CHAPTER 16

The Judiciary

OBJECTIVES

This chapter introduces the student to the final branch of United States government: the courts. After reading and reviewing the material in this chapter, the student should be able to do each of the following:

1. Explain what judicial review is and trace its origins.
2. List and comment on the three eras of varying Supreme Court influences on national policy.
3. Explain what is meant by a dual court system and describe its effects on how cases are processed, decided, and appealed.
4. List the various steps that cases go through to reach the Supreme Court and explain the considerations involved at each step.
5. Discuss the dimensions of power exercised today by the Supreme Court and the opposing viewpoints on an activist Supreme Court.

OVERVIEW

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

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

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

CHAPTER OUTLINE WITH KEYED-IN RESOURCES

I. The idea of judicial review
   A. Only in the United States do judges play so large a role in policy-making
      1. Judicial review: the right of the federal courts to rule on the constitutionality of laws and executive actions
         a) Chief judicial weapon in the checks and balances system
         b) Since 1789, the Supreme Court has declared over 160 federal laws unconstitutional
      2. Few other countries have such a power
         a) In Britain, parliament is the supreme law-maker
         b) Judicial review is only effective in a few other countries with stable federal systems (e.g., Australia, Canada, Germany, India)
   B. Debate is over how the Constitution should be interpreted
      1. Strict construction: judges are bound by wording of Constitution
      2. Activist: judges should look to underlying principles of Constitution
      3. Not a matter of liberal versus conservative
         a) A judge can be both conservative and activist, or liberal and strict constructionist
         b) Today: most activists tend to be liberal, most strict constructionists tend to be conservative

II. The development of the federal courts (THEME A: THE HISTORY OF THE FEDERAL JUDICIARY)
   A. Founders' view
      1. Most Founders probably expected judicial review but did not expect federal court to play such a large role in policy-making
      2. Traditional view: judges find and apply existing law
      3. Activist judges would later respond that judges make law
      4. Traditional view made it easy for Founders to predict courts would be neutral and passive in public affairs
      5. Hamilton: courts are the least dangerous branch; their authority only limits the legislature
      6. But federal judiciary evolved toward judicial activism, shaped by political, economic, ideological forces of three historical eras
   B. National supremacy and slavery: 1789 to 1861
      1. *Marbury* v. *Madison* (1803) and *McCulloch* v. *Maryland* (1819)
         a) Supreme Court could declare a congressional act unconstitutional
         b) Power granted to federal government should be construed broadly
         c) Federal law is supreme over state law
      2. Other cases: interstate commerce clause is placed under the authority of federal law; state law conflicting with federal law was declared void
      3. *Dred Scott* v. *Sandford* (1857): Blacks were not, and could not become, free citizens of the U.S.; federal law (Missouri Compromise) prohibiting slavery in northern territories was unconstitutional
   C. Government and the economy: 1865 to 1936
      1. Dominant issues of the period
         a) Under what circumstances could the state governments regulate the economy?
         b) When could the federal government do so?
      2. Private property held to be protected by the Fourteenth Amendment
      3. Judicial activism—Supreme Court assessing the constitutionality of governmental regulation of business or labor

4. Supreme Court was supportive of private property, but could not develop a principle distinguishing between reasonable and unreasonable regulation of business
5. The Court interpreted the Fourteenth and Fifteenth amendments narrowly as applied to Blacks—upheld segregation, excluded Blacks from voting in many states

D. Government and political liberty: 1936 to the present
1. Court establishes tradition of deferring to the legislature in economic regulation cases
2. Court shifts attention to personal liberties and is active in defining rights
3. Failed court-packing plan (FDR); "the switch in time that saved nine"
4. Warren Court provided a liberal protection of rights and liberties against government trespass

E. The revival of state sovereignty
1. Beginning in 1992, the Supreme Court began to rule that the states have the right to resist some federal action
2. Reassertion of limits to federal supremacy in cases involving gun control, Indian tribe lawsuits

III. The structure of the federal courts
A. Two kinds of federal courts were created by Congress to handle cases that the Supreme Court does not need to decide
1. Constitutional courts—exercise judicial powers found in Article III
a) Judges serve during good behavior
b) Salaries not reduced while in office
c) Examples: District Courts (94), Courts of Appeals (12)
2. Legislative courts
a) Created by Congress for specialized purposes
b) Judges have fixed terms
c) Judges can be removed
d) No salary protection
e) Example: Court of Military Appeals

B. Selecting judges
1. Judicial behavior
a) Party background has a strong effect on judicial behavior
b) Other factors also shape court decisions: facts of the case, prior rulings, legal arguments
2. Senatorial courtesy
a) Appointees for federal courts are reviewed by senators from that state, if the senators are of the president's party (particularly for U.S. district courts)
b) Gives heavy weight to preferences of senators from state in which judge will serve
3. The "litmus test"
a) Litmus test: a test of ideological purity
b) Presidents seek judicial appointees who share their political ideologies
c) Has caused different circuits to come to different rulings about similar cases
d) Raises concerns that ideological tests are too dominant, and has caused delays in securing Senate confirmations
e) Greatest impact on Supreme Court—no tradition of senatorial courtesy

IV. The jurisdiction of the federal courts
A. Dual court system
1. State court systems, federal court system
2. Federal cases listed in Article III and Eleventh Amendment of Constitution
a) Federal question cases: involving U.S. Constitution, federal law, treaties
b) Diversity cases: involving different states, or citizens of different states

3. Some cases can be tried in either federal or state court
    a) Example: if both federal and state laws have been broken (dual sovereignty; the Rodney King case)
    b) Jurisdiction: each government has right to enact laws and neither can block prosecution out of sympathy for the accused
4. Some cases that begin in state courts can be appealed to Supreme Court
5. Controversies between two state governments can only be heard by Supreme Court

B. Route to the Supreme Court
1. Most federal cases begin in district courts
    a) Most are straightforward, do not lead to new public policy
    b) Volume is huge: About 650 district court judges received over 300,000 cases
2. Supreme Court picks the cases it wants to hear on appeal
    a) Requires agreement of four justices to hear case—to issue a writ of certiorari
    b) Supreme Court generally only agrees to review certain types of cases
        (1) Involving significant federal or constitutional question
        (2) Involving conflicting decisions by circuit courts
        (3) Involving Constitutional interpretation by one of the highest state courts, about state or federal law
    c) Court may consider 7,000 petitions each year, but only about 100 appeals are granted certiorari
    d) Limited number of cases heard results in diversity of constitutional interpretation among appeals courts

V. Getting to court

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

B. Fee shifting
1. Usually, each party must pay their own legal expenses
2. The losing defendant pays the plaintiff's expenses (fee shifting) in certain cases

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

D. Class-action suits
1. Brought on behalf of all similarly situated persons
2. Number of class-action suits increased because there were financial incentives to bring suit and because Congress was not meeting new concerns

3. In 1974, Supreme Court tightened rules on these suits for federal courts, though many state courts remain accessible
4. Big class-action suits affect how courts make public policy (ex.: asbestos, silicone breast implants)

VI. The Supreme Court in action (THEME B: THE SUPREME COURT IN ACTION)
- A. Most cases arrive at the Court through a writ of certiorari
- B. Lawyers then submit briefs: documents that set forth the facts of the case, summarizes the lower court decision, gives the argument of that side of the case, and discusses other issues
- C. Oral arguments by lawyers after briefs submitted
  1. Each side has one half-hour
  2. Justices can interrupt with questions
- D. Since federal government is a party to almost half the cases, the solicitor general frequently appears before the courts
  1. Solicitor general: federal government's top trial lawyer
  2. Decides what cases the government will appeal from lower courts
  3. Approves every case presented to the Supreme Court
- E. Justices may also consider other opinions
  1. *Amicus curiae* briefs submitted if both parties agree or Supreme Court grants permission
  2. Other influences on the justices include law journals
- F. Conference procedures
  1. Role of chief justice: speaking first, voting last
  2. Selection of opinion writer by senior judge on winning side
  3. Four kinds of court opinions
     a) *Per curiam*: brief and unsigned
     b) Opinion of the court: majority opinion
     c) Concurring opinion: agree with the ruling of the majority opinion, but modify the supportive reasoning
     d) Dissenting opinion: minority opinion
     e) About 40% of opinions are unanimous

VII. The power of the federal courts (THEME C: THE POWER OF THE FEDERAL JUDICIARY)
- A. The power to make policy
  1. By interpretation of the Constitution or law
  2. By extending the reach of existing law
  3. By designing remedies that involve judges acting in administrative or legal ways
- B. Measures of power
  1. Number of laws declared unconstitutional (over 160)
  2. Number of prior cases overturned; not following *stare decisis* (over 260 cases since 1810)
  3. Extent to which judges will handle cases once left to the legislature (political questions)
  4. Kinds of remedies imposed; judges may go beyond what is narrowly required
  5. Basis for sweeping orders can come either from the Constitution or from court interpretation of federal laws
- C. Views of judicial activism
  1. Supporters
     a) Courts should correct injustices when other branches or state governments refuse to do so
     b) Courts are the last resort for those without the power or influence to gain new laws

2. Critics
   a) Judges lack expertise in designing and managing complex institutions
   b) Initiatives require balancing policy priorities and allocating public revenues
   c) Courts are not accountable because judges are not elected
3. Possible reasons for activism
   a) Adversary culture, emphasizing individual rights and suspicious of government power
   b) Easier to get standing in courts

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

VIII. Checks on judicial power

A. Basic restraints on judicial power
1. Judicial decisions can be resisted or ignored (e.g., Bible reading in schools, segregation in schools)
2. Judges have no enforcement mechanisms (police force or army)
3. Resistance is most effective if the person or organization resisting is not highly visible
4. Resisters must be willing to run the risk of being caught and charged with contempt of court

B. Congress and the courts
1. Confirmation and impeachment proceedings gradually alter composition of courts, though impeachment is an extraordinary and unusual event
2. Changing the number of judges, giving president more or less appointment opportunities
3. Supreme Court decisions can be undone
   a) Revising legislation
   b) Amending the Constitution
   c) Altering jurisdiction of the Court
   d) Restricting Court remedies

C. Public opinion and the courts
1. Defying public opinion frontally may be dangerous to the legitimacy of the Supreme Court, especially elite opinion
2. Opinion in realigning eras may energize court
3. Public confidence in the Supreme Court since 1966 has varied with popular support for the government, generally

D. Reasons for increased judicial activism
1. Government does more and courts interpret the laws
2. Activist ethos of judges is now more widely accepted

WEB RESOURCES

American Bar Association, teacher resources: http://www.abanet.org/publiced/

Federal Courts: http://www.uscourts.gov/

Federal Judicial Center: http://www.fjc.gov/

Understanding the Federal Courts, Administrative Office of the U.S. Courts: http://www.uscourts.gov/understand02

U.S. Supreme Court Decisions, 1937-1975: http://www.fedworld/supcourt

U.S. Supreme Court Oral Argument Transcripts:
http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html

RESEARCH AND DISCUSSION TOPICS

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

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

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

IMPORTANT TERMS

***activist approach**	The view that judges should discern the general principles underlying laws or the Constitution and apply them to modern circumstances.
****amicus curiae***	A brief submitted by a "friend of the court."
***brief**	A written statement by an attorney that summarizes a case and the laws and rulings that support it.
***class action suit**	A case brought by someone to help him or her and all others who are similarly situated.
***concurring opinion**	A signed opinion in which one or more justices agree with the majority's conclusion but for different reasons.
***constitutional court**	A federal court authorized by Article III of the Constitution that keeps judges in office during good behavior and prevents their salaries from being reduced. They are the Supreme Court (created by the Constitution) and appellate and district courts created by Congress.
***courts of appeals**	Federal courts that hear appeals from district courts. No trials.
***dissenting opinion**	A signed opinion in which one or more of the justices disagree with the majority view.
***district courts**	The lowest federal courts; federal trials can be held only here.

***diversity cases**	Cases involving citizens of different states who can bring suit in federal courts.
***dual sovereignty**	A doctrine holding that state and federal authorities can prosecute the same person for the same conduct, each authority prosecuting under its own law.
***federal question cases**	Cases concerning the Constitution, federal laws, or treaties.
***fee shifting**	A rule that allows a plaintiff to recover costs from the defendant if the plaintiff wins.
***in forma pauperis**	A method whereby a poor person can have his or her case heard in federal court without charge.
***judicial review**	The power of courts to declare acts of the legislature and the executive unconstitutional.
***legislative court**	Courts created by Congress for specialized purposes whose judges do not enjoy the protections of Article III of the Constitution.
***litmus test**	An examination of the political ideology of a nominated judge.
***opinion of the Court**	An signed opinion of a majority of the Supreme Court.
***per curiam opinion**	A brief and unsigned court opinion.
***plaintiff**	The party that initiates a lawsuit.
***political question**	An issue the Supreme Court will allow the executive and legislative branches to decide.
***remedy**	A judicial order enforcing a right or redressing a wrong.
***sovereign immunity**	The rule that a citizen cannot sue the government without the government's consent.
***standing**	A legal rule stating who is authorized to start a lawsuit.
***stare decisis**	"Let the decision stand," or allowing prior rulings to control the current case.
***strict constructionist approach**	The view that judges should decide cases strictly on the basis of the language of the laws and the Constitution.
***writ of certiorari**	An order by a higher court directing a lower court to send up a case for review.

THEME A: THE HISTORY OF THE FEDERAL JUDICIARY

Instructor Resources

Richard H. Fallon, *Implementing the Constitution.* Cambridge, MA: Harvard University Press, 2001.

Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law.* Lawrence: University Press of Kansas, 1996.

Robert G. McCloskey and Sanford Levinson, *The American Supreme Court,* 3rd ed. Chicago, IL: University of Chicago Press, 2000.

William E. Nelson, *Marbury* v. *Madison: The Origins and Legacy of Judicial Review.* Lawrence: The University Press of Kansas, 2000.

Lucas A. Powe, Jr., *The Warren Court and American Politics.* Cambridge, MA: Harvard University Press, 2000.

William Rehnquist, *The Supreme Court.* New York: Vintage Books, 2002.

Harold J. Spaeth and Jeffrey Allan Segal, *Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court.* New York: Cambridge University Press, 1999.

Mary L. Volcansek, *Judicial Impeachment: None Called for Justice.* Champaign-Urbana, IL: University of Illinois Press, 1993.

Bradley C.S. Watson, ed., *Courts and the Culture Wars.* Lexington Books, 2002.

Summary

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

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

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

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

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

Discussion Questions

1. What problems did the Court have in trying to limit economic regulation in the era between the Civil War and the New Deal?
2. What was the Roosevelt court-packing plan? What does it suggest about the relationship between the Supreme Court and the other branches of government?
3. How would one distinguish successful from unsuccessful assertions of judicial power? What is it that puts *Marbury* in one class and *Dred Scott* in another?

THEME B: THE SUPREME COURT IN ACTION

Instructor Resources

Henry Julian Abraham, *Justices, Presidents, and Senators*, new and revised ed. Lanham, MD: Rowman & Littlefield, 2001.

Lawrence Baum, *The Supreme Court*, 7th ed. Washington, D.C.: Congressional Quarterly Press, 2000.

Martin H. Belsky, *The Rehnquist Court: A Retrospective*. New York: Oxford University Press, 2002.

Peter H. Irons, *A People's History of the Supreme Court.* New York: Penguin USA, 2000.

Edward Lazarus, *Closed Chambers: The Rise, Fall and Future of the Modern Supreme Court,* updated edition. New York: Penguin, 1999.

Kevin T. McGuire, *Understanding the U.S. Supreme Court.* McGraw Hill, 2001.

Richard Pacelle, *The Supreme Court in American Politics.* Boulder, CO: Westview Press, 2001.

Harold J. Spaeth and Jeffrey A. Segal, *Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court.* New York: Cambridge University Press, 2001.

Kenneth W. Starr, *First Among Equals: The Supreme Court in American Life.* Warner Books, 2002.

Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review.* Lawrence, KS: University Press of Kansas, 2001.

Tinsley Yarborough, *The Rehnquist Court and the Constitution.* New York: Oxford University Press, 2000.

Jeff Yates, *Popular Justice: Presidential Prestige and Executive Success in the Supreme Court.* Albany: State University of New York Press, 2002.

Summary

The Supreme Court hears oral arguments beginning at ten in the morning, with each attorney allocated a half-hour. Justices are permitted to interrupt attorneys to ask questions at any time, and the clock is not stopped no matter how long the question. Attorneys are not allowed to read but may use notes.

Lights indicate how much time is left—a white one signaling five minutes and a red light notifying attorneys to stop. The proceedings are taped but are not aired on radio or television.

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

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

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

Discussion Questions

1. The Theme Summary describes several of the practices and rituals of the Supreme Court. Based on the Summary, how would you describe the culture of this institution? In what ways are its folkways (and thus its culture) similar to or different from the other branches of the government?
2. In what respects is the Supreme Court a political institution? Think carefully about how you are defining *political* in answering this question.
3. What are the reasons for a greater number of concurring and dissenting opinions in the Court decisions of recent decades? What are the advantages and disadvantages of such outcomes? How do these opinions affect the relationships among the justices?
4. The role of the clerks of the Court is extremely powerful: clerks are the Court's "agenda setters" in some important ways: they review all incoming petitions, provide research to the justices, and write drafts of the opinions. Most clerks are fresh out of an exclusive law school, are highly motivated by career, and are very intelligent. They generally share the philosophy of the justice they are clerking for, and they will hold this position for only one year. Is this an appropriate way for the Court to manage its workload? What are the advantages and disadvantages of this system?

THEME C: THE POWER OF THE FEDERAL JUDICIARY

Instructor Resources

Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction.* New Haven, CT: Yale University Press, 2000.

Jonathan Matthew Cohen, *Inside Appellate Courts: The Impact of Court Organization on Judicial Decision Making in the United States Court of Appeals.* Ann Arbor: University Press of Michigan, 2002.

Julie Dolan and Marnie Ezra, ed., *CQ's Supreme Court Simulation: Government in Action.* Washington, D.C.: CQ Press, 2001.

Martin Garbus, *Courting Disaster: The Supreme Court and the Unmaking of American Law.* New York: Henry Holt & Company, 2002.

Howard Gillman, *The Votes That Counted: How the Court Decided the 2000 Election.* Chicago, IL: University of Chicago Press, 2001.

Mark Silverstein, *Judicious Choices: The New Politics of Supreme Court Confirmations.* New York: W. W. Norton & Company, 2001.

Robert J. Spitzer, ed., *Politics and Constitutionalism: The Louis Fisher Connection.* Albany, NY: State University of New York Press, 2000.

Summary

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

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

To use the courts to influence public policy, one has to get to court. To do this requires resources and it requires *standing.* The average citizen has no chance of paying the high costs necessary to take a case all the way to the Supreme Court. However, there are numerous ways in which plaintiffs who are of average or even low income can have their interests represented in court. First, indigent persons can file petitions *in forma pauperis* and be heard for nothing. The *Gideon* case was an example. A variety of interest groups (such as the ACLU or the NAACP) will take cases that promote their purposes. State and local governments often raise important issues, and they have their own attorneys. Although the traditional practice in United States courts is that parties to a lawsuit pay their own legal expenses, Congress increasingly has been passing laws that allow individuals to sue government and corporations and, if they win, have their legal fees paid by the defendant. This is called *fee shifting.* Finally, *class action suits* allow a plaintiff to sue someone, not merely on her or his own behalf, but on behalf of all

persons in similar circumstances. Some cases of this sort are not filed for economic profit: The NAACP received no money for winning the *Brown* case. However, when money damages can be won on behalf of a large group of people, lawyers can reap huge rewards, so lawyers willing to take on such cases are readily found. The Supreme Court has restricted class action suits since 1974 by requiring that all parties to a case be notified, a condition that substantially increases the cost of filing.

The concept of *standing* is not a constitutional requirement. It was created by judicial interpretation of a provision in Article III that restricts federal courts to "cases and controversies." The problem is defining what constitutes a "case" or a "controversy." According to Chief Justice Warren, "those words limit the business of the federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Standing* is the term used to embody these principles. As currently construed by the Supreme Court, it means a court will decline to hear a case unless the complaining party (plaintiff) proves that a genuine conflict exists between the parties and that she or he has suffered a personal injury to a legally protected right. In other words, federal courts will not hear hypothetical issues. A conflict must be genuine. Moreover, the injury must be personal, not remote. However, since standing is largely a product of judicial invention, it is sometimes ignored when a situation warrants settlement by a court. For example, every abortion case would technically be moot because the pregnancy would long be over by the time an appeal reached the Supreme Court. The doctrine of standing has been relaxed in these appeals on the ground that the issue was "capable of repetition yet evading review."

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

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

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

The reasons for judicial activism are many. It is not the case that the courts are powerful because we have so many lawyers. America had more lawyers per capita in 1900, when the courts played a more limited role. Due to *class action* and *Section 1983 suits,* it has become easier for persons to get into

court. Increasingly, Congress has passed vague laws that require bureaucratic interpretation. Laws outlaw discrimination or require that agencies operate in the public interest without defining either. Parties adversely affected by decisions under vague laws challenge them in court. If courts once existed solely to settle disputes, today they also exist, in the eyes of their members, to solve problems. Finally, courts have become more powerful as government in general has become more powerful.

There are checks on judicial power. A judge has no police force or army, and people can disobey if the act is not highly visible and if they are willing to risk being charged with contempt of court. The Senate must confirm judicial nominees and the confirmation process is becoming increasingly contentious. Congress also has the power to impeach federal judges. Congress can change the number of judges either on the Supreme Court or in the lower federal judiciary. Congress and the states can amend the Constitution. Congress can alter the jurisdiction of the federal courts and prevent them from hearing certain kinds of cases. All of these checks have their limits. Amending the Constitution is difficult. Attempts to change the size of the Court, like the Roosevelt court-packing plan, are likely to run into opposition from a public that still accords considerable prestige to the Court. The Supreme Court might rule that attempts to limit the jurisdiction of the courts are unconstitutional. Presidential attempts to tilt the Supreme Court in a particular ideological direction have largely failed.

Discussion Questions

1. Why do presidents give careful thought to the political views of prospective judicial nominees? Isn't legal competence more important?
2. What kinds (and how many) resources are required to bring a case to the Supreme Court? Is the judicial system more accessible than the legislative or executive branches?
3. What sorts of legal doctrines or principles will an activist judge favor?
4. Is the judiciary still the "least dangerous" branch?
5. What are the checks on the power of the judiciary? Are they potent and easily invoked, or weak and difficult to invoke? Why haven't unpopular decisions, such as those on busing and school prayer, been overturned?

Abstract for Theme C

Executive Privilege

Although executive privilege—the right of a president to claim confidentiality in communications with principal advisers—was always viewed with some disfavor by the Congress, it was not directly challenged until 1973. In that year, a congressional investigation of the Watergate break-in led a special investigator to request tape recordings of Oval Office conversations. President Nixon refused to comply with this subpoena, citing executive privilege. The federal district court, although viewing the tapes as presumptively within the realm of executive privilege, nonetheless concluded that the arguments of the special prosecutor were sufficient to rebut such a position. The case, *U.S.* v. *Nixon* (418 U.S. 683 [1974]), was then taken to the Supreme Court.

The Court ruled, by a vote of 8–0, that executive privilege did not protect the president in this instance. The crucial passages of the opinion follow.

> [N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications...can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such

> conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* inspection...
>
> We conclude then when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial. (pp. 706, 713)

Nixon did surrender the tapes, which ultimately provided evidence of his knowledge of the Watergate break-in. In 1975, the House voted for his impeachment; Nixon subsequently resigned rather than face a Senate hearing.

Presidents Nixon through Bush generally negotiated their claims of executive privilege with the Congress. When the legislative branch requested materials that the White House considered as protected by executive privilege, representatives from the legislative branch and the presidency would discuss the request and develop a compromise. This arrangement allowed business to advance and also avoided any suggestion that the president was "keeping secrets." During the Clinton administration, however, the White House believed that the investigation of Independent Counsel Kenneth Starr posed a threat to the president's constitutional prerogatives. Accordingly, the Clinton White House went to court, arguing that executive privilege exempted the president from complying with several of Starr's requests.

Political scientist Mark Rozell summarized the Clinton—Starr arguments in the following words.

> During much of 1998, Clinton's lawyers argued that the president has a broad-based right to assert executive privilege and to deny that claim was nothing less than to strip away the legal protections for confidential White House deliberations. The [Office of the Independent Counsel] OIC countered that the Clinton scandal involved personal rather than official governmental matters, and therefore the White House's various claims of executive privilege could not stand. Each side cited substantial constitutional law, scholarly opinion, and historic precedents in defense of its case.
>
> Judge Norma Holloway Johnson ultimately sided with the OIC—not because she believed that Clinton's arguments in defense of executive privilege were weak but rather because Independent Counsel Kenneth Starr had made a compelling showing of need for access to the information shielded by executive privilege. Judge Johnson applied the classic constitutional balancing test, similar to that of the unanimous decision in *U.S.* v. *Nixon:* in a criminal investigation, the need for evidence outweighs any presidential claim to secrecy.
>
> Judge Johnson's decision resolved the immediate controversy, but it did little to clarify the proper parameters of executive privilege. As a consequence, the OIC declared victory because it achieved access to testimony crucial to the investigation. The White House declared victory because the judge had upheld the principle of executive privilege. After then dropping its claim of executive privilege, the White House later asserted additional claims as the investigation moved forward. ("The Law: Executive Privilege: Definition and Standards of Application," *Presidential Studies Quarterly* 29.4 (December 1999): 919.)

Court decisions in both the Nixon and Clinton administrations, therefore, narrowed executive privilege considerably. While acknowledging that the circumstances of these cases are unusual, many observers today wonder whether the effect of these decisions will be to isolate the president from advisors who could warn against unwise actions. If so, then it may be the denial of executive privilege—rather than its exercise—which will endanger the constitutional order.

Discussion Questions

1. Review the factual circumstances that generated the request for documents by independent counsels in the Nixon and Clinton administrations. Was the president's claim of executive privilege warranted?
2. Who "won" in the Clinton executive privilege case? Explain your judgment. Does the same reasoning apply to the Nixon case?
3. Should the judicial branch have heard the executive privilege disputes between the legislature and the executive? Did these cases involve a political question rather than a legal dispute? Remember that Article II of the Constitution does not explicitly mention executive privilege. If the judicial branch should not resolve these disputes, then who should assume responsibility for their resolution?
4. The *Nixon* opinion was written for a unanimous Court by Chief Justice Burger, a Nixon appointee. The ruling is generally taken as proof of the independence of the judiciary and of its commitment to protecting the integrity of the system of separated powers and of checks-and-balances. Do you agree with this interpretation? Or should Burger and other Nixon appointees have removed themselves from the case to avoid even the suggestion of bias?
5. Which branch is more constrained by the above opinions—the judicial or the executive? Do these opinions define executive privilege too narrowly or too generously?