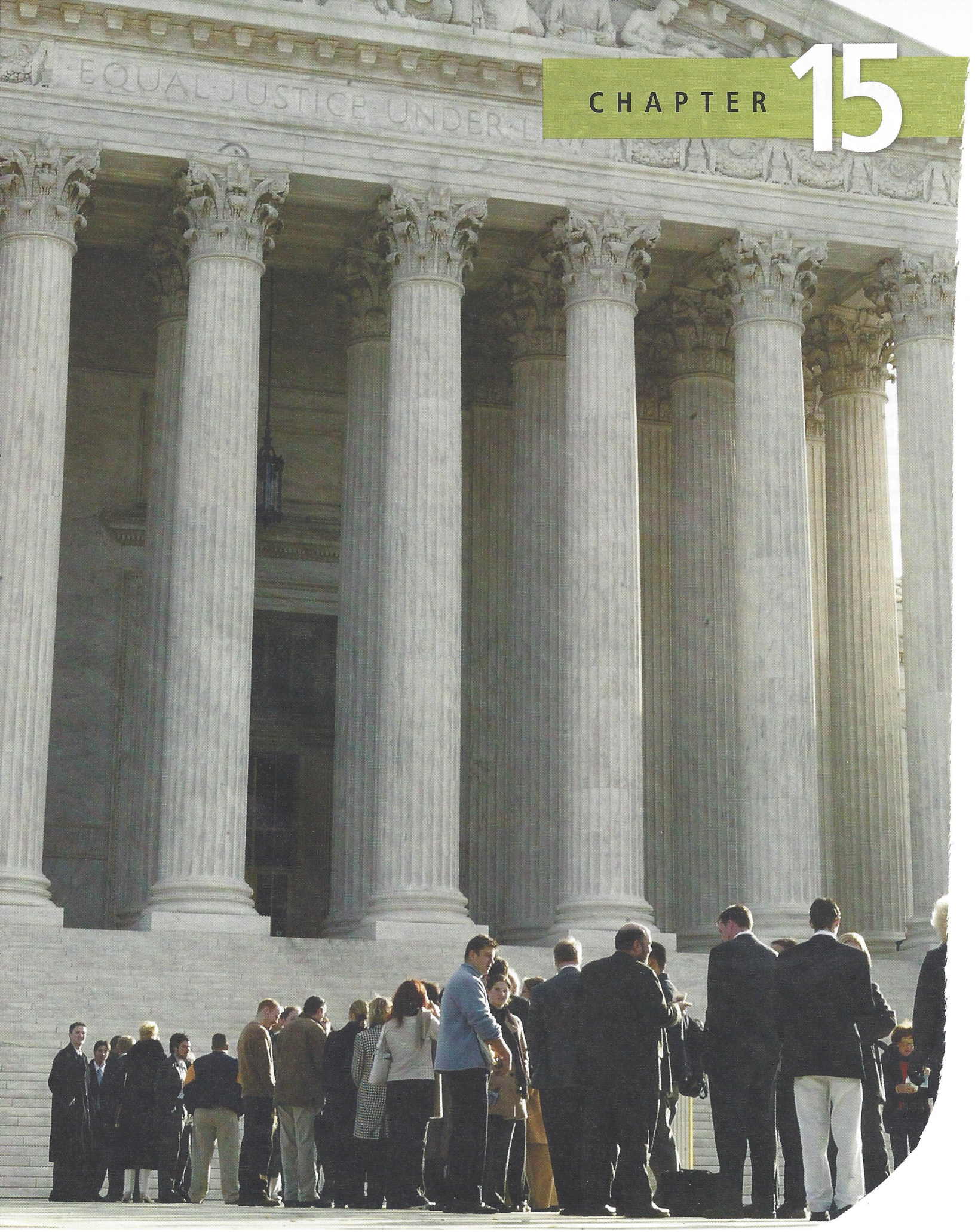
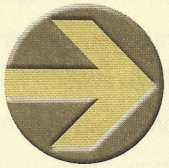


CHAPTER 15

The Judiciary

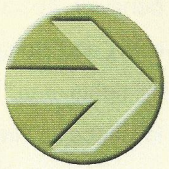
THEN

The federal judiciary did not have a great effect on the daily lives of citizens due to its limited jurisdiction as established by the Judiciary Act of 1789.



NOW

All major policy issues—social, economic, and political—eventually end up in the courts; therefore, courts make policies that affect the daily lives of citizens.



NEXT

Will the nuclear option, which limits the use of the Senate filibuster, change the politics of judicial appointments?

Will the ideological makeup of the Supreme Court continue to come under scrutiny as both conservative and liberal justices engage in judicial activism?

Will the judicial branch retain its status as the most trusted branch of government?

Courts resolve legal disputes,

conflicts over the law, and in the process, judges and jurors must determine the facts of the case. At the same time, judges must interpret relevant laws and then apply them to the facts of the case while protecting the due process rights of defendants. Why do judges have to interpret laws before applying them? As discussed throughout this textbook, laws—whether found in constitutions, legislation, executive orders, or administrative rules and regulations—are often vague, ambiguous, and even contradictory. Therefore judges, through their interpretation and application of laws in the context of a lawsuit, play an important role in lawmaking.

In *Federalist* No. 78, Alexander Hamilton explains that the Constitution intentionally structures the federal judiciary to be the weakest branch of government. Several characteristics of the courts highlight the weakness of the judiciary in relation to the other branches. Unlike the executive and legislative branches, which are proactive in making policies that address societal concerns as they arise, courts must wait for people to bring conflicts to them through lawsuits. Courts are reactive. In addition, once courts have resolved a conflict, they must rely on the other branches of government to implement their decisions. Unlike Congress and the president, judges do not approve federal budgets nor do they supervise bureaucrats who put policy into effect.

Eventually, all major policy questions (stemming from conflicts over what the law means) end up in front of the courts. Frequently, court decisions spark changes in how the executive branch implements existing or new laws. Because of the constitutionally created system of checks and balances, the elected officials in the executive and legislative branches have several means to check judicial authority. Therefore, the three branches engage in ongoing dialogue over the foundational principles of U.S. democracy, found in the Constitution, and the laws enacted by elected and appointed officials that regulate individual, group, and governmental behavior. According to Supreme Court justice Ruth Bader Ginsburg, "In so many instances, the court and Congress have been having conversations with each other, particularly recently in the civil rights area."[1] In our democracy, citizens engage in these ongoing conversations as they try to influence all three branches.

PREVIEW

In this chapter, we survey the foundations, structure, and workings of the contemporary U.S. judiciary. We examine how the courts make policy as they resolve legal disputes that affect social, economic, and political aspects of the polity. We also explore constraints on judicial policy making.

FIRST, we answer the question, what do courts do.

SECOND, we focus on the sources of U.S. law, including constitutions, statutes, judicial decisions, executive orders, and administrative law.

THIRD, we consider different types of lawsuits.

FOURTH, we examine the structure of the federal court system.

FIFTH, we look at the criteria and process for appointing federal judges.

SIXTH, we survey how the U.S. Supreme Court functions today.

SEVENTH, we examine judges as policy makers, including the constraints on judicial policy making.

EIGHTH, we review the work of the Roberts Court.

What Do Courts Do?

Unlike the legislative and executive branches that proactively respond to citizens' needs and demands by formulating, approving, funding, and implementing laws, judges (and the courts in which they work) are reactive. Judges must wait for someone to file a lawsuit (a legal dispute) before they can do their work. In addition, while elected legislators and executives must represent their constituents, judges do not have constituents to represent. Judges are responsible for upholding constitutions. Therefore, in our democracy we expect elected legislators and executives to be partial to the majority of their constituents; majority rule. At the same time, we expect judges to be impartial to individuals or groups and partial to constitutions.

To resolve legal disputes, courts in the United States implement an **adversarial judicial system,** with each of the two parties in a legal dispute presenting its set of facts. At the end of a lawsuit, one party will win and the other party will lose. (See the "Global Context" to learn of Mexico's recent adoption of an adversarial judicial system.) The ability of a court to hear a case depends on whether that court has **jurisdiction**—the legal authority of a court to resolve a case, which is established by either a constitution or a statute.

adversarial judicial system
a judicial system in which two parties in a legal dispute each present its case and the court must determine which side wins the dispute and which loses

jurisdiction
the legal authority of a court to resolve a case, established by either a constitution or a statute

Global Context

MEXICAN COURTS TRANSITIONING TO THE ADVERSARIAL SYSTEM OF JUSTICE

Under its traditional, written-based inquisitorial judicial system, Mexican judges conduct trials behind closed doors. The two parties to the dispute submit written reports, documents, and briefs to a judge. The judge reviews the documents in private and issues a verdict typically without comment or explanation. This closed justice system fosters a lack of trust in the system, with worries about possible bribery, corruption, and violation of the rights of the accused.*

In 2008, Mexico amended its constitution, radically overhauling its court system. Every state and federal judicial system in Mexico must transition to an adversarial system by 2016. The Mexican constitutional mandate to overhaul the judicial systems will allow both parties in a legal dispute to present their facts, evidence, and witnesses in open-to-the public courtrooms. Both parties will have the opportunity to question all witnesses and object to the questions posed and evidence presented by the opposing party. Judges, lawyers, and citizens at-large believe that open, adversarial trials are more transparent, better protect due process and the rights of the accused, and bolster the presumption of innocence until proven guilty.**

Mexican federal prosecutor Catalina Leon believes that Mexico's transition from its current written-based inquisitorial justice system to an oral-based adversarial system, similar to the system U.S. courts use, is "going to help us a lot [because] it guarantees better justice." Victor Romero, a Mexico City federal judge, tells of his initial resistance to the change to an adversarial system. However, after learning about the U.S. court system during a U.S. Department of Justice–sponsored institute, he noted, "This experience has impacted me favorably because I have been able to see its benefits."*

Mexican officials believe that if the transition to an adversarial system is successful, it will improve the public's trust of judges and the legitimacy of court procedures and verdicts.

SOURCES: *Karla Zabludovsky, "In Mexico, Rehearsing to Inject Drama into the Courtroom," *The New York Times*, August 28, 2012, A7. **Jose Antonio Caballero, "Judiciary: The Courts in Mexico," *Americas Quarterly* (Spring 2013), www.americasquarterly.org/judiciary-courts-mexico.

There are two generic legal disputes brought to courts. The first dispute is over the facts of a case, and the second dispute is over the proper interpretation and application of the law to the case. **Trial courts** have **original jurisdiction,** which means they are the first courts to hear a case and try to resolve it based on determining the truth of what occurred—the facts of the case. Trial courts must decide if the party accused of harming an individual, group, or society at-large by violating law (the defendant) is guilty (in criminal cases) or liable (in civil cases). If the court finds the defendant guilty or liable, then it will levy a punishment or sanction.

Appellate courts with **appellate jurisdiction** are responsible for correcting errors made by other courts when they interpret and apply law in a specific case. Therefore, courts with appellate jurisdiction review the procedures used and decisions made by judges in cases already decided by another court. Often, appellate courts must clarify laws to determine if the judge(s) in the previous legal dispute properly interpreted and applied the relevant laws in the specific case. At other times, appellate courts must choose between laws that conflict. In the process of clarifying laws and choosing between conflicting laws, appellate courts determine what the law is; they make law.

In resolving disputes, courts are responsible for ensuring that the U.S. Constitution is not violated. In the landmark case ***Marbury v. Madison*** (1803), the Supreme Court, led by Chief Justice John Marshall, grabbed for itself the power of judicial review.[2] **Judicial review** is the Court's authority to determine that an action taken by any government official or governing body violates the Constitution (see Chapter 2). In the *Marbury* case, the Supreme Court ruled that a section of the Judiciary Act of 1789 that gave new authority to the Supreme Court was

trial court
courts with original jurisdiction in a legal dispute that decides guilt or liability based on its understanding of the facts presented by the two disputing parties

original jurisdiction
judicial authority to hear cases for the first time and to determine guilt or liability by applying the law to the facts presented

appellate courts
courts with authority to review cases heard by other courts to correct errors in the interpretation or application of law

appellate jurisdiction
judicial authority to review the interpretation and application of the law in previous decisions reached by another court in a case

Marbury v. Madison
the 1803 Supreme Court case that established the power of judicial review

judicial review
the court's authority to determine that an action taken by any government official or governing body violates the Constitution

U.S. Supreme Court
serves as the court of last resort for conflicts over the U.S. Constitution and national laws; in addition to its appellate jurisdiction, the Court also has limited original jurisdiction

unconstitutional. In its ruling, the **U.S. Supreme Court** argued something that it had never argued before: that it had the power not only to review acts of Congress and the president, but also to decide whether those laws were consistent with the Constitution, and to strike down laws that conflicted with constitutional principles.

Legal scholar Joel B. Grossman observes that in *Marbury,* "[John] Marshall made it abundantly clear that the meaning of the Constitution was rarely self-contained and obvious and that those who interpreted it—a role he staked out for the federal courts but one that did not reach its full flowering until the mid-twentieth century—made a difference."[3] Judicial review is the most significant power the Supreme Court exercises. Over time, the Court has extended this power to apply not only to acts of Congress, the president, and federal bureaucrats but also to laws passed by state legislatures and executives, as well as to state court rulings and acts of state and local bureaucrats. Today, all courts in the United States, federal and state, have judicial review authority.

In our federal system of government, with dual sovereignty, both the national government and the state governments are sovereign, each having its own authority to make laws, execute laws, and resolve conflicts over its laws (as explained in Chapters 2 and 3). One characteristic of this dual sovereignty is that the national government establishes national law and each state government establishes state laws. A second characteristic of dual sovereignty is the **dual court system,** in which each state has a judicial system that is responsible for resolving legal disputes over the state's laws and the federal judicial system is responsible for resolving legal disputes over national laws.

dual court system
the existence of 50 independently functioning state judicial systems, each responsible for resolving legal disputes over its state laws, and one national judicial system, responsible for resolving legal disputes over national laws

Sources of Laws in the United States

Law is a body of rules established by government officials that bind governments, individuals, and nongovernment organizations. A goal of law is to create a peaceful, stable society by establishing rules of behavior that government enforces, with punishments imposed on those who the government finds guilty of violating the law. Another goal of law is to create processes by which conflicts about the rules and expected behaviors can be resolved. There is a variety of sources of law in the United States, including constitutions, pieces of legislation, executive orders, rules and regulations made by administrative bodies, and judicial decisions. From these sources come different types of law.

law
a body of rules established by government officials that bind governments, individuals, and nongovernment organizations

Judicial Decisions: Common Law

Common law is judge-made law grounded in tradition and previous judicial decisions, instead of in written laws. When there was no written law for judges to apply when resolving legal disputes, the judges used their understanding of the societal norms of justice and fairness to resolve conflicts. The legal principle established by the judge (common law) became binding on judges when resolving later cases with similar facts. This common-law **doctrine of *stare decisis*** (Latin for "let the decision stand") directs judges to identify previously decided cases with similar facts and then apply to the current case the rule of law used by the courts in the earlier cases. The previous cases with similar facts identified by judges are **precedent cases.**

common law
judge-made law grounded in tradition and previous judicial decisions, instead of in written law

doctrine of *stare decisis*
from the Latin for "let the decision stand," a common-law doctrine that directs judges to identify previously decided cases with similar facts and then apply to the current case the rule of law used by the courts in the earlier cases

precedent cases
previous cases with similar facts that judges identify for use in a new case they are deciding; judges apply the legal principles used in the precedent cases to decide the legal dispute they are currently resolving

The United States inherited, and then built on, a system of common law from England. When there was not written law to which the U.S. courts could turn, the newly established courts in the United States used British common law, and then eventually U.S. common law. Common law was the predominant form of law in the United States in the 19th century, before the volume of state and national legislation, rules, and regulations expanded. Eventually, many of the legal rules and principles developed by judges to resolve legal disputes over property, contracts, and harm caused by another person's negligent behavior were enacted in written laws.

Although the doctrine of *stare decisis* directs judges to ground their decisions in precedents, judges do have the discretion to step away from precedent if there are contradictory precedents, or if they believe the earlier decision was wrong (that is, if it misinterpreted or misapplied the law). Ultimately, common law gives judges the responsibility for interpreting law, especially if there are few precedents to guide them.[4]

In her book *The Majesty of the Law: Reflections of a Supreme Court Justice,* Sandra Day O'Connor notes, "The United States is a common-law country, not a civil-law country, and so in the United States a single case can be of great importance."[5] According to O'Connor, "the genius of the common law in the United States has been its capacity to evolve over time—case by case and issue by issue—as the courts apply basic legal principles developed over the past to resolve the challenges posed by new situations."[6]

Constitutions: Constitutional Law

Constitutions regulate the behavior of governments and the interactions of governments with their citizens. The body of law that comes out of the courts in cases involving constitutional interpretation is known as **constitutional law.** In cases concerning the Constitution, the highest court is the U.S. Supreme Court, and its decisions bind all Americans, including Congress and the president.

constitutional law
the body of law that comes out of the courts in cases involving the interpretation of the Constitution

In the United States, the U.S. Constitution is the supreme law of the land. All other laws must comply with the U.S. Constitution. National laws and treaties cannot violate the U.S. Constitution. State constitutions and laws cannot violate the U.S. Constitution. Throughout U.S history, courts have had to resolve disputes over the meaning of the U.S. Constitution.

For example, conflicts over the constitutional distribution of authority among the branches of the national government (the separation of powers) have landed in the courts. In its 2013 term, the U.S. Supreme Court was asked to determine the constitutionality of making presidential appointments while the Senate is in recess, which bypasses the Senate's authority to advise and consent (*National Labor Relations Board v. Noel Canning*).[7] The Court found that the president's authority to make recess appointments is limited to Senate recesses lasting no fewer than 10 days. During shorter recesses, the president cannot make recess appointments.

Disputes over the distribution of sovereignty between the national and state governments (federalism) also continue to end up in the courts. For example, in the summer of 2012, in the *National Federation of Independent Businesses v. Sebelius* case,[8] the U.S. Supreme Court found that the national government could not mandate that state governments extend Medicaid coverage as a requirement of its Affordable Care Act (2010).

The courts regularly have to resolve disputes over the proper balance between the common good and individual civil rights and liberties. To resolve these disputes, courts have to interpret language in the U.S. Constitution. In one recent case the Supreme Court had to determine the constitutionality of overall limits on contributions from individuals to political candidates and political parties (*McCutcheon v. Federal Election Commission*).[9] Do such limits infringe on First Amendment free speech rights? The Supreme Court ruled the limits unconstitutional.

Legislation

By the early 20th century, rapid changes in society and the economy forced legislators in Congress and the states to create laws to regulate the behavior of individuals and organizations to further the public good and protect individual liberties and rights. Laws written by legislatures are called legislation, acts, and statutes. Governments often compile legislative law in one document. All legislation may be in one consolidated document, such as is found in the **U.S. Code,** which is a compilation of all the laws ever passed by the U.S. Congress. The U.S. Code has 50 sections spanning a range of issues including agriculture, bankruptcy, highways, the postal service, and war and defense. At the state level, each state has a **penal code,** which is the compilation of all its criminal law.

U.S. Code
a compilation of all the laws passed by the U.S. Congress

penal code
the compilation of a state's criminal law—legislation that defines crime—into one document

National legislation and state legislation must comply with the U.S. Constitution. State legislation also must comply with the state constitution, which must comply with the U.S. Constitution.

Executive Orders

Article II, Section 1, of the U.S. Constitution states that "the executive power shall be vested in [the] president of the United States." This power allows the president to issue orders that create and guide the bureaucracy in implementing policy. A president can enact an executive order

In 2013, President Obama signed an executive order to establish the White House Council on Native Americans. In 2011, Obama established the White House Council on Women and Girls through an executive order. What might explain why Obama utilized executive orders to create these councils instead of relying on Congress to create them through legislation?

without input from the other branches of government, thoug executive orders are subject to judicial review and depend o the legislature for funding. Because executive orders have th force and effect of law, they represent a crucial tool in the pres dent's lawmaking toolbox.

A review of President Barack Obama's executive orde shows a range of public matters addressed in laws created b executive order. Obama's first executive order as preside established new policies and procedures governing the use c executive privilege by past presidents to prevent the release c presidential records held by the National Archives and Record Administration (Executive Order 13489). Obama used execu tive orders to establish the White House Council on Nativ Americans in 2013.[10] Today, presidents enact numerous law through executive orders during their presidencies, laws tha can be challenged in the federal courts.

Administrative Rules and Regulations: Administrative Law

As we saw in Chapter 14, legislation that creates policies and programs also delegates discretio to the bureaucrats in the executive branch whose job it is to implement them. Applying the administrative discretion, bureaucrats determine the best means to achieve the goals of th policies they execute. In the lawmaking process known as administrative rule making, bureau crats use their administrative discretion to establish specific rules, regulations, and standard necessary for the effective and efficient implementation of policy. The rules, regulations, an standards made by bureaucrats through administrative rule making have the force of law.

Examples of administrative law include the standards established by the Social Securit Administration to determine eligibility for Social Security disability benefits. Once establishe bureaucrats in the Social Security Administration offices apply the standards case-by-case in the review of medical documentation to determine which applicants are qualified to receive disabi ity benefits. An applicant denied benefits by the bureaucrat can appeal the decision to the Soci Security Administration's Office of Disability Adjudication and Review, where an administrativ law judge (another employee of the Social Security Administration, a bureaucrat, not a judici branch employee) reviews the case. The administrative law judge can overturn the denial of ber efits or uphold it. If the administrative law judge upholds the denial of benefits, the claim goes t the Appeals Council within Social Security (a multimember body of bureaucrats). The applica can appeal a denial of benefits from this council in the federal judicial branch. At that poin judicial branch judges will resolve the dispute over the implementation of administrative law.

Types of Lawsuits

Trial courts resolve disputes over the facts in a case. The dispute in a trial court may involv the claim that a defendant harmed society by violating criminal law, or it may involve the clai that a defendant caused harm to an individual, a group, or an organization by violating civil lav Verdicts in criminal trials and civil trials may be appealed for review to correct errors in th interpretation or application of law made by the judge presiding over the trial. We now turn t differentiating criminal and civil law, the procedures of criminal and civil trials, and trial proce dures from appellate procedures.

Criminal Law and Trials

criminal law
the body of law dealing with conduct so harmful to society as a whole that it is prohibited by statute and is prosecuted and punished by the government

Criminal law is the body of law dealing with conduct considered harmful to the peace an safety of society as a whole, even when directed against an individual. Each state establishes i own criminal law, compiled in its penal code. Congress has established national criminal lav however, the vast majority of crimes are defined by state legislation, not national legislatio

Therefore, state courts resolve the overwhelming majority of criminal lawsuits. The government whose criminal statute was violated, either the national government or a state government, files the lawsuit, as the prosecutor against the defendant. For example, when a government arrests and accuses a person of setting a house on fire (arson), or sexually assaulting someone, or stealing and using someone's credit cards, it is the state in whose territory the crime occurred that has the authority to bring a lawsuit, charging the person with violating its criminal law.

In a criminal case, the government as prosecutor has the burden to prove its case against the defendant **beyond a reasonable doubt,** which means there is no doubt in the mind of the judge or the jury (depending on the type of trial it is, as discussed later) that the defendant is guilty of violating the criminal law as charged. When a court finds a criminal defendant guilty, typically the judge (even where there is a jury) determines the punishment. However, because the overwhelming majority of defendants charged with criminal offenses plead guilty prior to trial, most criminal cases never go through a trial.

beyond a reasonable doubt
the standard of proof the government must meet in criminal cases; the government must convince the judge or the jury that there is no reasonable doubt that the defendant committed the crime

As discussed in Chapter 4, criminal defendants who go to trial have a variety of constitutional rights to guarantee due process. Some of these rights include the right to a speedy trial; exclusion of evidence that law enforcement gained through an unreasonable search or seizure; assistance of counsel, including counsel paid for by the government for indigent defendants accused of serious crimes; and protection from cruel and unusual punishment. Defendants found guilty have the legal right to an appeal, although the overwhelming majority do not appeal guilty verdicts. Because the Constitution protects people from double jeopardy, which is the trying of a person again for the same crime that he or she has been cleared of in court, the government does not have the right to appeal not-guilty verdicts.

State and federal courts resolve criminal cases; however, they spend much more time resolving the larger volume of civil cases brought to them. Unlike criminal defendants, neither party in a civil lawsuit has a constitutional right to a speedy trail, and so it may take years before a civil lawsuit makes it to the courtroom.

Civil Law and Trials

Civil law is the body of law dealing with private rights and obligations that are established by voluntary agreements (written and oral contracts), legislation, constitutions (which establish civil rights and liberties), administrative rules and regulations, or common law.[11] Civil lawsuits involve disputes between individuals, between an individual and a corporation, between corporations, and between individuals and their governments. In civil law disputes, one party (the complainant) alleges that some action or inaction by the other party (the respondent) has caused harm to his or her body, property, psychological well-being, reputation, or civil rights or liberties.

civil law
the body of law dealing with disputes between individuals, between an individual and corporations, between corporations, and between individuals and their governments over harms caused by a party's actions or inactions

When the harm is to a person's body or property and is caused by another person's negligence or other wrongful act, other than the violation of a contract, it is known as a **tort.** Well-publicized tort lawsuits include medical malpractice suits (disputes over claims that negligence of medical professionals caused harm) and product liability lawsuits (disputes over claims that a product, from toys to make up to medicine, caused harm). Until the recent writing of tort law into legislation, tort law was common law. The most common civil lawsuits stem from traffic accidents. Divorce and other family conflicts are also resolved in civil lawsuits because these disputes deal with obligations and rights created by a marriage contract.

tort
situation when a person's body or property is harmed by another person's negligence or other wrongful act, other than the violation of a contract

Courts use different procedures for the variety of civil lawsuits. However, some common practices are found in the majority of civil suits. For example, the complainant who files the lawsuit has the burden to prove that the respondent caused the harm. The burden of proof used in civil lawsuits is lower than that used in criminal trials. In civil trials, the complainant must prove that the **preponderance of evidence** is on his or her side; the evidence indicates that it is more likely than not that the accused caused the harm and is therefore liable.

preponderance of evidence
the standard of proof used in civil cases; the evidence must show that it is more likely than not that the accused caused the harm claimed by the complainant

Unlike criminal defendants, the respondents in civil suits do not have a constitutional right to the assistance of counsel. Nor do the complainants. This may explain why so few people who are harmed by the action or inaction of another, and have grounds to file a civil lawsuit, do not do so; they often cannot afford a lawyer. In addition, the overwhelming majority of civil lawsuits are settled (resolved) prior to trial. Respondents found liable for causing harm are not punished like those found guilty in criminal cases, but instead are required to remedy the harm, which often means paying monetary damages to the complainant.

Thinking Critically About Democracy

Should Jury Trials Be Eliminated?

The Issue: Article III, Section 2, of the Constitution, as well as the Sixth Amendment for criminal cases (interpreted by the Supreme Court to mean serious, "nonpetty" cases) and the Seventh Amendment for civil cases (if a dispute exceeds 20 dollars), establish the right to a trial by an impartial jury in federal courts. The framers established the jury system as a safeguard of constitutional liberties, to protect citizens from oppressive government. However, after sensational trials in which juries have acquitted accused murders, such as the 2011 Florida case acquitting Casey Anthony of murdering her 5-year-old daughter, the public and some legal experts have called for the elimination of jury trials. Is it time to eliminate jury trials?

Yes: Jury trials are much more expensive and time-consuming than bench trials. In addition, jury service is so onerous that most people try to get out of it. In fact, juries are not representative of the community. Therefore, it is not possible to receive an "impartial" jury of peers, since juries are comprised of those not smart enough to get out of jury duty. In civil cases, in which the issues are often very complicated and technical—such as medical malpractice lawsuits—jurors do not have the knowledge required to make the correct judgment.

No: Jurors—listening to the facts as presented in the courtroom and the instructions of a learned judge in the application of the law to the facts and using common sense grounded in societal norms—are a protection against government inquisitions and oppression. The government must prove its case beyond a reasonable doubt before it can abridge the defendant's life, liberty, or pursuit of happiness. In this era of government wiretapping and eavesdropping, citizens need as much protection as they can get from government. Furthermore, it is each citizen's responsibility to participate in this duty in order to uphold our democratic system.

Other Approaches: There are reforms that would increase the likelihood that citizens would embrace jury service, improving the quality of jurors and justice. For example, the federal government pays its employees their salary during their jury service. If jurors did not lose their pay, then they would be more willing to serve. Permitting jurors to take notes during the trial and requiring the judge to use plain English when instructing jurors would enhance the jurors' understanding of complex issues and the jury's deliberations.

What do you think?

1. Would justice be enhanced if jurors with expertise and knowledge related to the issues being disputed were called to serve, instead of a random selection of citizens? Explain.
2. When a person agrees to plead guilty to a lesser offense (known as plea bargaining), he or she gives up the constitutional rights that protect due process. Is the fact that so few cases go to trial, either a bench or a jury trial, due to plea bargaining, a threat to protecting constitutional rights and liberties? Explain.
3. It would take an amendment to the U.S. Constitution to eliminate the right to have an impartial jury hear your case. How likely do you think it is that two-thirds of the members of the House and the Senate would agree to propose and three-quarters of the states would agree to ratify such a constitutional amendment?
4. Would U.S. citizens be willing to give up their constitutional right to an impartial jury? Explain.

Trials versus Appeals

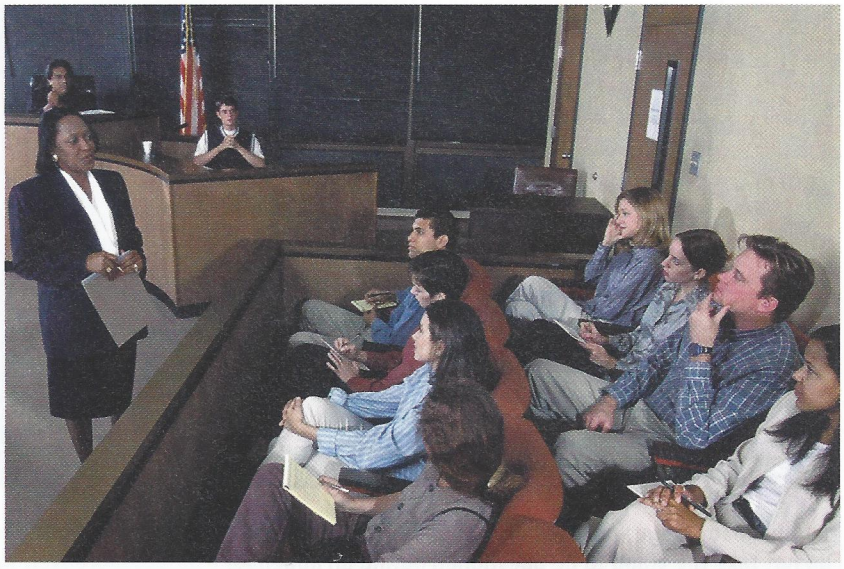
Television shows often feature cases in a trial court, not an appellate court. That is because the procedures used in trial courts, which differ from those used in appellate courts, are much more interesting to observe.

Criminal and civil trials include the questioning of witnesses by lawyers for both parties, presentation of evidence, and the right to a jury trial for those accused of more serious crimes or more extensive (and expensive) harm in a civil suit. In more serious criminal trials, the defendant usually has the choice between a bench trial or a jury trial. In civil trials with more extensive and expensive harm, the norm is to have a jury trial unless both parties agree to a bench trial. In a **jury trial,** a group of citizens selected to hear the evidence makes the determination of guilt or liability. Each juror (member of the jury) is expected to be impartial and neutral and

jury trial
a trial in which a group of people selected to hear the evidence presented decides on guilt or liability

base her or his decision on the facts presented in the courtroom. In federal trial courts, there must be unanimous agreement among the jurors on the verdict. In a **bench trial,** the judge who presides over the court proceedings decides guilt or liability. There is an ongoing conservation about whether jury trials should be replaced with bench trials (see "Thinking Critically About Democracy").

Appellate court cases do not include the questioning of witnesses, nor do they use juries. Instead, each party to the legal dispute submits legal briefs that present the facts as it sees them and legal material, including what they see as relevant law and favorable legal findings in similar, previously decided legal disputes (precedents). The goal of each party's legal brief is to persuade the court to rule in its favor. A panel of judges reviews the legal briefs as well as transcripts from the trial court and any previous appellate court hearings on the same case. The judges may allow each party to make a brief oral argument, typically about 20 minutes per side. The panel of judges decides the case (with a simple majority vote) based on the review of this paperwork, oral arguments when they are allowed, and conversations among themselves and their law clerks. Appellate courts often write, announce, and publish opinions that provide the legal rationale for the court's decision.



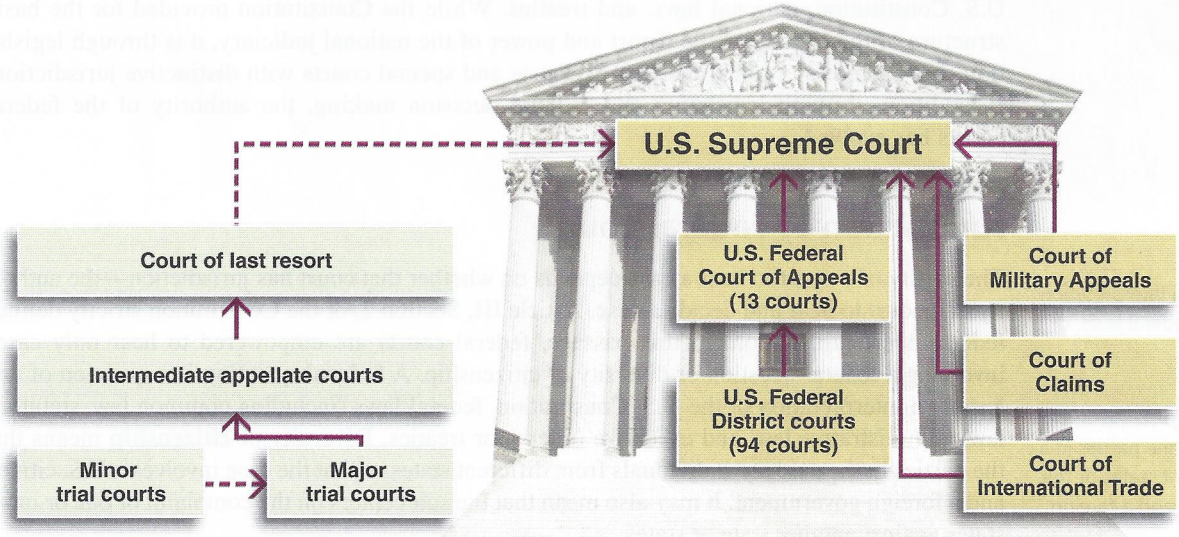
Juries are an option for the defendant in trial courts. Jurors in federal trial courts must be unanimous in their verdicts. The presiding judge can declare a hung jury if all jurors cannot agree on the verdict. Then the government (or complainant, in civil cases) must decide if it will try the case again, with a new trial and jury, or drop the case. How does this help explain the preference for jury trials among defendants?

bench trial
a trial in which the judge who presides over the trial decides on guilt or liability

In the dual court system, as presented in Figure 15.1, each state's court system resolves criminal and civil lawsuits stemming from disputes over the state's laws. At the same time, the federal court system resolves criminal and civil lawsuits stemming from disputes over federal law. One twist to the independent functioning of state and federal courts is that a lawsuit that began in a state court system can end up in the federal court system. Specifically, if a state court case raises

POLITICAL **Inquiry**

FIGURE 15.1 JURISDICTION IN THE DUAL COURT SYSTEM In the dual court system, the cases that state courts have authority to hear differ from those that the federal courts have authority to hear. What cases are within the jurisdiction of a state's court system? What cases are within the jurisdiction of the federal court system? When can a case that began in a state court system move into the federal court system?



>A panel of judges presides over appellate cases, and the majority of judges must agree on the verdict. Unlike during trials, witnesses do not take the stand to be questioned during an appellate hearing. Moreover, the panel of judges may decide that no oral argument is necessary, in which case the judges decide the case based on legal briefs and transcripts from previous trials and appeals in the case. How does this help to explain why television shows do not present appellate case courtroom scenes?

court of last resort
the highest court in a court system

questions about federal laws (typically about U.S. constitutional rights on appeal), then the cas may be brought to a federal appeals court after the state **court of last resort,** the highest court i the state's court system, has an opportunity to hear the case. We now turn to an examination c the federal judicial system.

The Federal Court System

Under the Articles of Confederation, there was no national judiciary. The state courts handle all lawsuits, including suits to resolve disputes over state laws and suits to resolve disputes ove national laws. State courts had original jurisdiction in all lawsuits.

During the Constitutional Convention, delegates agreed on the need for a national judiciary but they sparred over the appropriate structure and powers of a national judiciary. The debat was not resolved at the Constitutional Convention. Instead, Article III of the Constitutio established that "Judicial power of the United States shall be vested in one supreme Cou and in such inferior Courts as the Congress may from time to time ordain and establish. Article III also stated that the power of the national judiciary extended to all disputes over th U.S. Constitution, national laws, and treaties. While the Constitution provided for the basi structure of the U.S. Supreme Court and power of the national judiciary, it is through legisla tion that Congress established inferior courts and special courts with distinctive jurisdictior In addition, through legislation and judicial decision making, the authority of the federa courts has evolved.

Jurisdiction of Federal Courts

federal question
a question of law based on interpretation of the U.S. Constitution, federal laws, or treaties

diversity of citizenship
the circumstance in which the parties in a legal case are from different states or the case involves a U.S. citizen and a foreign government

The ability of a court to hear a case depends on whether that court has jurisdiction—the autho ity of a court to hear and decide a case. Article III, Section 2, of the Constitution strictly define federal court jurisdiction. In this passage, federal courts are empowered to hear only case involving a federal question or diversity of citizenship. A **federal question** is a question of la based on interpretation of the U.S. Constitution, federal laws (including common law, statutor law, administrative law, and executive orders), or treaties. **Diversity of citizenship** means tha the parties in the case are individuals from different states or that the case involves a U.S. citize and a foreign government. It may also mean that the suit centers on the complaint of one or mor states against another state or states.

The Structure of the Federal Courts

The federal court system is a three-tiered hierarchical system. At the bottom, in the first tier, are the U.S. district courts, which are the federal trial courts with original jurisdiction over a case. In the middle tier of the federal system are the U.S. courts of appeals, which have appellate jurisdiction. At the top of the federal court hierarchy, in the top tier, is the U.S. Supreme Court. The U.S. Supreme Court has appellate jurisdiction and rarely used, very limited original jurisdiction. The U.S. Supreme Court is the federal court of last resort.

Congress has complemented the three-tiered system of Article III courts (district courts, courts of appeals, and the U.S. Supreme Court) with specialized courts. Congress established the specialized courts through legislation grounded in its authority under Article I of the Constitution to "constitute tribunals inferior to the Supreme Court," and so the specialized courts are known as Article I courts.

U.S. SPECIAL COURTS In 2013, media coverage highlighted the activities of the Foreign Intelligence Surveillance Act (FISA) court. Congress established the FISA court in a 1978 act that spells out the procedures for the collection of human and electronic intelligence.[12] In June 2013, Britain's *Guardian* newspaper reported that the U.S. National Security Agency (NSA) was collecting telephone records of millions of Verizon customers. Then, *The Washington Post* reported that the NSA was wiretapping servers of nine companies, including Google and Facebook. The FISA court approved the national government's applications for this electronic surveillance. This government infringement on their privacy startled American citizens, but was quickly defended by President Obama and members of Congress as necessary to national security.

The FISA court is one example of an Article I court, or U.S. special court. Other special courts include the U.S. Bankruptcy Court, the U.S. Court of Military Appeals, the U.S. Tax Court, and the U.S. Court of Veterans' Appeals. Congress establishes Article I courts to help administer specific federal laws; therefore, these courts have administrative as well as judicial responsibilities.[13] Unlike the judges sitting on the benches in the Article III courts, who are appointed to life terms, the judges who preside over these special Article I courts are appointed to serve for fixed terms.

U.S. DISTRICT COURTS There are 94 federal district courts with 677 judgeships. Each state has between 1 and 4 district courts, and Washington, D.C., and Puerto Rico each have a district court. These trial courts do the bulk of the work of the federal judiciary because the courts have original, **mandatory jurisdiction,** which means they must hear every case filed with them. A judge presides over the trial court, and the judge, or a jury if the defendant chooses the jury option, decides what happened in the case, based on the application of the law to the facts presented in the courtroom. It is in the trial court that two parties to the lawsuit present evidence and witnesses testify. Federal district courts operate throughout the United States; every state has at least one. Congress, through legislation, can modify the jurisdiction of district courts as well as change the number of district court judgeships.

mandatory jurisdiction
the requirement that a court hear all cases filed with it

Defendants who lose in the district courts have the right to appeal their cases to a federal court of appeals if they believe the presiding judge misinterpreted or misapplied the law. However, the majority of cases decided by the district courts are not appealed. Therefore, the overwhelming majority of federal lawsuits are resolved in the district courts.

U.S. COURTS OF APPEALS At the middle level of the federal judicial hierarchy are 13 courts of appeals. Figure 15.2 shows the 12 courts of appeal that cover specific geographic regions (circuits), including the District of Columbia (D.C.) Circuit, plus the Federal Circuit. Each of the 12 circuit courts with geographically based jurisdiction hears appeals from the U.S. district courts within its region. D.C. Circuit also handles appeals stemming from conflicts over administrative law for the many federal agencies located in Washington, D.C. Confirmation battles for President Obama's nominees to three seats on this court led to changes in the Senate's filibuster rules in 2013, as discussed later in this chapter. The Federal Circuit has issue-based jurisdiction (as opposed to geographically based jurisdiction, as in the other circuits), covering specific kinds of cases, involving such matters as international trade, government contracts, and patents. Congress has authorized 179 judgeships for these courts.

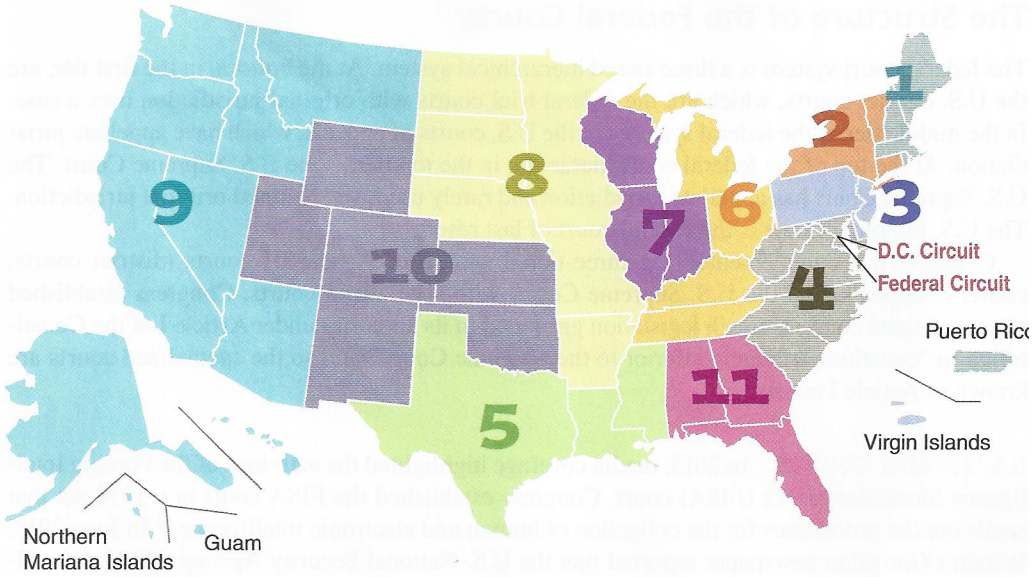


FIGURE 15.2

THE U.S. COURTS OF APPEALS

SOURCE: www.judicialnominations.org.

Judges on the courts of appeals work in panels of three to review cases. Similar to the U.S. district courts, the U.S. courts of appeals have mandatory jurisdiction, therefore they hear all cases that are filed with their court. The U.S. courts of appeals are considered intermediate appellate courts, because they are not constitutionally the court of last resort. Losing parties can appeal to the U.S. Supreme Court; however, only a very small percentage do. Therefore, the courts of appeals are in fact the court of last resort for the overwhelming majority of appealed cases.

THE U.S. SUPREME COURT At the top of the federal judicial hierarchy sits the U.S. Supreme Court. Although this court has a very limited original jurisdiction, it hears appeals from both the federal courts and the state courts when cases decided there concern a conflict over federal law, or a federal question. The framers limited the Supreme Court's original jurisdiction to those cases that concern ambassadors, public ministers, and consuls, and those involving two or more states. But over time, Congress, in cooperation with the Court, has decided that the Court should retain original jurisdiction only in cases involving suits between two or more states.

The U.S. Supreme Court's appellate jurisdiction is **discretionary jurisdiction,** which means the justices choose the cases they will hear from among all the cases appealed to the Court. Ultimately, the justices select to hear only a fraction of the cases appealed to the Supreme Court.

Since 1869, nine judges, called justices, sit on the Supreme Court. One of these justices has been specially selected by a president to serve as the **chief justice,** the judge who provides both organizational and intellectual leadership on the Court. Each of the remaining eight justices is an **associate justice.** Political scientists distinguish periods of court activity by changes in the chief justices; therefore, Supreme Courts are named for the chief justice. Today, we have the Roberts Court, named for the current chief justice, John Roberts, whom President George W. Bush nominated and the Senate confirmed in 2005.

discretionary jurisdiction
the authority of a court to select the cases it will hear from among all the cases appealed to it

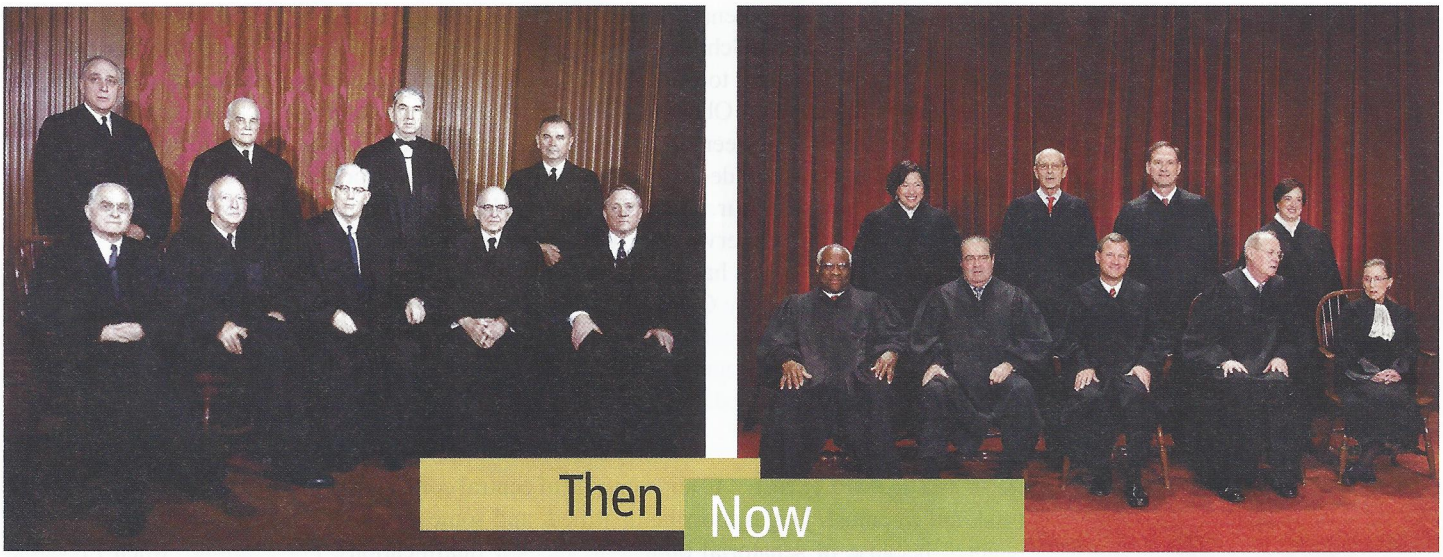
chief justice
the leading justice on the Supreme Court, who provides both organizational and intellectual leadership

associate justice
title of the eight Supreme Court justices who are not the chief justice

judicial independence
insulating judges from the need to be accountable to voters or elected officials so that they can make impartial decisions based on the law

Appointing Federal Judges

The framers wanted to ensure **judicial independence** so that federal judges could make impartial decisions based on the law, protected from the need to win the votes of citizens or support from elected officials to keep their job. To foster judicial independence, Article II of the Constitution establishes the president's authority to appoint, with the advice and consent of the Senate



Before Thurgood Marshall joined the U.S. Supreme Court as its 96th justice in 1967, all Supreme Court justices had been white men. Marshall, the first African American to sit on the Court, replaced Justice Tom Clark on the Court led by Chief Justice Earl Warren. The "Then" photo shows the all-male, all-white Warren Court (1953–1969) in a 1957 photo. Today, the Supreme Court has a record high of three women justices, including the first justice (male or female) of Hispanic descent, and the second African American to serve on the Supreme Court. While women (Caucasian and one Latina) and African American men have served on the Court as justices, only white men have served as chief justice of the Supreme Court. Should the Supreme Court offer descriptive representation, that is, look like the population in terms of demographic characteristics such as sex, race, and ethnicity, even if only for symbolic reasons?

Supreme Court and other federal judges. In addition, Article III states that U.S. Supreme Court justices and the judges of the inferior courts Congress creates "shall hold their offices during good behavior, and shall at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office." Therefore, the term of office for Article III judges extends until they resign, retire, or pass away, or until Congress removes them through the impeachment process. Because of the life term of Article III judges, the selection of federal judges for the district courts, the courts of appeal, and the U.S. Supreme Court is very important. Unfortunately, growing partisanship has increased the challenges presidents confront when identifying judicial nominees and winning Senate confirmation.

According to the Brennan Center for Justice, the number of judicial vacancies in federal district courts averaged 60 in each of the first 5 years of President Obama's administration; the 10 percent vacancy rate is a historic high in district court vacancies.[14] At the end of 2013, there were 18 vacancies in the federal courts of appeals, which is 10 percent of the judgeships in those courts.[15] In December 2013, there were 10 court of appeals nominees pending and 42 district court nominees pending.[16]

In both 2009 and 2010, President Obama faced one of the most important decisions of his presidency—filling a vacancy on the U.S. Supreme Court. His nominations, if confirmed, would have implications for policy decades after his presidency had ended. In May 2009, Obama announced Sonia Sotomayor as his nominee for the seat that had been occupied by Supreme Court justice David Souter, who had retired at the end of the Court's 2008–2009 term. The following year, he selected Elena Kagan as his nominee to replace retiring associate justice John Paul Stevens. Obama's selections of Sotomayor and Kagan illustrate the differing characteristics presidents might emphasize when selecting judges for the federal bench.

Selection Criteria

In selecting Sonia Sotomayor, President Obama sought a competent individual who would win Senate confirmation. Sotomayor had sat on the second circuit of the U.S. Court of Appeals since 1998. Obama also wanted to appoint a justice who promoted his ideology. Finally, following his election, Obama wanted to increase the diversity of the bench. Sotomayor was the Court's first Latino member.

Obama's selection of Elena Kagan was perhaps more surprising. Kagan, who served as the dean of the Harvard Law School, had never served as a judge. Though there was precedent for nonjudges being appointed to the Court, that career path was not the usual one. But in Kagan many analysts believe that Obama saw traits that far outweighed her lack of experience on the bench. Throughout her career, Kagan had gained a reputation as a conciliator—a peacemaker who could bring divergent ideological sides together, a characteristic that could prove important given the often-divided nature of the Court. In addition to Kagan's impeccable academic credentials, because she had not served as a judge, Kagan was not saddled with an enormous record of judicial opinions that could have been used against her during the confirmation process.

In Obama's two Supreme Court nominations, we clearly see several of the criteria presidents consider when nominating federal judges and justices: judicial competence, political ideology, representativeness of the population, and political considerations. These are the most common criteria presidents considered.

JUDICIAL COMPETENCE Competence is of central concern for nominees to the federal bench. First and foremost, judges must be qualified, and some nominees in recent decades have been rejected because of senatorial doubts about their qualifications. For example, when President George W. Bush nominated his White House counsel Harriet Miers as an associate Supreme Court justice in 2005, he was forced to withdraw his nomination because of concerns about Miers's lack of qualifications. Those objections indicated strongly that Miers would face a steep uphill climb in achieving Senate confirmation.[17]

POLITICAL IDEOLOGY Mindful that federal judges typically serve far beyond their own tenure, presidents often regard these nominations as a way of cementing their own legacies. They give the nod to judges, and more significantly, to Supreme Court justices, with whom they are ideologically compatible: liberal presidents nominate liberal judges, and conservative presidents nominate conservative judges. When George W. Bush nominated Chief Justice John Roberts, he chose an individual who shared the president's own policy views, particularly with regard to issues such as abortion, church and state relations, and criminal due process protections. In nominating Sonia Sotomayer, President Obama chose a person who held liberal views consistent with his own.

Using party affiliation and previous decisions as a measure of a nominee's political ideology, presidents tend to nominate judges with their own party affiliation. However, a judge's ideology can shift over time. For example, President George W. Bush nominated David Souter, expecting him to be a solid conservative vote on the Court. Instead, Souter became a solid member of the Court's liberal bloc, voting often with the more liberal justices. Then Justice Souter resigned from the Supreme Court just months after President Obama took office, allowing a Democratic president to replace the Republican-nominated Souter.[18]

descriptive representation
the attempt to ensure that governing bodies include representatives of major demographic groups—such as women, African Americans, Latinas, Jews, and Catholics—in proportions similar to their representation in the population at large

substantive representation
the assumption that a government official will best serve the concerns of the racial, ethnic, gender, or other group to which he or she belongs

symbolic representation
diversity among government officials is a symbol, an indication, that our democracy, our government by and for the people, is functioning appropriately by offering equal opportunity to influence government by becoming a government official

REPRESENTATION OF DEMOGRAPHIC GROUPS The impulse to diversify the Court's membership serves the goal of **descriptive representation,** which is representation on governing bodies, including the Court, of the country's leading demographic groups in proportion to their representation in the population at large. There is an implicit assumption that a justice occupying one of these seats will best serve the concerns of the racial, ethnic, gender, or other group to which he or she belongs, thereby offering **substantive representation.** That is, the Latino justice will take the perspective of Latinos, the female justice will consider the policy preferences of women, and so on. However, the representation may be more symbolic than real because not all women have the same views, nor do all men, even if they are of the same race or ethnicity. Therefore, one female or Latino judge cannot represent the diversity of views of the people they look like. Nevertheless, many public figures and citizens say that the Court should mirror as closely as possible the main contours of the national demographic profile, offering **symbolic representation** which indicates that our democracy, our government by and for the people, is functioning appropriately by offering equal opportunity to influence government as a government official.

Some presidents appear more concerned than others with enhancing diversity on the federal bench. Table 15.1 suggests that, compared to Republican presidents, Democratic presidents have been more concerned about descriptive representation.

POLITICAL CONSIDERATIONS Clearly, the nomination and confirmation of federal judges by the Senate does not take place in a vacuum. Beyond presidents' and senators' concerns about judicial qualifications, political ideology, and demographic representation, these players are acutely aware of what their constituencies will think of any nominee and of what might happen at the confirmation hearings. For that reason, they continuously gauge public opinion throughout the nomination and confirmation process. In addition to being mindful of the voters, the president and the senators calculate how interest groups, particularly those that helped to put them in office, will view the nominee.

TABLE 15.1

Demographics of Federal Judges as a Percentage of Those Confirmed (1993–2013)

CHARACTERISTIC	BILL CLINTON	GEORGE W. BUSH	BARACK OBAMA
Asian	1%	1%	7%
Hispanic	7%	9%	13%
Black	17%	8%	18%
White	75%	82%	62%
Female	29%	22%	42%
Male	71%	78%	58%

SOURCE: American Constitution Society for Law and Policy, www.judicialnominations.org.

Interest groups often have a significant voice in the confirmation hearings. Some groups almost always participate in the hearings, among them the American Bar Association, labor and civil rights organizations, law enforcement groups, and business interests. These groups let the members of the Senate know clearly whether they support or oppose a given candidate.

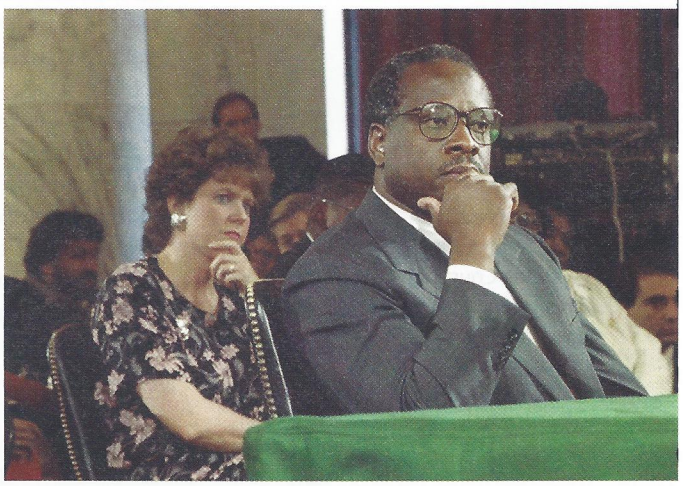
senatorial courtesy
a custom that allows senators from the president's political party to veto the president's choice of federal district court judge in the senator's state

The Senate's Role: Judicial Confirmation

Article II of the Constitution gives the president the authority, with the advice and consent of the Senate, to appoint federal judges. This sharing of power, with the president nominating judges and the Senate confirming them, operates in accordance with our system of checks and balances. In the case of the federal district court judges, a custom known as **senatorial courtesy** gives senators—although only those who are of the same political party as the president—a powerful voice in who the president nominates to serve as district court judges in their state. Under this tradition, a senator from the same political party as the president can block the president's nomination of a federal district court judge in the senator's state.

Because courts of appeals judges and Supreme Court justices serve more than one state, the individual senators from any one state play a far less powerful role in the appointment of these judges. Rather, the Senate Judiciary Committee takes the lead. Committee members are charged with gathering information about each nominee and providing it to the full Senate. The Senate Judiciary Committee votes on nominees to the federal bench, and the full Senate uses this vote to signal whether the nominee is acceptable. Sometimes the judiciary committee does not make a recommendation about a nominee, as when members split their vote 7-7 on the nomination of Clarence Thomas to the U.S. Supreme Court in 1991.

President Obama, like Presidents Bill Clinton and George W. Bush before him, ran into problems with many of his judicial nominees, particularly those nominated to the courts of appeals. Sparked by partisanship, senators from both political parties have used the filibuster to block votes on judicial nominees to promote partisan bias on specific courts. In November 2013, after repeated filibustering of President Obama's nominees, the Democratic majority in the U.S. Senate argued that the Republican minority had gone too far in its efforts to thwart the president. Without one vote from the Republican minority, the Democratic majority approved a filibuster rule change, called the nuclear option, prohibiting the use of the filibuster to block votes on presidential nominees to executive branch positions and all judicial positions except those for the U.S. Supreme Court. This rule change will force the Senate to provide its advice and consent on all presidential nominees.



Among the criteria President George H. W. Bush considered when he nominated Clarence Thomas to the U.S. Supreme Court in 1991 were Thomas's competence and political ideology, public concern for demographic representation, and political considerations. Thomas's conservative ideology, experience on the U.S. Court of Appeals—combined with public interest in replacing retiring Justice Thurgood Marshall, the first black Supreme Court justice, with another black justice—made Thomas a good choice for President Bush. However, liberal organizations raised concerns about Thomas, including the fact that he had served only two years as a federal judge. Here we see nominee Thomas, with his wife behind him, during the Senate Judiciary Committee confirmation hearings. The Judiciary Committee's 7–7 split vote was followed by the Senate's 52–48 vote to confirm. Today, Thomas remains the lone black justice on the U.S. Supreme Court.

Once Supreme Court justices and other Article III judges are confirmed by the Senate, they serve for life, as long as they do not commit any impeachable offense. Although lifetime tenure is controversial, it also means that such appointees often are the longest-lasting legacies of the presidents who appoint them.

How the U.S. Supreme Court Functions

collegial court
a court made up of a group of judges who must evaluate a case together and decide on the outcome; compromise and negotiation take place as members try to build a majority coalition

As a **collegial court,** the Supreme Court is made up of a panel of justices who must work closely together to evaluate a case and decide, with a majority vote, the outcome. Collegially, they decide what cases to hear, resolve each case heard, and develop the legal reasoning that, as presented in the Court's written opinion, will persuade the public that the Court's decision is correct. The *correct decision* means the justices upheld the legal principles found in the Constitution. Today's reality is that it is common for Supreme Court cases to be decided by a 5–4 vote, which indicates that the justices do not all agree on the same interpretation of constitutional language and its legal principles.

The overwhelming majority of cases decided by the U.S. Supreme Court are appeals. Therefore, we focus on how the Court processes the appeals that are filed with it.

Choosing Cases for Review

certiorari petition
a petition submitted to the Supreme Court requesting review of a case already decided

Approximately 7,000 ***certiorari* petitions** are filed with the Court each year, each asking for the review of a case already decided. Ultimately, the justices agree to review less than 100 cases in each annual term that begins in October and typically runs through the following June or July. For the thousands of cases the Court decides not to hear, the decision made by the last court to hear the case stands. How do the justices decide which cases to hear? Like the other stages of the decision-making process, "deciding to decide," as Supreme Court scholar H. W. Perry puts it, is a joint activity.[19]

cert memo
description of the facts of a case filed with the Court, the pertinent legal arguments, and a recommendation as to whether the case should be taken, written by one of the justices' law clerks and reviewed by all justices participating in the pool process

The decision to place a case on the Supreme Court's docket (schedule of cases it will review) is a collaborative one, with the nine justices and their law clerks (four clerks per associate justice and five for the chief justice) working together. The Supreme Court justices pool their law clerks so that only one clerk reviews a *certiorari* petition and writes a **cert memo,** which includes a description of the facts of the case, the pertinent legal arguments, and a recommendation as to whether the Court should hear the case. The clerk's cert memo is shared with all the justices. After reviewing the cert memos, the chief justice distributes a list of possible cases, the discuss list. The associate justices may add cases to the discuss list based on their own reviews of cert memos.

writ of *certiorari*
Latin for "a request to make certain"; issued by a higher court, this is an order for a lower court to make available the records of a past case it decided so that the higher court can review the case

Rule of Four
practice by which the Supreme Court justices determine if they will hear a case if four or more justices want to hear it

On Fridays throughout the Court's term, the justices meet in conference to discuss the cases on the discuss list.[20] At this point, they vote on whether to issue a writ of *certiorari*—a Latin term roughly translated as "a request to make certain"—for specific cases. The **writ of *certiorari*** is a higher court's order to a lower court to make available the records of a past case so that the higher court can review the case.[21] A writ of *certiorari* is sent when the justices, using their discretionary jurisdiction, agree to hear a case. The justices determine which cases to hear according to a practice known as the **Rule of Four,** under which the justices will hear a case if four or more of the nine justices decide they want to hear it. They do not need to give reasons for wanting or not wanting to hear a case—they simply must vote.

Considering Legal Briefs and Oral Arguments

***amicus curiae* brief ("friend of the court" brief)**
a legal brief, filed by an individual or a group that is not a party in the case, written to influence the Court's decision

When the justices agree to put a case on the docket, the parties in the litigation shift into high gear (see Figure 15.3). The petitioner (the party that sought the Court's review) files with the Court a brief—a document detailing the legal argument for the desired outcome. After the filing of this brief, the opposing party files its own brief with the Court.

Today, *amicus curiae* briefs are a common part of Supreme Court litigation. Filed by a person or group that is not a party to the lawsuit, an ***amicus curiae* brief, or "friend of the court" brief,** is written to influence the Court's decision in a specific case. Controversial cases with the potential to affect public policy trigger the filing of many *amicus* briefs.

In comparison with the legal briefs filed by the two parties involved in the legal dispute, *amicus curiae* briefs typically put forth new legal arguments, and discuss broader societal effects of potential Court decisions (not just the effect on the litigants). Jurists do not legally have to consider the information provided in *amicus curiae* briefs. However, research indicates that judges often use the information or the legal arguments contained in *amicus curiae* briefs to help them decide cases.[22] Judicial scholar Paul Collins found that no type of interest group dominated *amicus* activity, but instead "*amicus* participation in the Court is pluralistic."[23] Associate Supreme Court justice Stephen Breyer argues that the participation of organized interests in the judicial decision-making process provides an avenue for citizen engagement and civic discourse, which support a healthy democracy.[24]

In addition to reviewing legal briefs, justices listen to oral arguments—attorneys' formal spoken arguments that lay out why the Court should rule in their client's favor. Heard in the Supreme Court's public gallery, oral arguments give the justices the opportunity to ask the parties and their lawyers specific questions about the arguments in their briefs. To assist in their preparation for oral argument, justices typically have their clerks prepare **bench memos,** which summarize the case and outline relevant facts and issues presented in the case documents and the legal briefs. The bench memos may also suggest questions for the justices to ask during oral arguments.[25]

In typical cases, each side's lawyers have 30 minutes to make a statement to the Court and to answer the justices' questions. However, the justices can provide more time for oral argument, as they did in 2012 when they scheduled six hours of oral argument, over the course of three days, for the case challenging the constitutionality of the Patient Protection and Affordable Care Act (2010). The justices frequently interrupt the attorneys during their oral arguments by asking questions and sometimes seem to ignore the lawyers entirely, instead talking with one another. Chief Justice Roberts points out that the justices do not discuss the cases before oral argument. "When we get out on the bench, it's really the first time we start to get some clues about what our colleagues think. So we are often using questions to bring out points that we think our colleagues ought to know about."[26] Associate Justice Kagan notes that "part of what oral argument is about is a little bit of the justices talking to each other with some helpless person standing at the podium who you're talking through."[27] This discourse takes place entirely in public view, and transcripts (and sometimes even tapes) are readily available to the public.

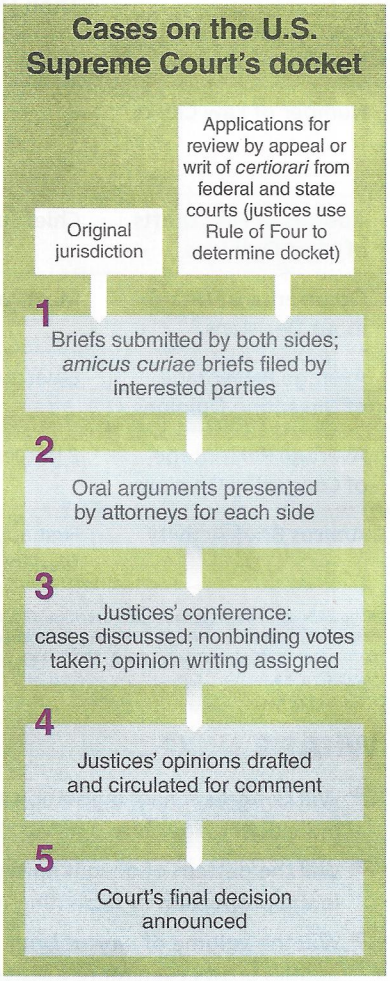
After the oral arguments, the justices meet in a private, justice-only conference to deliberate; no law clerks are present, and no information is shared with the public. The justices take a nonbinding vote on the case. If the chief justice votes with the majority, he chooses whether he wants to write the opinion that will provide the legal reasoning for the Court's decision or if he will assign the task to one of the other justices in the likely majority. If the chief justice is not with the majority, the senior member of the majority decides whether to write the opinion or assign the opinion to another justice. The assignment of the majority opinion is crucial to the resolution of the case because, in writing the opinion, the justice may persuade some justices to change their votes, making for a larger majority or possibly turning the majority into the minority, turning the losing party (based on the nonbinding conference vote) into the winning party. So let's consider how judges decide cases.

Resolving the Legal Dispute: Deciding How to Vote

How does each justice decide how to vote in a particular case? Judicial scholars offer several judicial decision-making models. The **legal model** focuses on legal norms and principles as the guiding force in judicial decision making. Specifically, according to the legal model, judges consider existing precedents, relevant constitutional and statutory law, and the intent of those who wrote the relevant laws, when deciding cases. Law schools train lawyers, and therefore judges, to follow the legal model. The **attitudinal model** indicates that judges allow their policy and ideological preferences to influence their decisions. In fact, evidence suggests that Supreme Court justices are for the most part ideologically consistent in their own decision making.[28] Constitutional law professor Dale Carpenter notes, "There's evidence that the justices do vote against their policy preferences from time to time, enough to disrupt the general narrative that they just vote their ideological preferences. But that doesn't stop the general story from being true."[29]

POLITICAL Inquiry

FIGURE 15.3 DECISION MAKING ON THE SUPREME COURT What is the Rule of Four? At what stages of the process do law clerks have the potential to influence the decisions of the Court?



bench memo
written by a justice's law clerk, a summary of the case, outlining relevant facts and issues presented in the case documents and briefs, that may also suggest questions to be asked during oral arguments

legal model
judicial decision-making model that focuses on legal norms and principles as the guiding force in judicial decision making, including existing precedents, relevant constitutional and statutory law, and the lawmakers' intent

attitudinal model
judicial decision-making model that claims judicial decision making is guided by policy and ideological preferences of individual judges

Then Now Next

Changes in the Supreme Court

	Then (1801–1835)	Now*
Number of Justices	5	9
Number of Law Clerks	0	37 (4 per associate justice, and 5 for the chief justice)
Authors of First Drafts of Most Opinions	Chief Justice	Law clerks
Occurrence of Unanimous Decisions	Most cases	Rare
Average Percentage of Dissenting Opinions	6 percent**	60 percent**
Average Percentage of Concurring Opinions	2 percent**	40 percent**
Amicus Brief Activity	First adversarial *amicus* filed in 1823 case+	At least one brief filed in 90 percent of cases++

*The Rehnquist Court is the most recent court for which data are readily available.
**Paul M. Collins, Jr., *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (New York: Oxford University Press, 2008): 143.
+Collins, p. 39.
++Collins, p. 46.

WHAT'S NEXT?

- Will Congress enact legislation to decrease the role of law clerks (who individual judges hire with no checks) in opinion writing?
- Will the pattern of dissent among the justices, as evidenced by the increase in the proportion of dissenting and concurring opinions, continue?
- Will the volume of *amicus* brief activity continue as the partisan nature of politics grows even more divisive?

strategic model
judicial decision-making model that states that the primary guide for judges is their individual policy preferences; however, their preferences are tempered by their consideration of institutional factors, as well as concern over the legitimacy of the court system

concurring opinion
judicial opinion agreeing with how the majority decides the case but disagreeing with at least some of the legal interpretations or conclusions reached by the majority

dissenting opinion
judicial opinion disagreeing both with the majority's disposition of a case and with their legal interpretations and conclusions

According to the **strategic model,** "while jus tices' decisions are primarily motivated by polic concerns (thus accepting the attitudinal model institutional constraints exist that limit the abilit of the justices to vote in a manner that is compati ble with their attitudes and values in every case."[3] The institutional constraints identified by propo nents of the strategic model include the preference of Congress, the president, and other justices sittin on the collegial court, as well as concern for main taining the legitimacy of the court system. If th Court makes decisions that are too far afield fron societal norms, the public might begin to questio the legitimacy of the Court in our democracy.

Research on the decision making of th Supreme Court justices suggests that none o these models explains every aspect of judicia decision making. Indeed, the three models mus be combined to better understand these decisio makers. Judicial scholars Bryan W. Marshall Richard L. Pacelle, Jr., and Christine Ludowis argue that "the behavior of the Supreme Court i governed by the personal preferences of the jus tices, but that is tempered by the need to attend t precedent as well as the institution's sense of dut and obligation to the law and the Constitution."[3]

Legal Reasoning: Writing the Opinions

After the conference at which the nonbindin vote to decide a case occurs, justices and their law clerks begin writing opinions. The justices' law clerks often write the first draft of their opinion and frequently take the lead in communicatin with the other justices through their law clerks. I fact, judicial scholar Artemus Ward states: "Mod ern justices now see themselves and their clerk as comprising an opinion writing team."[32]

When the justices disagree about a decision it is likely that several draft opinions circulate The justice assigned the majority opinion wil circulate a draft and revise it based on input from the other justices. Revisions are made t strengthen the legal reasoning, to win new votes from justices who were in the minority, or t keep the votes of justices in the majority. Other justices, with their clerks, will draft and cir culate opinions with their legal reasoning. Some of these drafts may become concurring opin ions; others may become dissenting opinions. **Concurring opinions** agree with how th majority opinion decides the case but disagree with at least some of the legal reasoning o conclusions reached in this majority opinion. **Dissenting opinions** not only disagree with th legal reasoning but also reject the underlying decision in the case.

After the opinions are written and signed off on, the Court announces the decision by pub lishing it. On rare occasions, the justices read their opinions from the bench. In 2007, Justic Ginsburg read her dissenting opinion in the *Ledbetter v. Goodyear Tire & Rubber*[33] case t bring immediate attention to a decision that she believed would have great, negative conse quences, especially on women. Ginsburg's reading was a catalyst for Congress to formulat and enact the Lilly Ledbetter Fair Pay Act in 2009, which was the first bill President Obam signed into law. The Fair Pay Act overruled the Court's interpretation of a piece of the 196

Civil Rights Act (in the 2007 *Ledbetter* case). In the *Ledbetter* case, the Court decided that when Ledbetter finally found out about her discriminatory pay, 19 years after her first discriminatory paycheck, it was too late for her to sue because she had only 180 days after the first discriminatory paycheck was issued in which to sue, according to the majority of justices' interpretation of the 1964 law. The Fair Pay Act of 2009 states that the 180-day statute of limitation to file an equal pay lawsuit (created in the 1964 law) resets after each new discriminatory paycheck. The Fair Pay Act is now the law that the Supreme Court must apply to pay discrimination cases.

Although the U.S. Supreme Court is the court of last resort, it does not always have the final word. As in the *Ledbetter* case, Congress can write new legislation to overrule the Court's interpretation of law. In this way, the U.S. Supreme Court is part of an ongoing dialogue, with officials in the other branches and levels of government, on laws and policies.

POLITICAL Inquiry

Standing behind President Barack Obama as he signs his first bill into law is Lilly Ledbetter, whose loss in the Supreme Court (with a divided 5-4 vote) mobilized Congress to approve the Lilly Ledbetter Fair Pay Act in 2009. How did Justice Ruth Bader Ginsburg, the lone woman on the Supreme Court at the time, vote on this sexual discrimination case? What did Justice Ginsburg do to light the spark that mobilized congressional action to enact a law to "correct" the Court's (mis)interpretation of the 1964 Civil Rights Act?

Judges as Policy Makers

Courts make law—common law—by deciding cases and establishing legal principles that guide future litigants and judges. The lawmaking function of courts ensures that judges have a powerful role as public policy makers, because the decisions they make profoundly affect not only the parties in the case but also society, the economy, and politics.

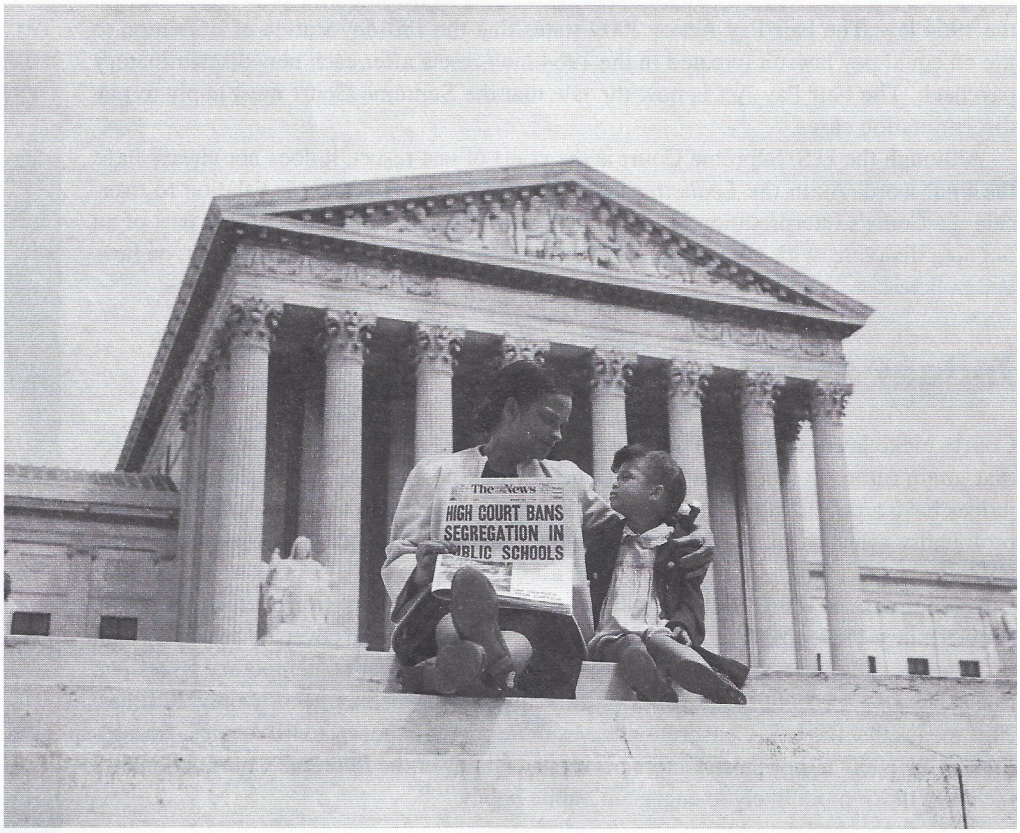
Law professor Tom Ginsburg, who compares constitutions from across the globe adopted since 1787, notes that the U.S. Constitution is briefer and covers fewer topics than do more recently approved constitutions. It also does not cover contemporary issues and topics because it was ratified over 200 years ago and has been amended only 27 times. This means that the U.S. Constitution leaves more room for courts to fill in gaps. According to Ginsburg, "all of these factors perversely empower the Supreme Court and makes the court much more likely to engage in public policy."[34]

From Judicial Review to Judicial Policy Making

The Court's decision in *Marbury v. Madison* (1803) claimed the power of judicial review for the courts, making the courts a major policy maker. The courts determine what policies are constitutional. In 1896, the Supreme Court decided in *Plessy v. Ferguson*[35] that the Fourteenth Amendment did not prohibit segregation of people based on race and color in public accommodations, specifically train cars. The Court in *Plessy* established the common-law legal principle of separate but equal. That decision allowed state and local governments to enact laws that permitted, and in some cases even required, segregation by race in a variety of venues, from movie theaters to housing developments to public schools. Then the Court struck a blow to segregation policies with its decision in *Brown v. Board of Education of Topeka, Kansas* (1954).[36] In *Brown,* using the common-law principle of judicial review, the Court reinterpreted the Fourteenth Amendment's equal protection clause, ruling the legal principle of separate but equal unconstitutional, and found segregation laws unconstitutional. The Court took its decision further, calling for integration of public schools with all deliberate speed. Clearly, the Court was engaged in policy making, and the policy has had a tremendous effect on society, the economy, and politics.

Supreme Court Justice Sandra Day O'Connor argues that the *Brown* case was a catalyst for lawsuits in which litigants claim violations of their constitutional rights to equal protection of the law and due process. O'Connor notes that prior to the *Brown* case, conflicts over the separation of powers within the national government and the distribution of powers between the national and state governments dominated the Supreme Court's docket. However, since the *Brown* case, "the Supreme Court's decisions on individual rights have recognized for the first time many of the freedoms that most Americans today assume as our birthrights. Among them are the right to speak freely and advocate for change, the right to worship as we please, and the privilege of political participation."[37] Therefore, judicial policy making includes defending and creating individual rights.

POLITICAL **Inquiry**



In a May 1954 landmark decision in the case of *Brown v. the Board of Education of Topeka, Kansas* (discussed in Chapter 5), the U.S. Supreme Court ruled *de jure* segregation in American public schools unconstitutional. Today, *de facto* segregation exists in many public schools. What is *de jure* segregation? What is *de facto* segregation? What causes *de facto* segregation?

Judicial Activism versus Judicial Restraint

judicial activism
an approach to judicial decision making whereby judges are willing to strike down laws made by elected officials as well as step away from precedents

When considering the courts' role as policy makers, legal analysts often categorize judges and justices as exercising either judicial activism or judicial restraint. **Judicial activism** refers to the courts' willingness to strike down laws made by elected officials as well as to step away from past precedents, thereby creating new laws and policies. It reflects the notion that the role of the courts is to check the power of the federal and state executive and legislative branches when those governmental entities exceed their authority or violate the Constitution.

During the Warren Court (the tenure of Chief Justice Earl Warren, 1953–1969), using the common-law doctrine of judicial review, the Supreme Court took an activist stance, most notably in rejecting the constitutionality of racial segregation. By barring southern states from segregation in a variety of contexts—including schools and other public facilities—the activist Warren Court powerfully bolstered the efforts of civil rights activists. The activism of the Warren Court was also instrumental in shaping the modern rights of the accused and the modern definitions of the privacy rights of individuals, which would later form the framework for the Court's thinking about abortion rights. Supported by presidents who enforced its rulings, the Warren Court took on a leadership role in changing the nature of U.S. society.

Although many people connect judicial activism with liberal-leaning court decisions, such as those made by the Warren Court, the reality is that judicial activism is also used to further conservative causes. The Burger Court (1969–1986) and the Rehnquist Court (1986–2005) were both conservative and activist. In fact, judicial scholar Thomas Keck labeled the Rehnquis

Court "the most activist Supreme Court in history."[38] The Rehnquist Court's conservative-leaning activism is evident in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992). In this case, the Court checked the authority of the state of Pennsylvania to implement a state law that limits access to abortion. In its decision, the Court laid the framework for the tightening of abortion laws in many states by clarifying what measures the states could take in restricting abortions.

Today, political scientists argue that "judicial activism simply means that the courts make public policy when the elected branches cannot or will not, often by declaring the actions of other political actors to be unconstitutional."[39] In addition, judicial activism means that the judges view the Constitution as a living, evolving document. However, the term *judicial activism* is often used by people to criticize judges when they do not agree with a court's decision.

Some judges reject the idea that the courts' role is to actively check legislative and executive authority. Noting that people elect officials to those branches to carry out the people's will, these judges observe **judicial restraint**—the limiting of their own power as judges. Practitioners of judicial restraint believe that the judiciary, as the least democratic branch of government, should not check the power of the democratically elected executive and legislative branches unless their actions clearly violate the Constitution.[40]

judicial restraint
an approach to judicial decision making whereby judges defer to the democratically elected legislative and executive branches of government

Although the policy making of judges, particularly U.S. Supreme Court justices, is an acknowledged reality today, justices do not have the last word. Associate Justice Sandra Day O'Connor notes, "the Constitution is interpreted first and last by people other than judges. The judicial branch is only an intermediate step in the continuing process of making our Constitution work."[41]

Constraints on Judicial Policy Making

The U.S. judiciary is a powerful institution. Nonetheless, judges and justices face checks and constraints that limit how they decide cases, make law, and act as policy makers. Among the most important checks on the judiciary's power are the other branches of government. But lawyers, interest groups, and individual citizens also check the courts and constrain their activism. Moreover, judges and justices are trained to, and actively attempt to, make good law by correctly interpreting the Constitution.

CHECKS AND BALANCES Formidable checks on the judiciary come from the legislative and executive branches. Article II of the Constitution explicitly gives the legislative and executive branches crucial checks on the structure of the courts. It grants Congress the power to create all federal courts other than the Supreme Court and gives both the president and the U.S. Senate important powers in determining who sits on all federal courts. Indeed, the procedures for choosing the judges who will serve on the federal bench afford the legislative and executive branches significant control over the judiciary.

Beyond giving the president a check on the judiciary through the power to nominate judges, the Constitution also empowers the president and the executive branch due to the courts' reliance on them for the enforcement of its decisions. Specifically, if presidents fail to direct the bureaucracy to carry out judicial decisions, those decisions carry little weight. Frequently, it is executive implementation that gives teeth to the judiciary's decisions.

The Constitution also creates a legislative check on the judiciary because the framers established only the Supreme Court and left it up to Congress to create the lower federal courts. In addition, the Constitution allows Congress to control the Supreme Court's jurisdiction. Congress also can control, through legislation, the number of judges or justices who serve in the federal judiciary. Historically, Congress has been willing to increase the number of judges only when its majority is of the same party affiliation as the incumbent president, who will have the authority to nominate judges to the newly created judgeships. In 2013, Republicans in the Senate used the filibuster to prevent President Obama from filling three vacancies on the D.C. Circuit Court, claiming the Court did not have a sufficient workload for its eleven judgeships and therefore there was no need to fill the three vacancies. However, they did not propose legislation to reduce the number of judgeships on the D.C. Circuit Court. This conflict resulted in the nuclear option discussed earlier.

The two houses of Congress moreover have a central role in deciding whether to impeach federal judges. The House issues the articles of impeachment, and the Senate conducts the impeachment trial. Finally, Congress initiates the process of constitutional amendment and can attempt to change the Constitution to overrule a court decision with which it disagrees. In fact, in several cases Congress has embarked on constitutional amendment procedures in direct response to a Court decision with which members of Congress or their constituencies have disagreed. For example, the Twenty-Sixth Amendment (1971), which standardized the voting age to 18 years, came about after the Supreme Court ruled that states could set their own age limits for state elections.[42]

Although the courts can check the lawmaking (and hence policy-making) power of the legislative and executive branches by exercising judicial review, the legislature and the executive can check the courts' power of judicial review through the creation of new laws. For example, as discussed earlier in this chapter, in response to the Supreme Court's interpretation of the law in the *Ledbetter v. Goodyear Tire & Rubber* in 2007, Congress approved and President Obama signed the Lilly Ledbetter Fair Pay Act in 2009, which overruled the Court's interpretation of a piece of the 1964 Civil Rights Act.

PUBLIC ACCOUNTABILITY Public opinion seems to have a distinct influence on what the courts do, especially appellate courts such as the U.S. Supreme Court. The Court rarely issues a decision that is completely out of step with the thinking of the majority of the population. In fact, most cases seem to follow public opinion. When the Court does break with public opinion, it opens itself up to harsh criticism by the president, Congress, interest groups, and/or the general public.

But sometimes in the case of a landmark decision that is out of touch with public sentiment the Court's ruling and people's opinions align over time. This shift can occur either because later courts adjust the original, controversial decision or, less commonly, because the Supreme Court's decision changes public opinion. One example of the interplay between public opinion and judicial decisions can be seen in the *Brown v. Board of Education* Court ruling. Initially many southern state legislatures and even judges in federal district and appellate courts in the South did not comply with the Court's call to integrate schools. Not only did some school districts continue to segregate, but more than 100 southern legislators signed the "Southern Manifesto," a document that claimed the U.S. Supreme Court had overstepped its authority. By the 1970s, progress in integrating schools had been made. However, there are still legal conflicts over segregation and integration today.

Citizens can also constrain the courts by threatening to ignore their rulings. When members of the public disagree with judicial decisions, or with any law for that matter, they can engage in civil disobedience. In acts of civil disobedience, individuals or groups flout the law to make a larger point about its underlying unfairness. Keep in mind that the courts have little ability to enforce their decisions, and if people refuse to recognize those decisions and the other branches of the government fail to enforce them, the courts risk losing their authority and power. Fear of losing authority may explain in part why judicial decisions rarely fall out of step with the large public stance on an issue. Like legislators, executives, and their colleagues sitting on the bench, citizens can impose significant constraints on courts and probably limit how judges handle cases and interpret laws. These constraints may not be written into the U.S. Constitution as the checks by the other branches are, but they are nonetheless very powerful and have a significant impact on how judges decide cases.

INTERNAL CONSTRAINTS Judges and justices also face powerful internal constraints on their judicial actions. Law schools train lawyers, and hence judges, to focus on the facts of the case and the relevant legal principles (found in law and precedent cases) when deciding cases. For lower-court judges, precedents from higher courts, as well as earlier decisions made by the court itself, impose limitations through the common-law doctrine of *stare decisis*. In addition, federal district court and appeals court judges do not diverge far from Supreme Court precedent because if they did so, they would risk having their decisions overturned. According to judicial scholar Paul Collins, "judges are concerned with making good law: attempting to determine the *most* legally appropriate answer to the controversy."[43]

Analyzing the Sources

THE ROBERTS COURT

JUSTICE	YEAR APPOINTED	NOMINATING PRESIDENT	CONFIRMATION VOTE	YEAR OF BIRTH
Antonin Scalia	1986	Ronald Reagan (R)	98-0	1936
Anthony M. Kennedy	1988	Ronald Reagan (R)	97-0	1936
Clarence Thomas	1991	George H. W. Bush (R)	52-48	1948
Ruth Bader Ginsburg	1993	Bill Clinton (D)	96-3	1933
Stephen G. Breyer	1994	Bill Clinton (D)	87-9	1938
John G. Roberts	2005	George W. Bush (R)	78-22	1955
Samuel Anthony Alito	2006	George W. Bush (R)	58-42	1950
Sonia Sotomayor	2009	Barack Obama (D)	68-31	1954
Elena Kagan	2010	Barack Obama (D)	63-37	1960

SOURCE: www.supremecourt.gov/about/biographies.aspx.

Evaluating the Evidence

1. Considering the party affiliation of the president who nominated each justice, what is the expected ideological bias of the Supreme Court today?
2. Considering the age of the Supreme Court justices nominated by President George W. Bush, what do you think is President Bush's long-term effect on the decision making of the Court?
3. Considering age and party affiliation of the president who nominated them, which, if any, Supreme Court justices do you believe might consider resigning during President Obama's second term? Explain your answer.
4. What would happen to the ideological bias of the Supreme Court if President Obama has the opportunity to appoint at least one more justice to the Court? What would be the effect if he has the opportunity to appoint two justices to the Court? Explain.
5. What might explain the pattern of change in confirmation votes?

The Supreme Court Today: The Roberts Court

John G. Roberts became chief justice of the Supreme Court in 2005. President George W. Bush initially nominated Roberts to replace Associate Justice Sandra Day O'Connor, who announced her retirement in the summer of 2005. Before the Senate had the opportunity to vote on Roberts's nomination for associate justice, Chief Justice William Rehnquist died. President Bush withdrew his nomination of Roberts for the associate justice position and nominated him instead for the vacant chief justice position. The Senate confirmed Roberts, and he began his term as chief justice in September 2005. O'Connor agreed to stay on the bench until the Senate confirmed her replacement. In January 2006, the Senate confirmed Samuel Alito to replace O'Connor on the bench. "Analyzing the Sources" presents information about the justices currently serving on the Roberts Court.

The ideological distribution of the Supreme Court today tilts slightly toward the conservative side, with Justices Clarence Thomas, Antonin Scalia, and Samuel Alito, as well as Chief Justice Roberts, reflecting a conservative viewpoint and Justices Sonia Sotomayor and Ruth Bader Ginsburg taking a more liberal stance on many issues. In the center are Justice Anthony Kennedy (the swing-voter), a moderate conservative, and Justices Stephen Breyer and Elena Kagan,

moderate liberals. Judicial scholars Lee Epstein and Andrew D. Martin summarize the ideologi cal nature of the Roberts Court, commenting that "Unlike the other Roberts justices, no underly ing ideological pattern seems to exist to [Associate Justice] Kennedy's votes."[44] That is, unlik the other justices whose ideological biases are often evident, Kennedy's votes swing betwee decisions supported by liberals and those supported by conservatives.

Court watcher Adam Liptak noted in the summer of 2012 that Chief Justice Roberts "ha worked hard to insulate his institution from the charge that it has political motivations, an accu sation that it is especially vulnerable to because the court's five more conservative member were appointed by Republican presidents and its four more liberal ones by Democrats."[45] Rob erts's vote to uphold the Affordable Care Act (2010), a key legislative initiative of the Democrats supports Liptak's assessment. According to Gallup polls, 4 in 10 Americans believe that th Supreme Court is ideologically balanced (not too liberal, not too conservative), 3 in 10 believ the Court is too liberal, and 2 in 10 believe the Court is too conservative.[46]

Associate Justice Ruth Bader Ginsburg, the most senior member of the liberal-leaning jus tices, claimed in the summer of 2013 that the Court "is one of the most activist in history. However, if judicial activism is measured by the number of laws struck down by the Court the Roberts Court is the least activist in the past 60 years. The liberal Warren Court, the mor conservative Burger Court, and the conservative Rehnquist Court each overturned federal, state and local laws at a higher rate than has the Roberts Court.[47]

There seems to be agreement among the justices that their questioning of attorneys has dom inated oral arguments. Justice Roberts is concerned that he has had to "act as an umpire i terms of the competition among my colleagues to get questions out. . . . I do think the lawyer feel cheated sometimes . . . it also would be nice for them to have a chance to present thei argument."[48]

According to Gallup polls, the public's approval of the Roberts Court has been droppin since its height in 2009 (61 percent approval).[49] Before the Court's 2013–2014 term began o October 7, 2013, 46 percent of Americans approved, whereas 45 percent disapproved of th way the Supreme Court was handling its job. Chief Justice Roberts is faring better than th Court. Just prior to the beginning of the term, Roberts enjoyed a 55 percent approval rating Interestingly, Roberts's approval rating among Democrats was 61 percent, whereas it was onl 46 percent among Republicans. Prior to Roberts's 2012 vote to uphold the Affordable Care Ac his approval was higher among Republicans than Democrats.

Gallup polls also show that Americans trust the judicial branch of the federal governmer more than the other two branches: 6 in 10 Americans report having a "great deal" or a "fai amount" of trust in the federal courts.[50]Although many people criticize appellate courts for judicia activism when they disagree with a court decision, citizens trust the nonelected policy maker (judges and justices) of the federal judicial branch more than they trust their elected federa representatives in the executive and legislative branches. This trust is a challenge to those wh believe that in a representative democracy only elected government officials should make policy Because of the vague and ambiguous language in laws that courts have to apply to resolv conflicts, judicial policy making is inevitable.

Conclusion

Thinking Critically About What's Next For the Judiciary

Rooted in a common-law tradition and framed by the Constitution, the American judiciary in its early form strongly reflected its English heritage, with its emphasis on law made by judges. Over the past two-plus centuries, the judiciary has evolved powerfully to accommodate a broad spectrum of societal changes in a continuously developing country. Today the policy-making role of the courts is acknowledged, if not appreciated, by political scientists, government officials, and most citizens.

French philosopher Alexis de Tocqueville noted the uniqueness and political consequences of the U.S. courts' power of judicial review in his famous 1835 book *Democracy in America*. He wrote: "The Americans have given their judges the right to base their decisions on the Constitution rather than on laws. In other words, they allow them not to apply laws which they consider unconstitutional."[51] Moreover, Tocqueville stated, "there is hardly a political question in the United States which does not sooner or later turn into a judicial one."[52] Politics have always been a part of the federal court system, and still are.

The judicial activism practiced by liberal and conservative justices, as they apply the common-law doctrine of judicial review, feeds concerns that the courts are engaged in partisan policy making, just like the other two branches of government. Although judges strive to make decisions that are legally correct, grounded in the fundamental rights found in the U.S. Constitution, the reality of 5–4 Supreme Court decisions indicates that not everyone agrees on what the Constitution means. The Senate's adoption of the nuclear option to limit the power of the partisan minority in the judicial appointment process speaks volumes to the partisan battles to control the direction of court decisions about the meaning of laws—constitutional law, legislation, executive orders, administrative law, and common law.

Whatever the future holds, the courts will remain a bastion in defense of individual liberties and rights. And public opinion of the judiciary will likely continue to run high, particularly when this institution is compared with the other branches of the government.

Study Now

Summary

1. What Do Courts Do?

The primary responsibility of courts is to resolve legal disputes over the facts of a case and the proper interpretation and application of law. Through the common-law doctrine of judicial review, the courts determine when acts of government bodies or officials are unconstitutional.

2. Sources of Laws in the United States

There are five sources of law in the American system: judicial decisions, constitutions, legislation, executive orders, and administrative law. Ultimately, courts resolve conflicts over these laws.

3. Types of Lawsuits

Trial courts resolve disputes over the violations of criminal laws and civil laws. The procedures used in criminal trials differ from those used in civil trials. Courts of appeals review cases to determine if errors were made in the interpretation or the application of law during the previous court hearing(s) of a legal dispute.

4. The Federal Court System

The Constitution expressly established only the Supreme Court, and, in a series of laws, beginning in 1789, Congress created the U.S. district courts, U.S. courts of appeals, and U.S. special courts. The district courts, special courts, and Supreme Court have original jurisdiction, although the Supreme Court rarely uses this jurisdiction. The courts of appeal and the Supreme Court have appellate jurisdiction.

5. Appointing Federal Judges

The president nominates and the Senate must confirm federal judges and justices. In selecting and evaluating nominees, the president and senators examine the nominee's competence and political ideology, consider how the nominee's demographic characteristics might represent the population at large, and may be influenced by the political support for nominees.

6. How the U.S. Supreme Court Functions

The Supreme Court has limited original jurisdiction. The overwhelming majority of cases the Court hears are appeals, and the justices choose to hear only a fraction of cases that come before them. Through a collegial process, justices decide what cases to hear, review legal briefs, listen to oral arguments, decide cases, and support their decisions with legal reasoning described in written opinions. The justices take many factors into consideration when deciding cases, including legal norms, their own policy preferences, and the preferences of their peers and the public.

7. Judges as Policy Makers

Since establishing the power of judicial review, the Supreme Court has become a key player in policy making. Although constrained by laws, checks and balances, and public opinion, judges interpret law and they make law as they determine what vague and conflicting laws should mean in light of the U.S. Constitution's fundamental principles.

8. The Supreme Court Today: The Roberts Court

Today, under the leadership of Chief Justice Roberts, the Supreme Court leans in a conservative direction. However, the public views the court as ideologically balanced and trusts the judicial branch more than the other two branches of the federal government.

Key Terms

adversarial judicial system 458
amicus curiae brief ("friend of the court" brief) 472
appellate courts 459
appellate jurisdiction 459
associate justice 468
attitudinal model 473
bench memo 473
bench trial 465
beyond a reasonable doubt 463
cert memo 472
certiorari petition 472
chief justice 468
civil law 463
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common law 460
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substantive representation 470
symbolic representation 470
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For Review

1. What legal disputes do trial courts resolve? What disputes do appellate courts resolve? What does the power of judicial review allow the courts to decide?
2. What are the five sources of law in the U.S. legal system, and for each source, who has the authority to create law?
3. What differentiates criminal law from civil law?
4. What is the structure of the federal court system? Which courts have original jurisdiction and which have appellate jurisdiction? How can a state lawsuit end up in a federal appellate court?
5. What criteria do presidents use when selecting judicial nominees? What role does the Senate play in the judicial selection process?
6. Outline the stages by which the Supreme Court decides cases. Explain the three judicial decision-making models.
7. In what ways do federal judges participate in civic discourse as policy makers? How is judicial policy making constrained?
8. What are the characteristics (mix of sex, political ideology, and level of activism) of the Roberts Court?

For Critical Thinking and Discussion

1. Explain judicial activism and judicial restraint. Which judicial behavior do you believe best serves the country? Why?
2. The Supreme Court has the power of judicial review, that is, the power to strike down federal and state laws that it views to be in conflict with the U.S. Constitution. In a representative democracy, what argument can be made against allowing the Court to overturn laws passed by the democratically elected branches? In a government founded on the principle of protecting rights of all people, even those in the minority, what argument can be made in support of allowing the Court to overturn laws passed by democratically elected branches?
3. When a president nominates a prospective federal judge, a number of factors are at play, and the nominee's qualifications are only one of these. What are the other factors? Should they be in play? Why or why not? In what ways do these factors reinforce or undermine democratic principles?
4. Which do you think impose greater limitations on policy making by federal courts: legal norms, the system of checks and balances, or public opinion? Explain your answer.
5. Unlike in the federal court system, in many states, judges are elected by the voters. Which system of judicial selection do you think best protects civil rights and liberties for all citizens, popular election or appointment (nomination by the chief executive and confirmation by a senate)? Explain.
6. Did the framers believe that judges should be accountable to the people or independent of the people and public opinion? Do you think Americans expect judicial accountability or judicial independence? What is your preference? Explain.