, let alone what precedents they established, if you even know what the term “precedent” means. And after that, knowledge pretty much drops to zero, with the exception of a few procedural matters in criminal cases you learned from television crime shows.

If you are like most Americans, you have highly ambivalent feelings (contradictory and mixed) about the courts and our justice system. On the one hand, you like the ideal of justice being blind and everyone being equal before the law. You want the courts to make sure the rest of the government follows the law. On the other hand, you feel that justice is not really equal, that those with money and power get away with all kinds of things you cannot get away with. And many of you may feel that the courts get too involved in political matters that are the business of the rest of government.

Behind these contradictory feelings is an assumption that legal can be separated from political. We want the courts to stick to the legal and leave the political to other branches. We see legal as being based on clear objective standards that rest on some nearly universal notion of justice. We see political as based on subjective standards that are determined by the power that different people have.

In fact, politics determines what is legal. You already know that the basic structure of the Constitution was based on the politics of necessity and compromise. It was the product of “the art of the possible.” It into account the powers of the most important groups in the nation, for example the slave-holding southern states. You know that highly political legislative bodies pass statutory laws. So we really cannot separate politics from the legal system.

As we shall see, politics exists throughout the courts and the legal system, all the way from selecting judges to how judges make decisions and to how

decisions get carried out. The idea of nonpolitical courts is a useful one, however. To the extent that citizens feel the courts are objective and nonpolitical, citizens are more likely to accept and follow these decisions. The idea of nonpolitical courts increases the legitimacy of the courts and respect for the law.

Am I saying that politics is all there is to the law? Are we fools in thinking that the courts act objectively in following laws? Not quite, but we will wait in trying to answer these questions until we learn more about the branch of government about which you know the least.

## II. The Constitutional Foundation for the Federal Court System—Not Much

Article III in the Constitution is devoted to the judicial power of the national government, and it tells us very little. Compared to Articles I and II, Article III is extremely short. Article I, which covers the legislative branch, runs ten sections and is about six times longer than Article III. Article II, on the executive branch, has four sections, and is more than twice as long as Article III. Clearly the founders gave less thought to the judicial system than to the other two branches.

The first section in Article III begins in a parallel way to Articles I and II, stating that “The judicial power of the United States, shall be vested in one supreme Court....” Beyond a Supreme Court, no other courts are defined in the Constitution. The power to create the rest of the court system is left to Congress: “such inferior Courts as the Congress may from time to time ordain and establish.”

### A. Judicial Independence

Judges are given independence from the other branches in Section 1 of Article III. They do not have set terms of office. Judges serve as long as they wish. The only limit is that they have “good Behavior.” What that means is not to be found in Article III. We have to go back to Article II, Section 4 to see what this might mean.

*The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.*

“Civil officers” include judges. And down through history Congress has impeached and removed a number of judges, usually for accepting bribes. That “bribery” is not “good behavior” is fairly clear. But beyond treason and bribery, what is meant by “**high crimes and misdemeanors**?” During the Clinton impeachment and trial in 1998, this was a critical question. If the “high crimes” phrase includes lying while under oath, as Clinton did, then it was grounds for removal. But if it means political crimes that endanger the functioning of our

system of government, then lying in a civil action about extra-marital sex falls far short of an impeachable offense. Strong historical arguments were made by both sides. But politics prevailed. Those opposed to Clinton did have enough votes for impeachment in the House, but not enough votes for conviction in the Senate. Clinton remained in office.

In practice, how does this apply to judges? As long as judges are not convicted of crimes and as long as they can convince at least 34 senators that their actions fall short of “high crimes and misdemeanors,” judges can serve for life.

In addition to lifelong terms, another feature in Section 1 of Article III helps insulate judges from political pressure. The other two branches cannot reduce or delay judges’ compensation as long as they are in office. So the power over the purse that Congress has over the Executive does not apply to judicial salaries. However, administrative budgets can be cut so as to reduce the capacity of the federal courts.

## B. Jurisdiction of the Federal Courts

Section 2 goes into some detail on the jurisdiction of the federal courts in general and the Supreme Court in particular. **Jurisdiction** means the kinds of cases the courts have the power to hear. Section 2 breaks down the Supreme Court’s jurisdiction into two kinds, original and appellate. **Original jurisdiction** means that cases are first tried in a certain court. **Appellate jurisdiction** means that a court can hear certain kinds of cases on appeal from lower courts where the case started.

The first phrase of Section 2 is quite important, because it gives the federal courts jurisdiction in cases that apply the Constitution. Of course, to do this the courts must interpret what the Constitution means. We will get back to that later.

*The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution...*

Then Section 2 goes on to list a wide range of other kinds of cases the federal courts can hear. The list includes cases between a state and a citizen of another state. However, the federal courts no longer hear these cases because of the Eleventh Amendment, which alters Section 2 by not allowing the federal courts to hear cases in which states are sued by citizens of other states or foreign citizens. In practice states sometimes voluntarily do allow such cases to be heard in state courts. What we are left with for federal courts are cases involving laws passed by Congress or treaties, cases involving ambassadors and foreign officials here in the U.S., cases from U.S. ships on the oceans, cases in which the national government is a party, cases between states, cases involving

citizens of two different states, and cases between U.S. citizens and foreign governments or citizens. That is still a pretty long list.

Section 2 also defines the original jurisdiction of the Supreme Court. The Supreme Court is the first court to hear cases involving ambassadors and other foreign officials, along with cases between states. Having the Supreme Court hold trials in these kinds of cases may have been possible in 1789. But given the large number of important cases appealed to the Supreme Court today, having the Supreme Court holding routine trials is practically impossible. In all of Supreme Court history, they have only heard about 135 cases under original jurisdiction. A contested parking ticket on the car of a foreign embassy is not going to be heard by the Supreme Court. Nor does the Court have time to hear cases involving criminal actions by embassy staff. In cases involving foreign officials, what usually happens is the official is expelled from the U.S. Parking tickets usually go unpaid. And when states have disputes (which often involve water rights or borders that shift as rivers change course), the Court usually calls in a third party to work out some agreement that the Court then ratifies.

Section 3 gives the Supreme Court appellate jurisdiction in the other kinds of cases. However, the Congress is allowed to create exceptions to the Supreme Court's appellate jurisdiction. Potentially this could give Congress a great deal of power to make certain kinds of cases out of bounds for the Supreme Court. But Congress has acted with restraint here. For example, Congress has set minimum amounts of money for suits between citizens of different states to keep the federal courts from being overwhelmed with trivial cases. More important, since 1925 Congress has allowed the Supreme Court itself to decide which cases it will hear on appeal. As a practical matter, the Supreme Court would be overwhelmed with cases if it had to listen to every appeal.

The final paragraph in Section 2 requires trial by jury in most cases and lays out some rules for where federal trials will take place. Normally the trial will take place in the state where the violation of federal law took place. But if the violations cover more than one state, then Congress is allowed to pass regulations that determine the place of trial.

### C. Treason

The final section in Article III concerns the crime of treason. It is rarely important today, though often quoted. It first defines treason, using the familiar phrase "giving them Aid and Comfort," referring to enemies who are waging war against the United States. The founders set high standards for conviction, requiring two witnesses, and limits on punishment, not allowing it to be extended to relatives, because of the founders' bad experiences with the British monarchy.

### D. Size of the Supreme Court—One of Many Things Left Out

You may have noticed that the Constitution is silent on how many justices are on the Supreme Court. This important matter is left entirely to Congress. As is the case with so many other things regarding our justice system, the **size of the Supreme Court** has been a political matter. Congress specified six justices in 1789, and allowed the number to grow up to ten by the end of the Civil War.

But then politics intervened. Congress, led by a wing of the Republican Party that wanted a harsh reconstruction policy imposed on the Southern states, was having many conflicts with President Andrew Johnson. The president favored a lenient policy in dealing with the Southern states that had tried to secede. To make sure Johnson did not get nominations to the Supreme Court, Congress passed a law specifying that the next three to retire would not be replaced. This would have let the number to fall to seven. It did fall to eight, but then before a third retired, Johnson left office and Congress raised the number to nine.

President Franklin Roosevelt tried to increase the number in the early 1930s after the Court had been ruling significant parts of his New Deal Legislation to be unconstitutional. His famous “**court packing plan**” would have allowed the President to nominate extra justices for every justice who was over 70 years of age, up to a maximum of fifteen justices. The official justification was that these old justices needed help. But the real reason was to give FDR enough nominations to the Court to give him a majority of justices who would support him. The Senate refused to go along with this plan. Even FDR’s powers were limited! Some justices left the Court so that FDR got some nominations, some justices switched their votes on later cases, and the Court began to rule in his favor. Sometimes historians describe this episode as “a switch in time saves nine,” referring to justices rather than stitches and sewing! The number has remained at nine ever since.

### III. Growth of the Federal Court System—Structure and Relationship to State Courts

With such little structure defined in the Constitution, a first order of business for the new Congress in 1789 was to create a court system below a Supreme Court. They did this in the famous **Judiciary Act of 1789**, which created U.S. District Courts in each of the states. Since then the system has become more complex, adding Courts of Appeals in the late 1800s. However, the basic structure created then remains today.

You can easily find diagrams of the federal court system on the Internet. Depending on level of detail, the structure is fairly simple. We’ll just go over the basics. At the bottom of the structure are the U.S. **District Courts**, where most federal trials take place. Today a little under a hundred of these courts exist. The geographical lines for district courts do not cross state lines. Keeping each

district court within a single state turns out to be politically important in nominations for district court judges, as we shall see.

The next level above district courts are the U.S. **Courts of Appeals**, sometimes called circuit courts, which hear appeals from the district courts. As of the writing of this book, Congress has created thirteen Courts of Appeals. Eleven of them cover the states. The other two Courts of Appeals deal with special matters. Geographical lines coincide with state lines so that no state is split into two districts. The large area covered by each court can create some inconvenience. For example, if you live in the southern part of South Carolina, you are in the fourth circuit. The location for the fourth circuit court is in Richmond, Virginia. You are much closer to the Eleventh Circuit Court, which includes Georgia and is located in Atlanta, only a short distance from South Carolina.

The next and last level is the Supreme Court. The Supreme Court hears appeals working their way from the district courts through the Courts of Appeals. The Supreme Court also can hear cases that involve U.S. Constitutional questions directly from state supreme courts.

For example, suppose that a person is convicted of a crime in a lower state court and that the evidence upon which that conviction was based came from a questionable search of that person's home. That is, the police may not have performed a legal search. Further suppose that the convicted person appeals to the state supreme court on the basis of the constitutionality of the search under the fourth amendment's prohibition of "unreasonable searches." Suppose the state supreme court rules that the search was unreasonable on some new grounds that have never before been recognized by the U.S. Supreme Court. The prosecution would very likely appeal to the U.S. Supreme Court, and the Court would likely decide to hear the case because it involves a new definition of "unreasonable." If the U.S. Supreme Court declines to hear the case, then the lower court ruling, in this hypothetical case the state supreme court's ruling, would stand and the conviction would be thrown out. That is a lot of "supposing," but you get the idea. One can **appeal state court rulings to the U.S. Supreme Court** only if the appeal involves some question pertaining to the U.S. Constitution.

When the Supreme Court agrees to hear a case coming from state courts, it issues something called a **writ of certiorari**, which calls for all the arguments and papers pertaining to that case to be sent up to the Supreme Court. One of the most famous instances where this was done started with a handwritten appeal from Clarence Earl Gideon, who had been convicted of theft in Florida without being provided a lawyer. The Supreme Court accepted Gideon's appeal and issued the writ. Ultimately, the Supreme Court ruled in Gideon's favor, applying the sixth amendment's requirement of "Assistance of Counsel" to state courts. Since then, all states have had to provide lawyers to defendants. We will

have more to say about this and similar cases in the chapter on civil rights and liberties.

Down through history Congress has created a variety of special courts under its general powers in Article I. Because these “Article I Courts” are not under Article III, their judges do not serve for life or have the same protections as other federal judges and justices. These include courts that deal with claims of damages against the government that usually involve government contracts, the U.S. Court of Federal Claims. The Courts of Military Justice dealing with trials of those in the military are another kind of special courts. Other examples include tax courts, courts that hear appeals involving veteran’s benefits, and a variety of special administrative courts dealing with the application of federal regulations. All of these courts have appeals that can go to the U.S. Supreme Court.

#### IV. Powers—Judicial Review

We already noted that the powers of the Court include “cases...arising under this Constitution.” What this means was not precisely clear. But the Supreme Court clarified what this meant in perhaps the most important case in Court history, *Marbury v. Madison* (1803). In this decision the Court claimed that it had the power to interpret the Constitution and declare a law to be unconstitutional—the power of **judicial review**. (While in an earlier case the Court had ruled a case to be constitutional—a ruling that really changed nothing since it upheld the law—*Marbury* was the first one in which it ruled a law to be unconstitutional.) The case involved partisan politics, human mistakes, questionable judicial conduct, and a good dose of political genius.

In the bitter presidential election of 1800, Thomas Jefferson won his rematch with Federalist President John Adams. Not only did the Jeffersonian Republicans (as they were called at the time, though they later evolved into the Democrats, another story for another chapter), win the White House, they also captured control of Congress. But at that point in history, the new Congress did not meet until March. So the old Federalist dominated Congress had a couple of months to salvage what they could.

The Federalists tried to retain some political power by taking control of the judicial branch. They passed laws creating new courts and staffed those courts with Federalists, nominated by Federalist President Adams and confirmed by the Federalist majority in the Senate. To complete the process, all the official documents confirming the appointments had to be delivered to the new judges. But time was running out.

Here is where **John Marshall**, the most famous Chief Justice in American history, enters the story. Early in 1801 the Chief Justice of the Supreme Court resigned and John Adams nominated his Secretary of State, John Marshall, to fill

the vacancy. Marshall was confirmed by the Federalist-dominated Senate and assumed the job of Chief Justice in February. But he also continued to serve as Adam's Secretary of State. Ok, I can hear your objection to this. You are right—it does seem to violate the basic notion of separation of powers. But Adams and Marshall got away with it. One of Marshall's jobs as Secretary of State was to deliver those official papers appointing the new judges. In trying to perform both jobs, he did not get all the papers delivered.

One of the people who thought they had a judgeship awaiting them was William Marbury. We can only imagine his frustration when the paper confirming his new job did not arrive. Time passes. Thomas Jefferson came into office. The undelivered appointment papers were found on Marshall's old desk. Naturally, President Jefferson told his new Secretary of State, his good friend James Madison, not to deliver the papers. Why should they help the Federalists complete their political plot to capture control of the judiciary?

When Mr. Marbury heard of this, he did what every good American would do today—he “sued the bas\_\_\_!” He went directly to the U.S. Supreme Court, following the rules set out in the Judiciary Act of 1789f. This law gave the Supreme Court original jurisdiction in cases where someone wanted a “**writ of mandamus**,” which is an order to make an official take some action. In this case Marbury was asking the Supreme Court to order Madison to deliver his appointment papers. As you will see, those rules about writs became important in deciding the case.

Marbury might have thought winning this case would be easy, because Marshall, a strong Federalist, was chief justice. Certainly Marshall would have been most happy to give fellow Federalist Marbury the judgeship.

If you are following this story even a little bit carefully, you might at this point raise another objection. How could Marshall, who played a role in the case for failing to deliver the papers, sit as a judge on the case? Did he not have direct involvement and a direct interest? Should he not have excused himself from the case because he had a conflict of interest? I would agree with you on all these observations. But again, Marshall ignored these ethical questions and did rule on the case. He got away with the conflict of interest, something that I think would be impossible today. Perhaps, despite popular impressions, standards of legal conduct have improved over the centuries. That aside, back to the case.

Though Marshall's political self-interest in the case was clear, how to actually get what he wanted was not so clear. You see—and this is a critical point about the power of the Supreme Court and any other court for that matter—courts are limited in power because they cannot enforce their own decisions. They have no police or army to force other officials to do things. They have no bureaucracy to carry out rulings. They are almost entirely dependent on the other

branches and on lower levels of government all the way down to state and local governments to have decisions carried out. All they can do is make decisions.

Marshall seemed to have two obvious alternative courses of action, and neither was very good. He (and the rest of the Supreme Court, over which he had a great deal of influence) could issue the writ to try and make Madison deliver the commission to Marbury. If the Supreme Court tried this, Marshall knew that Madison and his boss, President Jefferson, would refuse. And the Court had no way to force them to follow the ruling. Certainly any threat from Congress to impeach and remove the President would be impossible because Jefferson's party controlled Congress. So Marshall and the Court would look foolish and weak. Alternatively, Marshall could rule in favor of what Jefferson wanted. But that would only be an admission of weakness.

With two bad alternatives, to look weak or admit he was weak, what could Marshall do? He found a third alternative, one that was a stroke of political genius. Knowing that he could never get Marbury the judicial commission, he instead focused on the law that gave the Supreme Court original jurisdiction to issue these writs, the Judiciary Act of 1789.

Marshall and the Court ruled that the part of this law giving the Court original jurisdiction for people wanting writs changed the jurisdiction of the Supreme Court as laid out in the Constitution in Article III Section 1. In effect, Congress was trying to amend the Constitution by simply passing a law. Constitutional amendment requires a much more difficult process than just passing a law. So Marshall and the Court declared that this part of the Judiciary Act of 1789 was unconstitutional. Even though the Court might like to issue the writ, and even though Marbury deserved his commission, the Court could not help him because the law that gave it jurisdiction over such cases was invalid.

In making this ruling, the Court claimed the power of judicial review, the power to rule on the constitutionality of laws passed by Congress. The Court had never declared a law unconstitutional before. The Constitution is not completely clear on who has the power of judicial review. The term is not even in the Constitution. Getting this power was far more important than any judgeship. And Marshall made the claim in such a way that President Jefferson could not really challenge the ruling. What could Jefferson do, deliver the commission to show that Marshall was wrong? That was not going to happen. So this claim of power stood unchallenged.

Over history judicial review has given the judicial branch enough power to put it in the same league as the other two branches. If you consider other really important cases down through American history, like *Brown v. Board of Education* (1954) that ruled segregation laws unconstitutional, they involve the Court using its power of judicial review.

## V. Caseload in Federal and State Courts and the Judicial Calendar

Although somewhere in the range of seven thousand cases are appealed to the Supreme Court each year, the Court hears only a relative few, usually a little under a hundred cases or so. That means an appeal has less than one chance in seventy of getting the Court to hear it. Not very good odds! The odds improve if the case involves some important Constitutional question, like how far freedom of the press extends or the right to privacy. The odds improve dramatically if lower courts have overturned an existing Supreme Court ruling or if lower courts have two different opposing rulings that need to be resolved. Cases coming from an appeal request by the **Solicitor General**, who is the Justice Department's lawyer on cases in which the federal government is a party, are also more likely to be heard, because they involve an appeal from the national government.

Deciding which cases to hear is a time-consuming and difficult task. Someone has to sort through all the appeals papers and decide. Justices usually rely heavily on **Supreme Court clerks** for help in this. The clerks help justices in a variety of ways, including reading appeals and making recommendations. After reading the clerk's recommendation, a justice may then personally look at the most promising appeals in detail. In order to hear a case, four of the nine justices must want to accept the appeal—the **rule of four**.

I want to add a comment on the clerks. They are far more important than the term "clerk" implies. They are among the top law school graduates in the top law schools in the nation. Each justice personally hires about eight clerks each year, though the exact number depends on how much work the justice likes to delegate. Clerks usually work for a year before moving on to better paying jobs, and they work really hard. Nevertheless, clerking for a Supreme Court justice is the best job any law school graduate could want. Clerking is almost a guarantee for future success, so these positions are highly competitive, even though they involve long hours. Other federal judges also hire clerks, who also have great opportunities after their year is over. But of course being a Supreme Court clerk is tops.

We should note that the caseload in all federal courts is quite small in comparison to state courts, where most legal cases are heard and decided without ever going into the federal courts. Federal courts hear less than five percent of all legal cases. Each state has its own separate court system, often but not necessarily patterned in a similar manner to the federal courts. State courts usually have trial, appeals and a supreme court along with special courts, like juvenile and/or family courts. States choose judges in different ways, including popular election, legislative selection, processes that are similar to that at the national level with governors nominating and legislatures confirming, and complex hybrid systems. You might look up how your own state chooses its state

judges. However, research shows that the different methods of selection have little impact on the quality of or decisions made by state judges.

The Supreme Court meets in what are called terms, which run from October 1 till June 30, a little behind the standard academic school year. I know that three months vacation sounds like a good deal, but justices do a lot of reading and thinking about cases that might be coming up during their vacations. They don't sit on the beach for three months—if they do sit on the beach, they may be working on cases on a laptop (as Justice Stevens has been known to do).

## VI. Selection of Justices and Judges—More Politics

As you should know by now, both of the other branches of government are involved in selecting federal judges. The process always involves the two general steps of a president nominating and the Senate confirming the appointment by a two-thirds vote. But the details of selection depend on the kind of judge being selected. We will not go into much detail here, but you should know a few of the basics for federal district court judges, appeals judges and Supreme Court justices. Of course, the Supreme Court nominations and confirmations attract the most press coverage.

Let's start with district court judges. About 700 district judges hear cases in about 95 district courts across the nation. As we mentioned earlier in the chapter, district court lines always lie within a single state. Because of this, senators from each state have a great deal of interest in the judges in their own particular states. To make sure they have influence, the Senate has adopted an informal practice called **senatorial courtesy**. What this means is that the president had better consult with any senator from that state who is of the same party as the president. The Senate enforces this practice by refusing to confirm any nominee who is not cleared in this way. Presidents go along. In actual practice, senators informally suggest to the president who they would like to see as a district court judge in their state. A common joke is that the only qualification for a federal district judge is to have a senator of the president's party as a friend. So federal district judges are almost always members of the president's party and have close political and personal ties to U.S. Senators in the president's party. We do not see very many radical judges getting nominated or confirmed in this process!

The selection of judges on the 13 federal Courts of Appeal does not involve the practice of senatorial courtesy because the geographical lines for these courts cross state lines (though senators from the region take a great deal of interest in these nominations). The process for their selection is similar to that for Supreme Court justices. The difference is that the whole process is lower profile and gets less attention from the public. It is nevertheless important

because with the Supreme Court's light caseload, thousands of cases are actually decided at the appeals level.

On the average, a president can expect an opportunity to nominate a new Supreme Court justice about every two years, though the rate is far from even from president to president. Politics pervades the process. Late in a president's second term, members of the other party in the Senate will usually block any nominations in hopes of winning the White House and having one of their own to make the nominations.

Deciding who to nominate is a process within a process. The president may have her or his own ideas, but the president gets lots of advice and pressure from a wide range of people. The president had better consider the desires of the Senate, especially key senators of the president's party, because without their support the nomination will not get very far. Lack of support has killed more than one nomination before it ever got out of the Senate Judiciary Committee, the committee that looks at all judicial nominations first. Interest groups weigh in on possible nominations, often running ads for or against potential and real nominees, hoping to sway public opinion one way or the other. The Justice Department does a complete background check of potential nominees to make sure that no scandal or ethical questions might create problems.

Even after all this, a presidential nomination can blow up during the Senate confirmation process. The most famous case of a public relations crisis was the hearings for Justice Clarence Thomas, nominated by President George H. W. Bush in 1991. In the middle of the hearings, Anita Hill, a law professor who had been a law clerk for Thomas when he was an Appeals Court judge, came forward to make charges of sexual harassment. The Senate investigated the charges in open hearings, taking testimony that could be rated X for sexually explicit material. Ultimately, Thomas survived and the Senate confirmed him on a divided vote, but the ordeal badly damaged his reputation.

The Senate has turned down several presidential nominations when the beliefs of the nominee were judged to be too much at odds with beliefs Senators had about the meaning of the Constitution. This is virtually always along partisan lines. The Democratic Senate turned down President Reagan's nomination of Robert Bork. Bork presented himself as a "strict constructionist" who took a very narrow view of the Constitution. For example, Bork rejected the idea that any individual right to privacy existed in the Constitution, an idea that did not win him much public support. Conservatives in President George W. Bush's own party forced him to withdraw his nomination of Harriet Miers because they did not see her as conservative enough.

The end result of this process is that judicial nominations almost always reflect the party of the president and the balance of partisan power in the Senate. A Republican president can nominate very conservative Republicans if the

president has a strong Republican majority in the Senate. The opposite is true for Democratic presidents. They need a strong Democratic majority in the Senate to get liberal judges and justices confirmed. If the Senate is controlled by the other party, presidents often look for relatively more moderate judges that the opposing party is willing to confirm. As we shall see, the partisan backgrounds of judges and justices make a lot of difference in how they rule on cases.

## VII. How the Supreme Court Decides Cases

If you take the trouble to read an actual Supreme Court decision (which would be a good exercise—just search the Web for Supreme Court decisions and go from there), you will notice several things about the way the decision is organized. You will often find something called a “syllabus,” which is a kind of executive summary of the case and the decision. The “opinion” is the majority opinion of the Court. In addition you may find **concurring opinions**, which give the reasoning of those justices who agreed with the conclusions of the majority, but got there through a different line of reason, or who may have wanted to extend the decision more broadly. Finally, you may find **dissenting opinions**, written by justices who think the majority was wrong. These can be quite angry in tone, written in the hope that some future Supreme Court opinion will recognize that the majority was wrong and the dissent was right. Sometimes new majority opinions cite some earlier dissent.

Whether the opinion is a majority opinion, concurring opinion, or dissenting opinion, you will almost always see two things. First, you will see references to the Constitution and some discussion about what the words in the Constitution mean. And second, you will see a lot of citations of previous cases that led the justice to the conclusion she or he draws in the case being decided. One might think that this is how justices decide cases, by looking first at the Constitution and then at previous cases. Let’s examine these two explanations and then some alternative explanations. How well does each of these explanations help us understand the Supreme Court’s decisions?

### A. Apply the Constitution—If Only That Easy!

You already know that the Constitution is relatively short, quite vague in many places, and leaves out a lot of details. It was not even clear on the role of the Supreme Court in judging the constitutionality of laws, a power the Court claimed, as you know, in *Marbury v. Madison* (1803). Does the Constitution say anything about abortion? Does the Constitution clearly state that citizens have a right to personal privacy? Does the Constitution give presidents a clear set of emergency powers? Does the Constitution explicitly allow Congress to create a national banking system or regulate the money supply in the nation as it does through the Federal Reserve System? Does the Constitution ban execution by hanging? Does the Constitution state the circumstances under which Congress

can grant money to religious schools? As you might have guessed, the answer to all of these questions is no.

At the same time, the Supreme Court has told us the meaning of the Constitution in many rulings over the years. It created a right to privacy and set limits on that right. It has allowed the president to exercise emergency powers, allowed creation of all kinds of banking and monetary regulation, banned certain methods of execution, and could at some date ban human execution altogether. It has allowed certain kinds of financial aid to go to religious schools. And the list goes on. The meaning of the Constitution is kind of like what the baseball umpire said to the catcher and batter who were arguing over whether a pitch was a strike or a ball: "It ain't nothin' till I call it!"

Because so many new situations have arisen since the writing of the Constitution and because the words are so broad and vague, the document must be interpreted—interpretation is inevitable! So the question then becomes how should it be interpreted? What kinds of rules and guidelines should apply in the process of interpretation?

In thinking about this, I am reminded of different religions that have arisen around different interpretations of the various holy books. The many different Christian religions rest on different interpretations of the Christian Bible. Different interpretations of the Jewish Torah have led to different groups of Judaism, Orthodox, Reformed and so on. The same can be said of the Koran and Islam.

So it is with the Constitution—different schools of thought exist on proper rules for interpretation. **Strict constructionists** and **originalists** believe that the meanings of the words should be narrowly construed and stay as close as possible to the meanings they originally had in the minds of the founders. **Loose constructionists** and advocates of the **living Constitution** believe that meanings change as times change and the words should evolve in meaning as new needs arise. Believers in **judicial restraint** tend toward more narrow interpretations, believing that the courts undermine their legitimacy if they get too involved in creating new policies and rights—that these kinds of controversial things should be left to amendment and to the other two more political branches. Those believing in **judicial activism** see the Courts' role as standing up to the other two branches when they fail to protect rights. Because the other two branches are more closely tied to public opinion, they are more likely to cave in when the public wants to deprive some unpopular group of their rights. We covered these ideas on interpretation back in chapter 2, the chapter on the Constitution, so you might look back there for further review.

And so the arguments go on. We might conclude that the precise words of the Constitution are less important than the meanings judges give them. So what we really need to know to understand and explain Court decisions is how judges decide which rules to use in interpreting the Constitution. The Constitution itself is

relatively little help. All sides cite it, in part because citing the Constitution lends legitimacy to decisions. That is, citizens have nearly universal respect for the Constitution, even if they rarely know what is in it! So citing the Constitution is a kind of sprinkling of holy water on a decision to make it more acceptable. But all sides have different interpretations, and the interpretations are what are really important.

One last point. In those rare cases where the meaning of the Constitution is clear so that almost everyone agrees with that meaning, the case would have been decided in a lower court, and the Supreme Court would not review the ruling. The cases that get to the Supreme Court are those where some question exists about the meaning of the Constitution. They get the tough cases.

#### B. Precedent—“Stare Decisis”

We observed that justices almost always cite previous cases in writing their opinions. This use of **precedent**, or the Latin phrase **stare decisis**, which means “let the decision stand,” has a certain appeal to almost everyone. The use of previous cases to decide current cases gives the law some amount of certainty and predictability. We all like some certainty and predictability in our lives. Lawyers could not give legal advice to business clients about whether or not some practice was legal if courts were constantly changing rulings in random ways. Legal contracts would become impossible and business relationships would grind to a halt without some predictability based on previous court rulings. So precedent is a good thing.

But—by now you should know that there is almost always a “but”—when the precedent is clear and no pressure exists to change precedent, the Supreme Court will almost certainly go with the rulings of lower courts and not even hear a case. But when lower courts choose different precedents because the current case has no clear precedent that fits it, or when a great deal of pressure exists to change an existing precedent, the Supreme Court will likely hear the case. Then it has to decide which precedent to use or whether to overturn a previous precedent. Such was the situation when the Court heard *Brown v. Board of Education* (1954) and chose to overturn the “separate but equal” precedent in *Plessy v. Ferguson* (1896) that had allowed states to racially segregate public schools.

Therefore, we can make similar observations about the use of precedent to the observations we made about applying the Constitution. The Supreme Court gets the cases where no clear precedent exists or when pressures exist to change precedent—the tough cases. The really important question is not whether to use precedent, but the guidelines in the minds of justices on which precedent to apply or whether sufficient reason exists to change precedent. So in the cases the Supreme Court hears, knowing precedent does not help us understand very much. The citing of precedent in the decision might be seen as

an after-the-fact justification for the decision, not the rationale that led to the decision itself.

### C. Political Predisposition—Judicial Baggage

The failure of either a simple application of the Constitution or use of precedent to explain how the Supreme Court reaches decisions suggests why the president and the Senate spend so much time and energy in deciding precisely who should be federal judges. Wanting to choose people of their own party who share a common philosophy on the proper rules for Constitutional interpretation is no accident. The political backgrounds of judges and justices tell us a lot about how they will decide cases.

Previous studies of Supreme Court rulings show that about 90% of the time we can explain how the justices rule on a case from their party identification and political ideology. That is pretty astonishing. Putting aside all precedent and all argument about what the Constitution says, all you have to know is the party and ideology of the judge and you will know how a judge will rule about nine times out of ten.

You might look at the current justices on the Court and classify them by their party (almost always the same as the President who nominated them) and their ideology (a little harder to find, but not that hard). Then you might look at major cases in the most recent Supreme Court term and see how the justices divided up on several important cases. You will usually see similar groupings when the Court divides on an opinion. The conservative Republican justices will almost always stick together as will the Democrats. The swing votes are usually the moderates, who in recent years have been some relatively moderate Republicans on the Court.

An excellent example of this kind of split was the *Bush v. Gore* (2000) case, which stopped the recount of votes in Florida after the 2000 election and insured a victory in the election for then Texas Governor George W. Bush. The five vote majority consisted of the three most conservative Republicans along with two of the somewhat less conservative Republican justices. These justices usually applied the philosophy of judicial restraint, but this time they took a judicially activist position to intervene in how a state counted votes. The usually judicially activist two Democrats took a restrained position of wanting to let the state of Florida proceed in the recount. They were joined by the two moderate Republicans on the Court. The political result seemed to be what was most important to most of the justices. Yet, in reading the opinion you will still see many previous cases cited and the Constitution quoted. In his dissent, Justice Stevens, one of the moderate Republican justices, concluded with his own angry condemnation of the decision: "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the

identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.”

#### D. Process—Room for Influence and Persuasion

Okay, so we now have explained about 90% of the rulings by the Supreme Court. What about the other ten percent? The process by which justices hear cases leaves considerable room for some persuasion from a variety of sources. When the Supreme Court is closely divided along party and ideological lines, the persuasion is usually aimed at the more moderate justices who could go either way. To see the places where persuasion can take place, we will briefly outline the process the Court uses in deciding cases.

##### 1. Written Briefs

Once a case has been accepted by at least four justices (the rule of four, remember?), the next step is for the Court to examine all the written briefs that have arguments by each side. In addition, the Court can, at its own discretion, consider **amicus curiae briefs** (Latin for “friend of the court”) that outside interested parties can write and submit arguing for one side or the other. These parties can be anyone, including states, members of other branches, interest groups, and even private individuals.

##### 2. Oral Argument

The oral argument is the next step. This is when the lawyers for both sides make their arguments face-to-face to the justices on the Court. It can be quite dramatic and is almost certainly the most high pressure situation any lawyer can encounter. Arguing a case before the Supreme Court is for a lawyer as playing in the Super Bowl is to a football player—a very big deal! She or he might spend months in preparation for this presentation, and then one sentence into it, the justices might start asking questions, arguing with the attorney and with each other. Yet the lawyer only has a set time (usually thirty minutes for each side) to make the argument. When the time is up, a red light comes on and the lawyer must stop, though the justices sometimes allow the lawyer to finish a sentence or idea. A good lawyer will know the predispositions of each of the justices and try to slant the argument to exploit this knowledge.

##### 3. Judicial Conference

The rest of the steps, except the announcing of the decision, all take place in secret. But we do know something of what happens from what justices sometimes say and from what law clerks pass on. The judicial conference takes place after oral argument, usually on Friday of the same week. In this conference, the justices have an opportunity to persuade each other. The Chief Justice is in the best position to do the persuading because by tradition the Chief

speaks first. Then the justices speak from most senior to least senior. After speaking and discussing, they take a tentative vote on the case. This time they go in reverse order, junior to most senior and the Chief voting last. Thus the Chief has the opportunity to break any ties. Following the vote, the most senior justice on the majority side, or the Chief if he or she is on the majority side, assigns the opinion writing for the majority side.

#### 4. Opinion Writing

That gets us to the next stage, opinion writing. A decision is not really a decision until a majority signs the opinion. So this stage can turn into a kind of competitive essay writing contest—the first person getting a majority to sign wins! Here clerks can play a role in telling other clerks what their justice needs to be persuaded to sign. Different opinions and versions of opinions circulate through the justices' offices until one gets a majority. From the point of view of the justice doing the writing, a nine to nothing decision is best. Next to losing, the next worst thing is to get a few votes and then several concurring opinions that agree with the outcome but not the logic behind the outcome. This means that no clear precedent is created. You can see where a lot of persuasion and give and take can happen in this process.

#### 5. Announcement and Enforcement

Finally, the author of the majority opinion reads the decision in open court. He or she literally reads it word for word, usually in a monotone voice. Some observers have suggested that the court employ actors to give more dramatic readings. Even that might not help. If you read some actual decisions with their long sentences and complex wording, you will quickly see how boring this can be. Average citizens could listen to the entire opinion and not be sure who actually won the case.

If a lower court ruling is overturned, the Supreme Court will send the case back to the lower court to reconsider, using the words: “the case is **remanded** for further proceedings not inconsistent with this opinion.” That means the lower court should rehear the case along the lines we suggest.

No guarantee exists that the lower court will comply, though almost always the lower courts do go along. Failure to do so will result in another Supreme Court case that overturns lower court action again. But that could take a while. One white conservative southern judge in Dallas, Texas kept ruling in favor of the segregation laws and the federal courts kept overturning his decisions. This went on for years. No actual desegregation took place there until 1961.

### VIII. Conclusion—A Nation of Laws AND People

So now you see that our ideal nonpolitical judicial system is permeated with politics, all the way from how judges are chosen to how they decide what philosophy to employ in reaching decisions. You also see that the ideal of nonpolitical justice is useful to the courts. This is because citizens are more likely to respect court decisions if they feel that the decisions were reached in some objective manner where all sides have a chance to be heard so that judges can weigh the evidence and arguments.

Now that you are more fully aware of this not terribly pleasant truth, you might ask: is that all there is to justice? Is it one big con game in which the deck is always stacked for one side or the other? Is justice nothing more than the political balance of who is stronger? If you take a very cynical point of view of American history and politics, you might just stop here. You might conclude that justice is just politics, and because politics is all about power, everything is decided on the basis of power. Or as one cynical observer said, justice means just us! End of discussion?

Not quite. These are ancient questions that great political thinkers have considered for thousands of years. Plato wrote about an exchange between Socrates and one of his students, Thrasymachus. The student asked whether justice is nothing more than the interest of the few with power. Socrates replied that if the few want to keep power, they must do what is in the interest of the many.

So it is with the Supreme Court. It cannot get too far from what the American people value if it wishes to maintain legitimacy and expect people to follow its rulings.

Let's look at some examples to illustrate this idea. In ***Dred Scott v. Sandford*** (1857), the Supreme Court issued a decision that interpreted the Constitution in a very pro-slavery way. Abraham Lincoln denounced the decision in his famous debates with Douglas in 1858. Lincoln opposed judicial supremacy in interpreting the Constitution, believing that in a democratic republic the people's wishes should be supreme. After becoming president in 1861, Lincoln defied the ruling. He did things that the ruling presumably prohibited, like issuing passports to blacks who had been freed from enslavement, whom the Court said in *Dred Scott* could never be treated as citizens of the United States. Lincoln got away with this because he had the mass of public opinion on his side. The Court, not having the power to enforce its own decisions, could do nothing.

But public opinion does not always favor the interests of the downtrodden. In an 1832 case, the Supreme Court, led by John Marshall, issued a ruling that would have protected the Cherokees from being forcibly removed from their land. Andrew Jackson, with public opinion on his side, ignored the ruling and took actions that ultimately led to forced removal and the deaths of thousands of Native Americans.

When public opinion backs the Court, it can even bring down the president. When the Watergate tapes became publicly known, President Nixon tried to use a broad claim of executive privilege to refuse to turn them over to the federal prosecutor. The secret recordings of conversations in the Oval Office were thought to have evidence of Nixon's participation in a cover-up of White House involvement in the Watergate break-ins, which was obstruction of justice. The Supreme Court ruled 8-0 (one justice recused himself from the case) that the tapes had to be turned over. Three of the justices in the ruling were Nixon's appointees. Nixon considered defying the ruling and destroying the tapes. But his advisors said that doing this would certainly lead Congress to impeach and remove him. Public opinion was on the side of the Court.

As you can see from these cases, the Supreme Court does not always rule with public opinion, but having opinion on their side helps greatly in enforcement. This is why the Court has a tradition of at least some judicial restraint, being reluctant to get involved in political matters, especially when public opinion is against them. Straying too far from opinion invites the other branches to ignore judicial rulings.

Thus, widely shared standards of justice and morality do play a role in what the Court does. The Court must at least keep in mind the values of the many as a limit on what they might like to do for the powerful few, or even for some unpopular weak minority. To put it another way, the Supreme Court's sensitivity to public opinion adds a democratic flavor to our republic.

## **KEY TERMS AND IDEAS**

high crimes and misdemeanors  
jurisdiction, original and appellate  
size of the Supreme Court  
Court packing plan  
Judiciary Act of 1789  
District Courts  
Courts of Appeals  
basis for appeal of state court rulings to the U.S. Supreme Court  
writ of certiorari  
*Marbury v. Madison* (1803)  
judicial review  
John Marshall  
writ of mandamus  
Solicitor General  
Supreme Court clerks  
rule of four  
senatorial courtesy

concurring opinions  
dissenting opinions  
strict constructionists and originalists  
loose constructionists and the living Constitution  
judicial restraint and judicial activism  
precedent or stare decisis  
amicus curiae briefs  
remanded  
*Dred Scott v. Sanford* (1857)

### **Possible Internet Exercises**

1. Find out how state judges are chosen in your home state.
2. Find the current members of the Supreme Court, their age, when they were placed on the Court and the president who nominated them.
3. Find descriptions of which Supreme Court Justices are considered conservatives, which are considered moderates, and which are considered liberals.
4. Find several decisions in the most recent Supreme Court term that were split decisions (5 to 4 or 6 to 3) and determine if the same justices tended to line up in the same sides of the cases. What does this tell you about the justices and about how the Supreme Court makes decisions?