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The Judicial Branch

"It is emphatically the province and duty of the judicial department to say what the law is."

—John Marshall for the Supreme Court in *Marbury v. Madison*, 1803

Essential Question: How do the nation's courts compete and cooperate with the other branches to settle legal controversies and to shape public policy?

Most of us have some understanding of trials where accused criminals are innocent until proven guilty and where one party sues another. Courtroom drama has been popular since Perry Mason—a 1950s television defense attorney who lost only one case in a nine-year series run. More recently, TV has stereotyped small claims courts with the feisty, tell-it-like-it-is judge, a beefy courtroom bailiff, and litigants who rudely yell at each other.

The true picture of the judiciary shows a revered institution shaped by Article III of the Constitution, the Bill of Rights, and federal and state laws. The courts handle everything from speeding tickets to death penalty cases. State courts handle most disputes, whether criminal or civil. Federal courts handle crimes against the United States, high-dollar lawsuits involving citizens of different states, and constitutional questions. The U.S. Supreme Court is the nation's highest appeals court.

Constitutional Authority of the Federal Courts

Today's three-level federal court system consists of the **U.S. District Courts** on the lowest tier, the **U.S. Circuit Courts of Appeals** on the middle tier, and the **U.S. Supreme Court** alone on the top. These three types of courts are known as "constitutional courts" because they are either directly or indirectly mentioned in the Constitution. All judges serving in these courts are appointed by presidents and confirmed by the Senate to hold life terms.

No national court system existed under the Articles of Confederation, so the framers decided to create a national judiciary while empowering Congress to expand and define it. Because states had existing courts, many delegates saw no reason to create an entirely new, costly judicial system to serve essentially the same purpose. Others disagreed and argued that a national judicial system

with a top court for uniformity was necessary. "Thirteen independent [state] courts of final jurisdiction over the same cases, arising out of the same laws," *Federalist No. 80* argued, "will produce nothing but contradiction and confusion."

Article III

The only court directly mentioned in the Constitution is the Supreme Court, though Article III empowered Congress to create "inferior" courts. Article III establishes the terms for judges, the jurisdiction of the Supreme Court, the definition of treason, and the right of a defendant to a jury trial.

Judge's Terms All federal judges "shall hold their offices during good behavior," the Constitution states. Although this term of office is now generally called a "life term," judges can be and have been impeached and removed. This key provision empowers federal judges to make unpopular but necessary decisions. The life term assures that judges can operate independently from the other branches, since the executive and legislative branches have no power to remove justices over disagreements in ideology. The life term also allows for a consistency over time in interpreting the law. Of course, most federal judges take senior status at age 65 or fully retire. So, short of the challenging standard of an impeachment charge by the House and a two-thirds removal vote by the Senate, federal judges and their jobs are protected for life. Additionally, Congress cannot diminish judges' salaries during their terms in office. This way, Congress cannot use its power of the purse to leverage power against this independent branch. These are the chief ways that Article III protects the independence of the Supreme Court and lower courts, as well as the independence of the judiciary branch of government.

Jurisdiction The Supreme Court has **original jurisdiction**—the authority to hear a case for the first time—in cases affecting ambassadors and public ministers and those in which a state is a party. For the most part, however, the Supreme Court acts as an appeals court with **appellate jurisdiction**.

Treason Article III also defines *treason* as "levying war" or giving "aid or comfort" to the enemy. Treason is the only crime mentioned or defined in the Constitution. Because English kings had used the accusation of treason as a political tool in unfair trials to quiet dissent against the government, the founders wanted to ensure that the new government could not easily prosecute that charge just to silence alternative voices. At least two witnesses must testify in open court to the treasonous act in order to convict the accused.

Right to Jury Trial This article also mentions a criminal defendant's right to a jury trial. Many more rights of the accused were included later in the Bill of Rights, but the right to a jury trial was a priority to the framers as a citizen-check on accusation by the government and was thus included in Article III.

FOUNDATIONAL DOCUMENTS: *FEDERALIST No. 78*

Anti-Federalists were concerned about establishing an independent judiciary. In England, Parliament could vote to remove judges from office, and it could pass laws overriding judicial decisions. Brutus, the mouthpiece for the Anti-Federalists, expressed concern that there was no similar checking power on the Supreme Court. "Men placed in this situation," he wrote in *Brutus No. 15*, "will generally soon feel themselves independent of heaven itself."

Alexander Hamilton and other Federalists did not share this concern. In *Federalist No. 78*, Hamilton affirms that the independent judicial branch has the power of judicial review to examine acts of legislatures to see if they comport with the proposed Constitution. He also emphasizes that as long as judges are acting properly, they shall remain on the bench. This "permanency" shall protect them from the other branches when they make unpopular but constitutional decisions. He believed an independent judiciary posed no threat.

> [The Judiciary] will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. . . . [since it] has no influence over either the sword or the purse. . . .
> [F]rom the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office . . .
>
> No legislative act . . . contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves . . . A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them [the judges] to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. . . .
>
> [T]he independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. . . . That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.

However, the establishment of judicial review was not settled by Hamilton's writing. As you will read, the landmark decision in *Marbury v. Madison* (1803) established that principle. Nonetheless, it is still debated today.

Political Science Disciplinary Practices: Analyze and Interpret
Federalist No. 78

When analyzing and interpreting sources, consider the following factors:

- Claims—What statements are asserted to be true?
- Perspective—How does the context (time, place, and circumstance) affect the author's viewpoints?
- Evidence—What facts or experiences does the author use to support claims?
- Reasoning—How does the author link the evidence to the claims?

Apply: Complete the following activities.

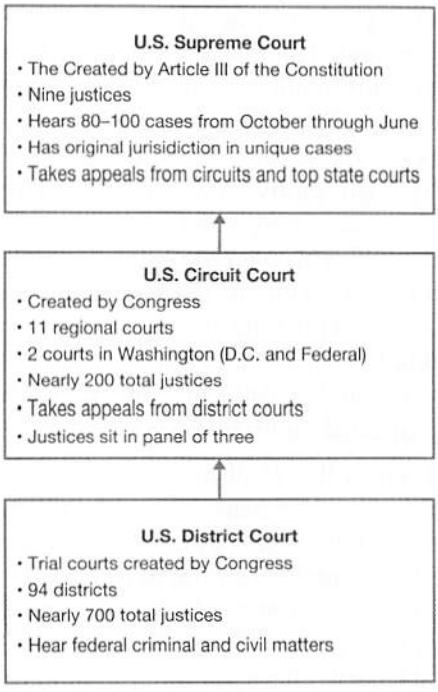
1. Describe Hamilton's claim about the power of the judiciary.
2. Describe Hamilton's perspective in terms of the context in which he argues his support of the Federalist plan of government.
3. Describe the evidence Hamilton offers to back up his claim on the relative power of the judiciary.
4. Describe Hamilton's reasoning for supporting life terms.
5. Explain how the implications of Hamilton's argument relate to checks and balances in government.

Then read the full text of *Federalist No. 78* on page 665 and answer the questions that follow it.

A Three-Level System

The first Congress quickly defined a three-tier federal court system with the Judiciary Act of 1789 to clear up the vague and brief Article III. The law established one district court in each of the 13 states, plus one each for the soon-to-be states of Vermont and Kentucky. The law also defined the size of the Supreme Court with six justices, or judges. President Washington then appointed judges to fill these judgeships. In addition to the district courts, Congress initially created three regional circuit courts designated to take cases on appeal from the district courts. Two Supreme Court justices were assigned to each of the "circuits" and were required to hold court twice per year in every state. The presiding district judge joined them to make a three-judge intermediate panel. In a given period, the Supreme Court justices would hold one court after another in a circular path, an act that became known as "riding circuit."

Federal Court System



U.S. District Courts

There are 94 district courts in the United States—at least one in each state, and for many western states, the district lines are the same as the state lines. Each district may contain several courthouses served by several federal district judges. Nearly 700 district judges nationwide preside over trials concerning federal crimes, lawsuits, and disputes over constitutional issues. Annually, the district courts receive close to 300,000 case filings nationwide, most of a civil nature.

A Trial Court U.S. district courts are trial courts with original jurisdiction over federal cases. The litigants in a trial court are the **plaintiff**—the party initiating the action—and the **defendant**, the party answering the action. In a criminal trial, the government is the plaintiff, usually referred to as the "prosecution." In civil trials, a citizen-plaintiff brings suit against another, the defendant, who allegedly injured him or her. Others who may be part of a trial court are witnesses, jury members, and a presiding judge. Trial courts are finders of fact; that is, these courts determine if an accused defendant did in fact commit a crime, or if a civil defendant is indeed responsible for some mistake or wrongdoing.

Federal Crimes The U.S. district courts try federal crimes, such as counterfeiting, mail fraud, or evading federal income taxes—crimes that fall under the enumerated powers in Article I, Section 8 of the Constitution. Most violent crimes, and indeed most crimes overall, are tried in state courts.

Congress has outlawed some violent crime and interstate actions, such as drug trafficking, bank robbery, terrorism, and acts of violence on federal property. For example, in *United States v. Timothy McVeigh* (1998), the government argued that McVeigh exploded an Oklahoma City federal building and killed 168 victims. A federal court found him guilty and sentenced him to death.

Defendants have a constitutional right to a jury and defense lawyer and several other due process rights included in the Bill of Rights. The judge or jury must find the defendant guilty "beyond a reasonable doubt" in order to convict and issue a sentence. Many cases are disposed of when a defendant pleads guilty before the trial. This **plea bargain** allows the government and the defendant to agree to a lesser sentence in exchange for the defendant's guilty plea. A plea bargain saves courts time and taxpayers money, and it guarantees a conviction. For example, FBI agent Robert Hanson was discovered to have sold government secrets to the Russians for years. He was charged with espionage crimes and pleaded guilty in order to avoid the death penalty.

U.S. Attorneys Each of the 94 districts has a U.S. attorney, appointed by the president and approved by the Senate, who represents the federal government in federal courts. These attorneys are executive branch employees who work in the Department of Justice under the **attorney general**. They serve as federal prosecutors, and with assistance from the FBI and other federal law enforcement agencies they prosecute federal crimes committed within their districts. Nationally, they try close to 80,000 federal crimes per year. Of those, immigration crimes and drug offenses take up much of the courts' criminal docket. Fraud is third.

Civil Cases Citizens can also bring civil disputes to court to settle a business or personal conflict. Some plaintiffs sue over torts, civil wrongs that have damaged them. In a lawsuit, the plaintiff files a complaint (a brief that explains the damages and argues why the defendant should be held responsible). The party bringing suit must prove the defendant's liability or negligence with a "preponderance of evidence" for the court to award damages. Most civil disputes, even million-dollar lawsuits, are handled in state courts. Congress has empowered the U.S. district courts to have jurisdiction over disputes involving more than $75,000 with *diversity citizenship*—cases in which the two parties reside in different states.

Disputes involving constitutional questions also land in this court. In these cases, a federal judge, not a jury, determines the outcome because these cases involve a deeper interpretation of the law than more general cases do. Sometimes a large group of plaintiffs claim common damage by one party and will file a **class action suit**. After a decision, courts may issue an **injunction**, or court order, to the losing party in a civil suit, making them act or refrain from acting to redress a wrong.

Suing the Government Sometimes a citizen or group sues the government. Technically, the United States operates under the doctrine of sovereign immunity—the government is protected from suit unless it permits such a claim. Over the years, Congress has made so many exceptions that it even established the U.S. Court of Claims to allow citizens to bring

complaints against the United States. Citizens and groups also regularly bring constitutional arguments before the courts. One can sue government officials acting in a personal capacity. For example, the secretary of defense could be personally sued for causing a traffic accident that caused thousands of dollars in damage to another's car. But the secretary of defense or Congress cannot be sued for the loss of a loved one in a government-sanctioned military battle.

Special Legislative Courts In addition to the constitutional trial courts that make up our U.S. district courts, Congress has created a handful of unique courts to hear matters of expert concern. These are known as the special legislative courts because they are created by the legislature as opposed to the Constitution. Presidents appoint these judges and the Senate must approve them, typically for a 15-year fixed term. These courts deal with specific issues, and therefore an experienced judge in that area of law is desired for a defined period of time. Special courts include the court of federal claims mentioned above, as well as courts that determine matters of taxation; international trade; spying and surveillance; and military matters. (See page 219.)

U.S. Circuit Courts of Appeals

Directly above the district court is the U.S. Circuit Courts of Appeals. The circuit courts have appellate jurisdiction, taking cases on appeal. In 1891, Congress made the circuit court of appeals a permanent body. The country had expanded to the Pacific Coast, and Supreme Court justices still had to travel across the now distant and expansive circuits. The increasing caseload, too, made this task unmanageable for justices based in Washington.

Appellate Courts Appeals courts are especially influential because they don't determine facts; instead, they shape the law. The losing party in a trial can appeal based on the concept of ***certiorari***, Latin for "to make more certain." Thousands more cases are appealed than accepted by higher courts. The appellant must offer some violation of established law or procedure that led to the incorrect verdict in the trial court. Appeals courts look different and operate differently from trial courts. Appeals courts have a panel of judges sitting at the bench. There is no witness stand or jury box since the court does not entertain new facts but decides instead on some narrow question or point of law.

The **petitioner** appeals the case, and the **respondent** responds, claiming why and how the lower court ruled correctly. The hearing lasts about an hour as each side makes oral arguments before the judges. Appeals courts don't declare guilt or innocence when dealing with criminal matters, but they may order new trials for defendants. After years of deciding legal principles, appeals courts have shaped the body of U.S. law.

The U.S. Courts of Appeals consist of 11 geographic circuits across the country, each with one court in major cities such as Atlanta, New Orleans, and Chicago. Nearly 200 circuit court justices sit in panels of three to hear appeals from both criminal and civil trials. Occasionally in important matters, an entire circuit court will sit *en banc;* that is, every judge on the court will hear and decide a case. Appeals court rulings stand within their geographic circuits.

In addition to the 11 circuits, two other appeals courts are worthy of note. The Circuit Court for the Federal Circuit hears appeals dealing with patents, contracts, and financial claims against the United States. The Circuit Court of Appeals for the District of Columbia, among other responsibilities, handles appeals from those fined or punished by executive branch regulatory agencies. The D.C. Circuit might be the second most important court in the nation and has become a feeder for Supreme Court justices.

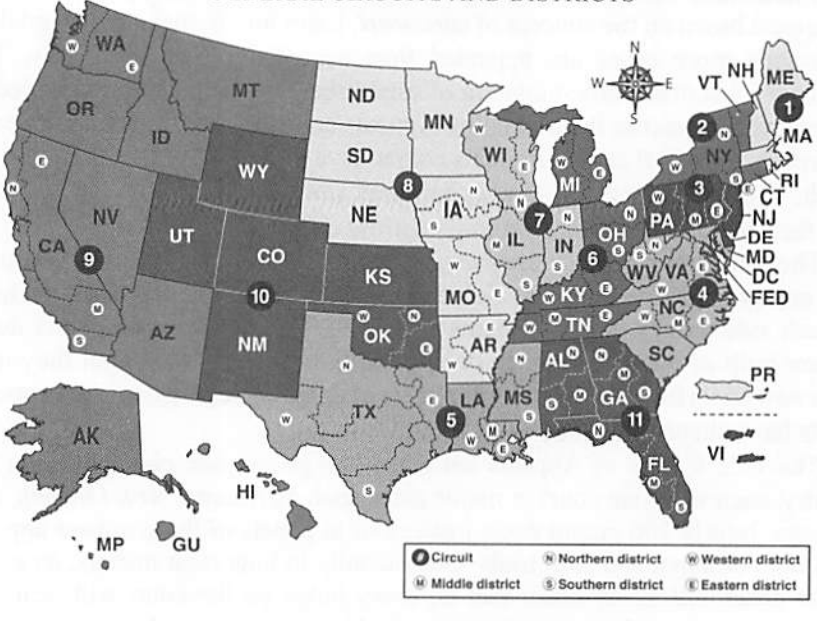
The United States Supreme Court

Atop this hierarchy is the U.S. Supreme Court, with the chief justice and eight associate justices. The Supreme Court mostly hears cases on appeal from the circuit courts and from the state supreme courts. The nine members determine which appeals to accept, they sit *en banc* for attorneys' oral arguments, and they vote to decide whether or not to overturn the lower court's ruling. The Court overturns about 70 percent of the cases it takes. Once the Supreme Court makes a ruling, it becomes the law of the land. Contrary to what many believe, the Supreme Court doesn't hear trials of serial murders or billion-dollar lawsuits. However, they decide on technicalities of constitutional law that have a national and sometimes historic impact.

Common Law and Precedence

Courts follow a judicial tradition begun centuries ago in England. The **common law** refers to the body of court decisions that make up part of the law. Court rulings often establish a **precedent**—a ruling that firmly establishes

FEDERAL CIRCUITS AND DISTRICTS



a legal principle. These precedents are generally followed later as other courts consider the same legal logic in similar cases. The concept of **stare decisis**, or "let the decision stand," governs common law.

Lower courts must follow higher court rulings. Following precedence establishes continuity and consistency in law. Therefore, when a U.S. district court receives a case that parallels an already decided case from the circuit level, the district court is obliged to rule in the same way, a practice called **binding precedent**. Even an independent-minded judge who disagrees with the higher court's precedent is guided by the fact that an appeal of her uniquely different decision will likely be overruled by the court above. That's why all courts in the land are bound by U.S. Supreme Court decisions. Judges also rely on **persuasive precedent**. That is, they can consider past decisions made in other districts or rulings in other circuits as a guiding basis for their decision. Precedents can of course be overturned. No two cases are absolutely identical, and for this reason differing considerations come into play. Attitudes and interpretations differ and evolve over time in different courts.

POLICY MATTERS: *SUPREME COURT PRECEDENTS ESTABLISH POLICY*

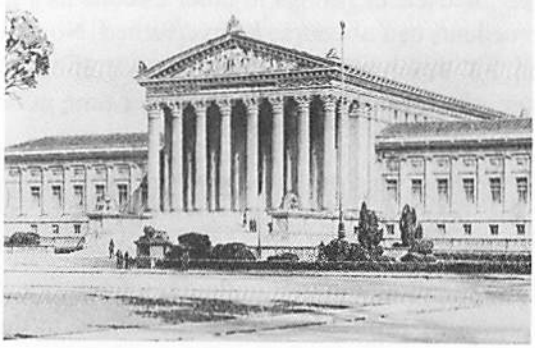
The Supreme Court's authority of binding precedent combined with its power of **judicial review**—the ability to declare a legislative act or an executive branch action void—makes it a powerful institution and often the final arbiter of national law. With these two powers, the Court has had a strong hand in establishing national policy. Early on, it addressed national supremacy and states' rights. Later, it defined the relationship between government and industry. Most recently, the Court has ruled on individual rights and liberties.

Defining Federalism The Supreme Court in its early years was a nondescript, fledgling institution that saw little action and was held in low esteem. President Washington appointed Federalist John Jay as the first chief justice. For its first year the Court was given a second-floor room in a New York building and convened for only a two-hour session. Several early justices didn't stay on the Court long. Jay resigned in 1795 to serve as governor of New York. The Court's reputation and role would soon change.

Once President John Adams appointed Federalist **John Marshall** as chief justice, the Court began to assert itself under a strong, influential leader. Marshall remained on the Court from 1801 until his death in 1835, establishing customs and norms and strengthening national powers. Marshall was a Virginian who acquired a strong sense of nationalism and respect for authority and discipline during his service in the Revolutionary War. After independence, he became an ardent Federalist and attended the Virginia ratifying convention to vote in favor of ratification.

Some consider John Marshall the father of the Supreme Court, since the Marshall Court established its customs and solidified the nation under the framers' plan. Throughout his 34 years as chief justice, he and his colleagues lived in a convivial atmosphere at a boarding house in Washington. Most who knew Marshall liked him. The Supreme Court, seven members at the time, simply shared a small room in the old Capitol with Congress. It held hearings in a designated committee room on the first floor for seven years until it was given more spacious quarters. It did not have its own building until the 1930s.

Marshall created a united court that spoke with one voice. When he arrived, he found the Supreme Court functioning like an English court in that multiple judges issued separate opinions. Marshall insisted that this brotherhood of justices agree and unite in their rulings to shape national law. The Court delivered mostly unanimous opinions written by one judge. In virtually every important case during his time, that one judge was Marshall. "He left the Court," Chief Justice William Rehnquist wrote years later, "a genuinely coequal branch of a tripartite national government . . . the final arbiter of the meaning of the United States Constitution." He fortified the Union and the powers of the federal government with rulings that strengthened national supremacy and Congress's commerce power.



Source: *Library of Congress*

The Supreme Court is the only federal court named in Article III of the Constitution, yet it did not operate in its own building—shown here in a drawing before it was built—until 1935.

Shaping a Strong Nation Marshall developed a legacy of siding with Congress when controversies regarding federalism arose, strengthening the national government and expanding Congress's powers more than Jeffersonian Republicans wanted. The *McCulloch v. Maryland* and *Gibbons v. Ogden* rulings empowered Congress to create a bank and to regulate interstate commerce.

The Marshall Court also established the principle of **judicial review**—the right of the Court to determine the constitutionality of a law or executive order—in one of its first landmark cases, *Marbury v. Madison* (1803). In deciding the case, the Court struck down part of the Judiciary Act and thereby exercised judicial review.

MUST-KNOW SUPREME COURT DECISIONS:
MARBURY V. MADISON (1803)

The Constitutional Question Before the Court: Can an appointed judge sue for his appointment, and does the Supreme Court have the authority to hear and implement this request?

Decision: Yes and No. Unanimous, 5:0

Facts: This controversy started as a dispute regarding the procedures of appointments during a presidential transition. Outgoing President John Adams had lost reelection to Thomas Jefferson and, in one of his final acts as president, appointed several members of his own Federalist Party to the newly created judgeships. The Senate had confirmed these "midnight judges," so-called because their appointment was made so late in the tenure of President Adams. Secretary of State John Marshall, who had just been named chief justice of the Supreme Court, had prepared the commissions, the official notices of appointment, and had most of them delivered. William Marbury was among 17 appointees who did not receive official notice. Marshall simply left these to be delivered by the next administration.

Once President Thomas Jefferson, a Democratic-Republican, took office, he instructed his new secretary of state, James Madison, to hold the commissions. Jefferson did reappoint several of those appointees, but he refused others on partisan grounds. Marbury wanted the Supreme Court to issue a court order known as a writ of mandamus forcing Madison and the executive branch to deliver the appointment to him and, thus, his job.

Marbury brought the case to the Supreme Court because of language in the relatively new Judiciary Act of 1789 that defined the Supreme Court's jurisdiction in cases like his.

Reasoning: Marshall's Supreme Court took the case and determined that an appointed judge with a signed commission could sue if denied the job. (That is the yes vote.) However, they also ruled that the law entitling Marbury to the commission and the job, Section 13 of the Judiciary Act, ran contrary to Article III of the Constitution when it decided that the Court had original rather than appellate jurisdiction in such cases. (That is the no vote.) Congress could not, Marshall's Court said, define the Court's authority outside the bounds of the Constitution.

The Court unanimously ruled that it had no jurisdiction in the matter, and in so ruling cancelled Marbury's claim. It simultaneously instituted the practice of judicial review. The Court had asserted its powers and checked Congress.

The Court's Unanimous Opinion by Mr. Justice John Marshall:

> If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested . . . If Congress remains at liberty to give this court appellate jurisdiction, where the Constitution has

declared their jurisdiction shall be original and original jurisdiction where the Constitution has declared it shall be appellate; the distribution of jurisdiction, made in the Constitution, is form without substance . . .

The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States [the Judiciary Act of 1789], to issue writs of mandamus to public officers, appears not to be warranted by the Constitution . . .

The act to establish the judicial courts of the United States authorizes the Supreme Court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." The secretary of state, being a person, holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional. . . .

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other the courts must decide on the operation of each . . .

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty . . .

Since *Marbury*: Marbury is a landmark for its initiation of judicial review in American jurisprudence and in defining common law. Marshall had declared at the Virginian Ratifying Convention—a Federalist allaying fears of opponents to the proposed Constitution—that Congress would not have power to make law on any subject it wanted. A new federal judiciary, he said, "would declare void" any such congressional act repugnant to the Constitution. Marshall became the first judge to do just that.

Judicial review or striking down acts of Congress came as a rarity after Marbury. Not until the infamous Dred Scott case in 1857 (page 201) did the Court again strike down a law, this time one that outlawed slavery north of the Missouri Compromise line. During the Industrial Era (1874–1920) and into the 20th century, the Court used its power of judicial review to strike down laws with greater frequency.

Political Science Disciplinary Practices: Analyze and Interpret Supreme Court Decisions

1. Describe the facts in the *Marbury v. Madison* case.
2. Describe the controversy in the *Marbury v. Madison* case.
3. Explain the Court's reasoning from the majority opinion.
4. Explain how the ruling in *Marbury* relates to the U.S. Constitution.
5. Explain how the ruling in *Marbury* relates to *Federalist No. 78*.

An Evolving Court

Since the Marshall Court, the Supreme Court has reflected the changes in the composition of the Court—the individual justices who have come and gone and the perspectives each of them brought—as well as changes in society. Yet the Supreme Court is known more for continuity than for change. Membership is small and justices serve long tenures. The Court's customs are established through consensus and remain over generations.

Early Courts to the New Deal

Chief Justice Roger Taney replaced John Marshall. The Court's operation changed somewhat with new leadership and new members. In 1837, Congress increased its membership to nine justices to ease the workload and created additional circuits. It also took up questions regarding slavery during the antebellum period. Taney and his fellow justices were determined to protect slavery as a state's right and upheld a congressional fugitive slave act.

In 1857, as the North and the South grew further apart, the Court decided the Dred Scott case. The slave Dred Scott had traveled with his master into free territory and claimed, with the help of abolitionist lawyers, that having lived in free northern territory, he should have his freedom. Taney and the Court's majority shocked abolitionists with their decision and left one of the Court's worst legacies. The ***Dred Scott v. Sandford*** ruling held that Scott wasn't even a citizen and thus had no legal right to be a party in federal court, much less the country's top tribunal. The Court went further, stating that a slave owner's constitutional right to due process and property prevented depriving him of that property, regardless of where he traveled. Abolitionists and anti-slavery advocates in the territories challenged the Court's legitimacy.

Corporations and the State In the late 1800s, the Court examined concerns over business, trade, and workplace regulations. The nation had expanded manufacturing power, factories, railroads, and interstate trade. Workers were subjected to long hours in unsafe conditions for modest pay. Congress tried to address these issues under its power to regulate interstate commerce. State legislatures also devised laws creating safety bureaus, barring payment in company scrip, setting maximum working hours, and preventing women and children from working in certain industries. While lawmakers tried to satisfy workers' groups and labor unions, their counterparts—typically strong businesses dominant in the northeastern United States—argued that minimal government interference and a *laissez-faire* approach to governance was the constitutionally correct path. When pressed by corporations to toss out such laws, the Court had to decide two principles: what the Constitution permitted government to do, and which government—state or federal—could do it.

The Court began to overturn various state health, safety, and civil rights laws, and in so doing shaped social policy. It threw out a congressional act that addressed monopolies. It also ruled Congress's income tax statute null and void. By the turn of the century, the Court had developed a conservative reputation

as it questioned business regulation and progressive ideas. In *Lochner v. New York* (1905), the Court overturned a New York state law that prevented bakers from working more than 10 hours per day. The law was meant to counter the pressures from the boss that mandated long hours in an era before overtime pay. In *Lochner,* the Court ruled that liberty of contract—a worker's right to freely enter into an agreement—superseded the state's police powers over safety and health. The Court later considered research and sociological data submitted by noted attorney Louis Brandeis, who eventually became a justice on the Court. The Brandeis brief persuaded the Court to uphold a maximum-hours law for women working in laundries. The consequence of protective work laws for women was that they could not effectively compete with men.

During the Progressive Era, the Court made additional exceptions but quickly returned to a conservative, strict constructionist view of business regulation. A **strict constructionist** interprets the Constitution in its original context, while a **liberal constructionist** sees the Constitution as a living document and takes into account changes and social conditions since ratification. The Court held that Congress could not use its commerce power to suppress child labor. The Court's conservative viewpoint turned further to the right, taking social policy with it, when former president William Howard Taft became chief justice. It ruled that minimum wage law for women also violated liberty of contract.

The New Deal and Roosevelt's Plan During the Depression, the Court transformed. Charles Evans Hughes replaced Taft as chief justice in 1929. Hughes managed a mixed group with a strong conservative four, nicknamed the "Four Horsemen," who overturned several New Deal programs. The Court struck down business regulations, invalidated the National Recovery Act (1933), ruled out New York's minimum wage law, and restricted the president's powers to remove commissioners on regulatory boards.

Congress raised the Court's status with a new building in Washington that represented its authority, ceremony, and independence. In 1935, the justices moved into their current building with its majestic façade and familiar red-curtained courtroom. The Court also went through another transformation as it changed ideologically to solidify New Deal laws for the next generation.

After his 1936 landslide reelection, Franklin Delano Roosevelt (FDR) responded to the rebuffs of the conservative Court by devising a plan to "pack the Court." He proposed legislation to add one justice for every justice then over the age of 70, which would have allowed him to appoint up to six new members. FDR claimed this would relieve the Court's overloaded docket, but in reality he wanted to dilute the power of the conservative majority who had been unreceptive to his New Deal proposals. The sitting Court denied any need for more justices. Conservatives and liberals alike believed such a plan amounted to an attack on the Court's independence. Many consider FDR's plan an example of an imperial presidency (pages 123–126).

The Court changed ideologically, however, when one of the conservatives took an about-face in *West Coast Hotel v. Parrish* (1937), which sustained

a Washington state minimum wage law. Justice Owen Roberts became "the switch in time that saved nine," meaning that there was no longer any need to try to pack the Court with additional justices. After the *West Coast Hotel* decision, the Court upheld every New Deal measure that came before it. Roosevelt pressed ahead with more legislation, including a national minimum wage that has withstood constitutional scrutiny ever since. Winning four elections, he was able to appoint nine new justices to the Court friendly to his policies before his death in 1944.

A Court Dedicated to Individual Liberties

In the post-World War II years, the Court protected and extended individual liberties. It delivered mixed messages on civil liberties up to this point—holding states to First Amendment protections while allowing government infringements in times of national security threats. For example, it upheld FDR's executive order that placed Japanese Americans in internment camps after the Japanese attack in 1941 of the U.S. naval base in Pearl Harbor, in what was then Hawaii Territory (*Korematsu v. United States*, 1944). After that, however, the Court began a fairly consistent effort to protect individual liberties and the rights of accused criminals. The trend crested in 1973 when the Court upheld a woman's right to an abortion in *Roe v. Wade*.

The Warren Court The Court extended many liberties under Chief Justice **Earl Warren** after President Dwight Eisenhower appointed him in 1953. As attorney general for California during the war, Warren oversaw the internment of Japanese Americans, and in 1948 he was the Republican's vice presidential nominee. But any expectations that Warren would act as a conservative judge were lost soon after he took the bench.

Civil Rights and Civil Liberties Warren's first major case was *Brown v. Board of Education* decided in 1954 (pages 305–307). When the National Association for the Advancement of Colored People Legal Defense Fund argued that the "separate but equal" standard set by the Court in the 1896 *Plessy v. Ferguson* decision was outdated and violated the Fourteenth Amendment's equal protection clause in public education, Warren rallied his fellow justices to a unanimous opinion in favor of Brown. As the district courts worked out the particulars of the integration process, the High Court issued several subsequent unanimous pro-integration rulings over the next decade.

Warren was flanked by civil libertarians Hugo Black and William O. Douglas. With them, the Court set several precedents to guarantee rights to accused defendants that ultimately created a national criminal justice system. They declared that courts could throw out evidence obtained unlawfully by the police. States soon had to provide defense attorneys for indigent (poor) defendants at state expense. And arrested suspects had to be formally informed of their rights with the so-called *Miranda* ruling.

The Supreme Court also placed a high priority on the First Amendment's protection against a government-established religion and protection for citizens' free speech. It outlawed school-sponsored prayer (*Engel v. Vitale,*

1962—page 254) and upheld students' rights to nondisruptive symbolic speech in schools (*Tinker v. Des Moines Public Schools*, 1969—page 243). The Court upheld the press's protection against charges of libel. The Warren Court legacy is that of an activist, liberal court that upheld the individual rights of minorities and the accused.

Warren's legacy did not please traditionalists because his Court overturned state policies created by democratically elected legislatures. The controversial or unpopular decisions led some people to challenge the Court's legitimacy. Several Warren Court decisions seemed to insult states' political cultures and threaten to drain state treasuries. Some argued that Earl Warren should be impeached. The Warren Court had made unpopular decisions, but it had not committed impeachable acts—such as taking bribes or failing to carry out the job—so there wasn't political support in the House for Warren's impeachment. Then, as now, the only surefire way to alter the Court's membership is to await justices' retirements or deaths so a president can replace them with different nominees.

The Burger Court President Richard Nixon won the 1968 election, in part by painting Warren's Court as an affront to law enforcement and local control. When Warren announced his retirement, Nixon replaced him with U.S. appeals court justice Warren Burger. But Burger by no means satisfied Nixon's quest to instill a conservative philosophy, and he largely failed in judicial leadership. While lacking Warren's leadership skills, Burger continued American law on a path similar to the one Warren had begun.

Burger had a difficult time leading discussions "in conference"—the Court's closed-chamber discussions. Some suspected that Burger at times switched his opinion toward the end of the process in order to gain control and to draft or assign the writing of the opinion. The chief often couldn't round up enough agreement to get a five-justice majority. Thus cases went undecided while the Court took on additional ones. The justices became overworked and took as many as 150 appeals in a year.

In *Roe v. Wade*, Burger joined six others on the Court to outlaw or modify state anti-abortion laws as a violation of due process. With this ruling, a woman could now obtain an abortion, unconditionally, through the first trimester of pregnancy. He also penned a unanimous opinion to uphold school busing for racial enrollment balance.

Supreme Court historian and former clerk Edward Lazarus refers to Burger as "an intellectual lightweight" who had "alienated his colleagues and even his natural allies." By 1986, Burger had proven pretentious and chafing to his colleagues, and he had simply become tired. At the press conference where he announced his retirement, a reporter asked him what he would miss most on the Court. Burger stalled, sighed, and said, "Nothing."

The Rehnquist Court At the same press conference, President Reagan elevated Associate Justice William Rehnquist to the chief position. Rehnquist had attended Stanford Law School and clerked for Supreme Court Justice

Robert Jackson in the 1950s. Based on Rehnquist's strict constructionist views, President Nixon had nominated Rehnquist for the High Court. The Senate did not confirm him easily and accused him of racism, as he had recommended upholding the "separate but equal" doctrine when clerking for a justice in the early 1950s en route to the *Brown* ruling. This same controversy arose in 1986 as he accepted the chief's position.

Initially, Rehnquist found himself in dissent and all alone on several cases, earning him the nickname "the Lone Ranger." When Rehnquist took over for Burger, however, additional strict constructionists soon joined him. He improved the conference procedures and decreased the Court's caseload. All the justices, liberals and conservatives alike, welcomed the changes. In the 1990s, the Rehnquist Court upheld state rights to place limitations on access to abortions and limited Congress's commerce clause authority. In addition to efficiency, Rehnquist had ushered in another ideological shift.

The Supreme Court Today

When President George W. Bush replaced Chief Justice Rehnquist after his death with John Roberts (2005), the Court's membership had not changed for about 12 years. President Barack Obama appointed two justices during his first term, circuit judge Sonia Sotomayor (2009), who became the first justice of Hispanic descent and the first Latina, and U.S. Solicitor General Elena Kagan (2010). In 2017, President Trump nominated Neil Gorsuch as the Court's newest member.

Diversity Originally, the Court was a white, Protestant man's institution. Some diversity came when presidents appointed Catholics and Jews. In 1967, President Lyndon Johnson appointed the first African American, Thurgood Marshall. Ronald Reagan appointed the first woman, Sandra Day O'Connor, in 1981.

The current Court is as diverse and as experienced as it has ever been. One African American, Clarence Thomas, and three females serve on the Court. There are five Catholics, three Jews, and one Protestant. Historically, many Supreme Court justices had never served as judges before their nomination. Presidents from FDR through Nixon tended to nominate highly experienced political figures and presidential allies. Since 1969, however, that trend has changed to naming lesser-known jurists who have served on other federal courts and therefore bring considerable judicial experience to the Court.

Ideology The Rehnquist Court and the current Roberts Court have been difficult to predict. The conservative and liberal wings have been balanced by the swing votes of O'Connor and now Justice Anthony Kennedy. **Swing votes** are those often tie-breaking votes cast by justices whose opinions cannot always be easily predicted. For the past decade or so, most experts have been quick to characterize the Court as leaning conservative. However, the Court has limited states' use of the death penalty and upheld government's eminent domain authority for economic development.

Chief Justice **John Roberts** has guided the Court with judicial minimalism. "Judges and justices are servants of the law, not the other way around. Judges are like umpires," he said during his confirmation hearing. "Umpires don't make rules; they apply them . . . nobody ever went to a ball game to see the umpire." Robert's operation takes fewer cases, while the conversations and conferences go longer. He has achieved more unanimity in decisions than some previous chief justices and has written more narrow opinions to address the questions before the Court.

CURRENT AND RECENT SUPREME COURT JUSTICES				
Current Justices	**President**	**Senate vote**	**Prior Job**	**Law school**
John Roberts, Chief	G.W. Bush	78–22	DC Circuit	Harvard
Anthony Kennedy	Reagan	97–0	Ninth Circuit	Harvard
Clarence Thomas	G.H.W. Bush	52–48	DC Circuit	Yale
Ruth Bader Ginsburg	Clinton	96–3	DC Circuit	Harvard
Stephen Breyer	Clinton	87–9	First Circuit	Harvard
Samuel Alito	G.W. Bush	58–42	Third Circuit	Yale
Sonia Sotomayor	Obama	68–31	Second Circuit	Yale
Elena Kagan	Obama	63–37	Solicitor General	Harvard
Neil Gorsuch	Trump	54-45	Tenth Circuit	Harvard
Recent Justices				
William Rehnquist	Nixon	68–26	Justice Dept.	Stanford
Antonin Scalia	Reagan	98–0	DC Circuit	Harvard
John Paul Stevens	Ford	98–0	Seventh Circuit	Northwestern
David Souter	G.H.W. Bush	90–9	First Circuit	Harvard
Byron White	Kennedy	Voice vote	Justice Dept.	Yale
Sandra Day O'Connor	Reagan	99–0	Arizona Court of Appeals	Stanford
Harry Blackmun	Nixon	94–0	Eighth Circuit	Harvard
Lewis Powell	Nixon	89–1	ABA President	Harvard
Warren Burger	Nixon	74–3	DC Circuit	St. Paul

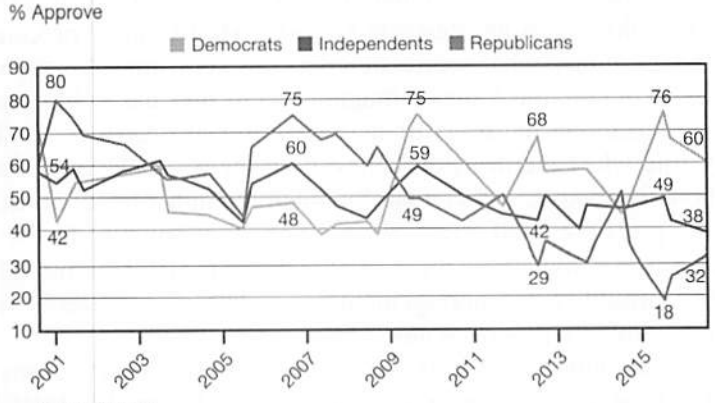
Continuity and Change Over Time

The Supreme Court is known more for continuity than for change. Membership is small and justices serve long tenures. The Court's customs are established through consensus and remain over generations. The contemporary group operates in many ways as the earlier Courts did. Debate about the Court focuses on some of the same issues as in earlier times as well.

The combination of the lifetime tenure of justices and the Court's exercise of judicial review has given rise to debates over the legitimacy of the Supreme Court. Some people believe, as Brutus expressed more than 200 years ago, that with no power to hold them accountable, the justices on the Supreme Court are too separated from the real sources of power—the people and the legislature—to be legitimate arbiters of democratic law. Brutus believed the Supreme Court justices would "be placed in a situation altogether unprecedented in a free country. They are to be rendered totally independent, both of the people and the legislature, both with respect to their offices and salaries. No errors they may commit can be corrected by any power above them, if any such power there be, nor can they be removed from office for making ever so many erroneous adjudications."

Furthermore, as you read, the composition of the Court changes as seats become vacant, and the presidential appointments to fill them can lead to shifts in the ideology of the Court. These changes can result in the overturning of some precedents, calling into question the reliability and therefore legitimacy of Supreme Court decisions. Controversial and unpopular decisions can face a number of challenges.

Supreme Court Job Approval, by Political Party



Source: *Gallup*

Democrats tend to have higher approval of the Supreme Court than Republicans. Two controversial rulings widened the partisan gap. In 2012, the Court upheld a key provision in the Patient Protection and Affordable Care Act ("Obamacare"), an act much disliked by Republicans. In 2015, the Court ruled in *Obergefell v. Hodges* that same-sex couples have a fundamental right to marry. The partisan gap in the view of the Supreme Court after that decision was the widest ever recorded.

Stare Decisis and Constitutional Application

Precedent plays an important role in judicial decision-making. Rulings by higher courts bind lower courts to the same ruling. However, in 1932 Justice Brandeis wrote in a dissenting opinion in *Burnet v. Coronado Oil & Gas Co.*, "Stare decisis is usually the wise policy, because in most matters it is more important that the applicable law be settled than it be settled right." This was especially true about rulings related to legislation, he argued, because errors in the Court's decision could be corrected by Congress. However, on matters related to the application of the Constitution, which the legislature has no power to change, Brandeis noted that the Court has often reconsidered and overturned its own previous ruling if an earlier one was made in error.

Consider the 1944 case of *Smith v. Allwright*. The Court had ruled in 1935 in *Grovey v. Townsend* that the Democratic Party of Texas, as a private, voluntary organization, could determine its own membership rules even if those rules banned African Americans from membership and therefore prevented them from voting in the primary. In 1944, Lonnie E. Smith, an African American denied the right to vote in a Texas primary, brought suit, arguing that his rights under the Fifteenth Amendment were being violated. Mr. Justice Reed delivered the majority opinion in *Smith v. Allwright* and furthered the discussion of stare decisis vs. overturning a previous decision.

"The privilege of membership in a party may be, as this Court said in *Grovey v. Townsend,* no concern of a state. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the state makes the action of the party the action of the state. In reaching this conclusion, we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment, and not upon legislative action, this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. . . This is particularly true when the decision believed erroneous is the application of a constitutional principle, rather than an interpretation of the Constitution to extract the principle itself. Here, we are applying, contrary to the recent decision in *Grovey v. Townsend,* the well established principle of the Fifteenth Amendment, forbidding the abridgement by a state of a citizen's right to vote. *Grovey v. Townsend* is overruled."

Why in only nine years was the opinion of the Court changed so dramatically? First, the composition of the Court had changed significantly. The conservative "Four Horsemen" had retired, and FDR had appointed more liberal judges to replace them. Second, the social context was very different. The United States was at war, and African Americans in the military served in segregated divisions, fighting to overturn fascism and establish democratic rule. Many in the United States noticed the gap between the ideals of the war, supported by 2.5 million African Americans who volunteered for duty,

and the realities of African American disenfranchisement in the South. As an independent body, the Supreme Court is not accountable to public opinion; nonetheless, the liberal justices no doubt reflected the changing social context as they overturned *Grovey*.

Judicial Activism vs. Judicial Restraint

After the Supreme Court first exercised judicial review in *Marbury*, it checked the legislature only one more time in the Republic's first full century, in the Dred Scott case. Other courts have since reserved the right to rule on government action in violation of constitutional principles, whether by the legislature or the executive. Judicial review has placed the Supreme Court, as Brutus predicted, above the other branches, making it the final arbiter on controversies of federalism that typically have made the federal government supreme while defining what states, Congress, and the president can or cannot do.

When judges strike down laws or reverse public policy, they are said to be exercising **judicial activism**. (To remember this concept, think *judges acting* to create the law.) Activism can be liberal or conservative, depending on the nature of the law that is struck down. When the Court threw out the New York maximum-hours law in 1905 in *Lochner*, it acted conservatively because it rejected an established liberal statute. In *Roe v. Wade*, the Court acted liberally to remove a conservative anti-abortion policy in Texas. Courts at multiple levels in both the state and federal systems have struck down statutes as well as executive branch decisions.

The Court's power to strike down parts of or entire laws has encouraged litigation and changes in policy. Gun owners and the National Rifle Association (NRA) supported an effort to overturn a ban on handguns in Washington, D.C. and got a victory in the *Heller* decision (page 263). Several state attorneys general who opposed the Affordable Care Act sued to overturn it. In a 5:4 decision, in *National Federation of Independent Business v. Sebelius*, the Court upheld the key element of the Affordable Care Act, the individual mandate. That mandate is the federal requirement that all citizens must purchase health insurance or pay a penalty. In striking down limits on when a corporation can advertise during a campaign season, it struck down parts of Congress's Bipartisan Campaign Reform Act (2002) in *Citizens United v. FEC* (2010) (page 508).

Critics of judicial activism tend to point out that, in a democracy, elected representative legislatures should create policy. These critics advocate for **judicial self-restraint**. Chief Justice Harlan Fiske Stone first used the term in his 1936 dissent when the majority outlawed a New Deal program. The Court should not, say these critics, decide a dispute in that manner unless there is a concrete injury to be relieved by the decision. Conservative strict constructionist Antonin Scalia once claimed, "A 'living' Constitution judge [is] a happy fellow who comes home at night to his wife and says, 'The Constitution means exactly what I think it ought to mean!'" Justices should not declare a law unconstitutional, strict constructionists say today, when it merely violates their own idea of what the Constitution means in a contemporary

context, but only when the law clearly and directly contradicts the document. To do otherwise is "legislating from the bench," say strict constructionists. This ongoing debate about judicial activism and restraint has coincided with discussions about the Court's role in shaping national policy

Still other critics argue that judicial policymaking is ineffective as well as undemocratic. Wise judges have a firm understanding of the Constitution and citizens' rights, but they don't always study issues over time. Most judges don't have special expertise on matters of environmental protection, operating schools, or other administrative matters. They don't have the support systems of lawmakers, such as committee staffers and researchers, to fully engage an issue to find a solution. So when courts rule, the outcome is not always practical or manageable for those meant to implement it. Additionally, many such court rulings are just unpopular.

How Cases Reach the Supreme Court

The Supreme Court is guided by Article III, congressional acts, and its own rules. Congress is the authority on the Court's size and funding. The Court began creating rules in 1790 and now has 48 formal rules. These guide the submission of briefs, the Court's calendar, deadlines, fees, paperwork requirements, jurisdiction, and the handling of different types of cases. Less formal customs and traditions it has developed also guide the Court's operation.

As you read, the Court has both original and appellate jurisdiction. It serves as a trial court in rare cases, typically when one state sues another over a border dispute or to settle some type of interstate compact. It also accepts *in forma pauperis* briefs, filings by prisoners (in the form of a pauper) seeking a new trial.

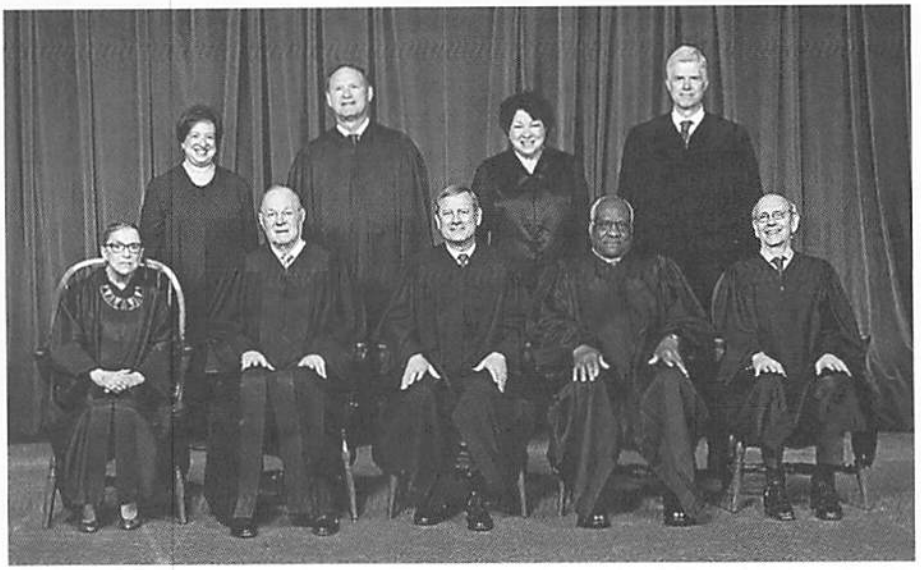
As the nation's highest appeals court, the Court takes cases from the 13 circuits and the 50 states. Two-thirds or more of appeals come through the federal system. The Supreme Court has a more direct jurisdiction over cases starting in U.S. district courts.

Like the circuit courts, the Supreme Court accepts appeals each year from among thousands filed. The petitioner files a **petition for certiorari**, a brief arguing why the lower court erred. The Supreme Court reviews these to determine if the claim is worthy and if it should grant the appeal. To be more efficient, the justices share their clerks, who review the petitions for certiorari and determine which are worthy. This "cert pool" becomes a gatekeeper at the Supreme Court. If an appeal is deemed worthy, the justices add the claim to their "discuss list." On a regular basis, all nine justices gather in conference to discuss these claims. They consider past precedents and the real impact on the petitioner and respondent. The Supreme Court does not consider hypothetical or theoretical damages; the claimant must show actual damage. Finally, the justices consider the wider national and societal impact if they take and rule on the case. Once four of the nine justices agree to accept the case, the appeal is granted. This **rule of four**, a standard less than a majority, reflects courts' commitments to claims by minorities.

The Court then issues a **writ of certiorari** to the lower court, informing it of the Court's decision and to request the full trial transcript. The justices spend much time reading the case record. Then a date is set for oral arguments. When the Court opens on the first Monday in October, the nine justices enter to hear the petitioner and respondent make their cases, each having 30 minutes for argument. A Supreme Court hearing is not a trial but a chance for each side to persuade justices on one or more narrow points of law. Justices will ask questions, pose hypothetical scenarios, and at times boldly signal their viewpoints. Sometime after the hearing, the justices will reconvene in conference to discuss the arguments and make a decision. A simple majority rules.

Opinions and Caseload

Chief Justice John Marshall's legacy of unanimity has vanished. The Court comes to a unanimous decision only about 30 to 40 percent of the time. Therefore, it issues varying opinions on the law. Once the Court comes to a majority, the chief justice, or the most senior justice in the majority, either writes the Court's opinion or assigns it to another justice in the majority. In making that decision, the assigning justice considers who has expertise on the topic, who is passionate about the issue, and what the nature of the discussions were that took place in conference. The **majority opinion** is the Court's opinion. It is the judicial branch's law much as a statute is Congress's law or an executive order is law created by a president. The majority opinion sums up the case, the Court's decision, and its rationale.



Front row, left to right: Associate Justice Ruth Bader Ginsburg, Associate Justice Anthony M. Kennedy, Chief Justice John G. Roberts, Jr., Associate Justice Clarence Thomas, Associate Justice Stephen G. Breyer. Back row: Associate Justice Elena Kagan, Associate Justice Samuel A. Alito, Jr., Associate Justice Sonia Sotomayor, Associate Justice Neil M. Gorsuch. Credit: Franz Jantzen, Collection of the Supreme Court of the United States

Justices who find themselves differing from the majority can draft and issue differing opinions. Some may agree with the majority and join that vote but have reservations about the majority's legal reasoning. They might write a **concurring opinion**. Those who vote against the majority often write a **dissenting opinion**. The dissenting opinion has no force of law but allows a justice to explain his disagreements with his colleagues. While these have no immediate legal bearing, dissenting opinions send a message to the legal community or to America at large and are often referenced in later cases when the Court might revisit the issue or reverse the precedent. On occasion, the Court will issue a decision without the full explanation. This is known as a ***per curium* opinion**.

Each justice typically employs four law clerks to assist them with handling briefs and analyzing important cases. These bright young attorneys typically graduate high in their classes at Ivy League law schools and have a prosperous legal career ahead of them. In fact, several Supreme Court justices of the modern era served as clerks in their earlier days. They preview cases for their bosses and assist them with writing the opinions.

Interactions with Other Branches of Government

Congress and the president interact with the judiciary in many ways. From the creation of various courts to the appointment of judges to implementation of a judicial decision, the judiciary often crosses paths with the other two branches. Despite the concern of some Anti-Federalists, the other branches of government do have ways to limit the power of the Supreme Court. BIG IDEA: The Constitution built in checks and balances to keep any branch from becoming too powerful.

Presidential Appointments and Senate Confirmation

With hundreds of judgeships in the lower courts, presidents will have a chance to appoint several judges to the federal bench over their four or eight years in office. When a vacancy occurs, or when Congress creates a new seat on an overloaded court, the president carefully selects a qualified judge because that person can shape law and will likely do so until late in his or her life. Since John Adams's appointment of the Federalist "midnight judges" in 1801 (page 199), presidents have shaped the judiciary with jurists who reflect their political and judicial philosophy. District and circuit appointments receive less news coverage and have less impact than Supreme Court nominees but are influential nonetheless. Presidents tend to consider candidates from the same or nearby areas in which they will serve. Law school deans, high-level state judges, and successful lawyers in private practice make excellent candidates. The president's White House legal team and the Department of Justice, in conjunction with the Senate, seek out good candidates to find experienced, favorable nominees.

BY THE NUMBERS SUPREME COURT'S RECENT CASELOAD		
Term	Cases Filed	Cases Argued
2004	7,496	87
2005	8,521	87
2006	8, 857	78
2007	8,241	75
2008	7, 738	87
2009	8,159	82
2010	7,857	86
2011	7,713	79
2012	7,509	77
2013	7,376	79
2014	7,033	75
2015	6,575	82

Source: *U.S. Supreme Court*

What do the numbers show? Roughly how many cases are appealed to the Supreme Court each year? How many cases does the Court generally accept? What fraction or percent of cases appealed does the Court take? Recall the reasons the Supreme Court will or will not accept an appeal.

Not all confirmed judges follow the philosophy the appointing president expected. Once confirmed, judges are independent from the executive. Several have disappointed the presidents who appointed them. Eisenhower did not bring Earl Warren to the Supreme Court to make liberal, activist decisions. Warren Burger disappointed Nixon when he voted to legalize abortion and to promote school busing for racial balance. Justice David Souter, appointed by Republican George H.W. Bush in 1990, proved to be a reliably liberal vote until he retired in 2009.

Senate's Advice and Consent The Senate Judiciary Committee looks over all the president's judicial appointments. Sometimes nominees appear before the committee to answer senators' questions about their experience or their views on the law. Less controversial district judges are confirmed without notice based largely on the recommendation of the senators from the nominee's state. The more controversial, polarizing Supreme Court nominees will receive greater attention during sometimes contentious and dramatic hearings.

The quick determination of an appointee's political philosophy has become known as a **litmus test**. Much like quickly testing a solution for its pH in chemistry class, someone trying to determine a judicial nominee's ideology on the political spectrum will ask a pointed question on a controversial issue, or

look at one of his or her prior opinions from a lower court. Presidents, senators, or pundits can conduct such a "test." The very term has a built in criticism, as a judge's complex judicial philosophy should not be determined as quickly as a black-and-white scientific measure.

Senatorial Courtesy The Senate firmly reserves its right of advice and consent. "In practical terms," said George W. Bush administration attorney Rachel Brand, "the home state senators are almost as important as—and sometimes more important than—the president in determining who will be nominated to a particular lower-court judgeship." This practice of **senatorial courtesy** is especially routine with district judge appointments, as districts are entirely within a given state. When vacancies occur, senators typically recommend judges to the White House.

Senate procedure and tradition give individual senators veto power over nominees located within their respective states. For U.S. district court nominations, each of the two senators receives a blue slip—a blue piece of paper they return to the Judiciary Committee to allow the process to move forward. To derail the process, a senator can return the slip with a negative indication or never return it at all. The committee chairman will usually not hold a hearing on the nominee's confirmation until both senators have consented. This custom has encouraged presidents to consult with the home-state senators early in the process.

All senators embrace this influence. They are the guardians and representatives for their states. The other 98 senators tend to follow the home state senators' lead, especially if they are in the same party, and vote for or against the nominated judge based on the senators' views. This custom is somewhat followed with appeals court judges as well. Appeals courts never encompass only one state, so the privilege and power of senatorial courtesy is less likely.

Confirmation When a Supreme Court vacancy occurs, a president has a unique opportunity to shape American jurisprudence. Of the 161 nominations to the Supreme Court over U.S. history, 36 were not confirmed. Eleven were rejected by a vote of the full Senate. The others were either never acted on by the Judiciary Committee or withdrawn by the nominee or by the president. Few confirmations brought rancor or public spectacle until the Senate rejected two of President Nixon's nominees. Since then, the Court's influence on controversial topics, intense partisanship, the public nature of the confirmation process, and contentious hearings have highlighted the divides between the parties.

Interest Groups The increasingly publicized confirmation process has also involved interest groups. Confirmation hearings were not public until 1929. In recent years, they have become a spectacle and may include a long list of witnesses testifying about the nominee's qualifications. The most active and reputable interest group to testify about judicial nominees is the American Bar Association (ABA). This powerful group represents the national interest of attorneys and the

legal profession. Since the 1950s, the ABA has been involved in the process. They rate nominees as "highly qualified," "qualified," and "not qualified." More recently, additional groups weigh in on the process, especially when they see their interests threatened or enhanced. Interest groups also target a senator's home state when they feel strongly about a nominee, urging voters to contact their senators in support or in opposition to the nominee. Indeed, interest groups sometimes suggest or even draft questions for senators to assist them at the confirmation hearings.

Getting "Borked" The confirmation process began to focus on ideology during the Reagan and first Bush administrations. The process took this turn when Reagan chose U.S. Appeals Court Justice Robert Bork in 1987. Bork was the conservatives' leading intellectual in the legal community. At 60 years old, he had been a professor at Yale Law School, U.S. solicitor general, and a successful corporate lawyer. He was an advocate of original intent, seeking to uphold the Constitution as intended by the framers. He made clear that he despised the rulings of the activist Warren Court. He spoke against decisions that mandated legislative reapportionment, upheld affirmative action, and placed citizen privacy over state authority.

When asked about his nomination, then-Senator Joe Biden, chair of the Senate Judiciary Committee, warned the White House that choosing Bork would likely result in a confirmation fight. Within hours of Reagan's nomination, Senator Edward Kennedy drew a line in the sand at a Senate press conference. "Robert Bork's America," Kennedy said, "is a land in which women would be forced into back alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizen's doors in midnight raids, and school children could not be taught evolution."

Kennedy's warning brought attention to Judge Bork's extreme views that threatened to turn back a generation of civil rights and civil liberties decisions. What followed was a raucous, lengthy confirmation hearing. Bork himself jousted with Senator Biden for hours. This contest drew attention as it was a pivotal moment for the Court when every liberal and conservative onlooker in the country had chosen sides as well as a clear illustration of the power of the Senate to influence the direction of the judiciary. After hearings with the committee, the full Senate, which had unanimously confirmed Bork as an appeals court judge in 1981, rejected him by a vote of 58 to 42. The term "to bork" entered the American political lexicon, defined more recently by the *New York Times*: "to destroy a judicial nominee through a concerted attack on his character, background, and philosophy."

Clarence Thomas In 1991, Justice Thurgood Marshall, the first African American on the Court, retired. President George H.W. Bush and his advisors introduced Marshall's replacement, conservative African-American judge Clarence Thomas. Thomas's controversial confirmation process centered on ideology, experience, and sexual harassment.

By naming Thomas, Bush satisfied the left's penchant for diversity, while also satisfying his conservative base with a strict constructionist. As Jeffrey Toobin, author of *The Nine*, says, "The list of plausible candidates that fit both qualifications pretty much began and ended with Clarence Thomas." After onlookers expressed concern about Thomas's ideology, they then pointed at his lack of experience. He had never argued a single case in any federal appeals court, much less the Supreme Court. He had never written a book, an article, or legal brief of any consequence. He had served as an appeals judge on the D.C. Circuit for about one year. The ABA gave him only a "qualified" rating, a rarity among nominees to the High Court.

Then Anita Hill came forward. Hill had some years earlier worked on Thomas's staff in the Department of Education and the Equal Employment Opportunity Commission and accused him of an array of sexually suggestive office behavior. The Judiciary Committee then invited her to testify. In a highly televised carnival atmosphere, Hill testified for seven hours about the harassing comments Thomas had made and the pornographic films he discussed. Thomas denied all the allegations and called the hearing a "high-tech lynching." After a tie vote in committee, the full Senate barely confirmed him.

"The Nuclear Option" During George W. Bush's first term, Democrats did not allow a vote on 10 of the 52 appeals court nominees that had cleared committee. Conservative nominees were delayed by Senate procedure. The Democrats, in the minority at the time, invoked the right to filibuster votes on judges. One Bush nominee waited four years.

Bush declared in his State of the Union message, "Every judicial nominee deserves an up or down vote." Senate Republicans threatened to change the rules to disallow the filibuster, which could be done with a simple majority vote. The threat to the filibuster became known as a drastic "nuclear option." The nuclear option was averted when a bipartisan group of senators dubbed the "Gang of 14" joined forces to create a compromise that kept the Senate rules the same while confirming most appointees.

President Obama had a lower confirmation rate than Bush. Late in his first term, about 76 percent of Obama's nominees had been confirmed, while nearly 87 percent of Bush's nominees were confirmed. Bush nominees waited, on average 46 days to be confirmed; Obama's waited an average of 115 days.

Denying Garland In February 2016, Associate Justice Antonin Scalia died. Republican presidential candidates in the primary race agreed on one thing: the next president should appoint Scalia's replacement. With Democratic President Obama in his final year on the job, Republican Senate Majority Leader Mitch McConnell announced that the Senate would not hold a vote on any nominee until the voters elected a new president. A month later, with 10 months remaining until a new president would be sworn in, Obama nominated Judge Merrick Garland to replace Scalia. Garland was a judicial pick from the D.C. Circuit with a unanimous "well-qualified" rating from the ABA. Senator

McConnell's decision was strategic if unusual, and he kept his promise to the dismay of many. Vacancies on the Supreme Court of course occur and the Court can operate temporarily with eight members, but to assure the vacancy for that period was unprecedented.

Constitutionally, nothing mandates a timeline on the Senate's confirmation process. Pundits and onlookers alike wondered about the propriety of this decision. Democrats saw the drastic move as a power grab by the Republican Senate. Some Republicans questioned McConnell's strategy, especially considering Democrat Hillary Clinton was the odds-on favorite to win the presidential election and might nominate a judge more liberal than Garland. On the day Americans would elect a new president, they would also elect several new senators. Who knew whether Republicans would have any say in the process after this election?

In the end, Donald Trump won the presidency, Republicans retained control of the Senate, and Trump nominated Tenth Circuit Justice Neil Gorsuch within two weeks of his inauguration. The Senate confirmed Gorsuch by a vote of 54 to 45.

BY THE NUMBERS
RECENT PRESIDENTS' JUDICIAL APPOINTMENTS

President	Supreme Court	Appeals Courts	District Courts	Total
Nixon (1969–1974)	4	45	182	231
Ford (1974–1977)	1	12	52	65
Carter (1977–1981)	0	56	206	262
Reagan (1981–1989)	3	78	292	373
G.H.W.Bush (1989–1993)	2	37	149	188
Clinton (1993–2001)	2	62	306	370
G.W. Bush (2001–2009)	2	61	261	324
Obama (2009–2017)	2	49	268	319

Source: *U.S. Courts. Excludes Court of International Trade*

What do the numbers show? What presidents appointed more judges than others? On average, how many Supreme Court judges does a president appoint? How many lower court judges? Which president of recent years appointed the most? How do a president's judicial appointees impact law and government in the United States?

Reforming Judicial Confirmation With all the interested parties focused on the potential impact of a new Supreme Court justice, confirmation has become a public and hotly debated event for an otherwise private, venerable institution. Joyce Baugh of Central Michigan University offers a solution to tame the confirmation process: Limit the number of participants at the hearings, prevent nominees from testifying, prevent senators from offering specific hypotheticals to conduct a litmus test, and base confirmation solely on nominees' written records and testimony from legal experts. Chief John Roberts spoke to the persistent problem of filling judicial vacancies in an age of partisanship. In his annual report on the judiciary, he declared, "Each party has found it easy to turn on a dime from decrying to defending the blocking of judicial nominations, depending on their changing political fortunes."

Executive and Legislative Influence on the Courts' Power

In addition to strategically choosing judicial nominees and selectively approving them, the president and Congress interact with lower courts and the Supreme Court in additional ways. The first two branches have the powers to bring matters and crimes to court, impeach and remove judges, use the power of the purse to affect the Judiciary and judicial decisions, partially redefine courts' jurisdiction, and implement court rulings in their own way.

The Justice Department In addition to appointing the judiciary, the executive branch enters the federal courts to enforce criminal law and to weigh in on legal questions. The president's Department of Justice, headed by the attorney general, investigates federal crimes with the Federal Bureau of Investigation (FBI) or the Drug Enforcement Administration (DEA), and U.S. attorneys prosecute the accused criminals. These attorneys are also the legal authority for federal civil law on a more local basis. When a party sues the federal government, it is the U.S. attorneys who defend the United States. In appealed criminal cases, these attorneys present the oral arguments in the circuit courts.

Another high-ranking figure in the Department of Justice is the **solicitor general,** who works in the Washington office. Appointed by the president and approved by the Senate, the solicitor general determines which cases to appeal to the U.S. Supreme Court and represents the United States in the Supreme Court room. When you see a Supreme Court case entitled the *United States v. John Doe*, it means the United States lost in one of the circuit courts and the solicitor general sought an appeal.

The solicitor general may also submit an ***amicus curiae*** **brief** (friend of the court brief) to the Supreme Court in cases where the United States is not a party. An amicus brief argues for a particular ruling in the case. Several solicitors general have later been appointed to the High Court, notably Stanley Reed, Thurgood Marshall, and Elena Kagan.

Impeachment Federal judges who have acted improperly can be removed by the same process for accusing and removing a president. In 1804, John Pickering became the first judge to be impeached. He was an

abusive, partisan drunkard on his way to insanity. Pickering refused to resign, so the House impeached him and the Senate convicted him on the charges of drunkenness and unlawful rulings. Almost immediately, Thomas Jefferson's party, the Democratic-Republicans, moved to impeach Supreme Court Justice Samuel Chase. In an age of partisan attacks, Jefferson's party wanted to weaken the remaining presence of Federalists on the federal bench. Chase had vigorously supported convictions under the Sedition Acts.

However, Jefferson wanted to avoid making the impeachment process a political tool to rid the third branch of opponents, so he withdrew his support for the endeavor, and Chase survived the Senate vote. Impeachment has served as Congress's check on the so-called life terms.

The House has impeached a total of 15 federal judges. The most recent was the 2010 impeachment of U.S. District Judge Thomas Porteous, whom the Senate later found guilty of corruption and perjury and voted to remove.

Congressional Oversight and Influence Congress sets and pays judges' salaries. Congress budgets for the construction and maintenance of federal courthouses. It has passed an entire body of law that helps govern the judiciary. This includes regulations about courtroom procedures to judicial recusal—judges withdrawing from a case if they have a conflict of interest. Occasionally Congress creates new seats in the 94 district courts and on the 13 appeals courts. Congress has more than doubled the number of circuit and district judges over the last 50 years.

SELECTED U.S. COURTS OF SPECIAL JURISDICTION

- U.S. Court of Appeals for the Armed Services
- U.S. Court of Federal Claims
- U.S. Court of International Trade
- U.S. Tax Court
- U.S. Court of Appeals for Veterans Claims

Some federal courts have only a limited, or special, jurisdiction. They are authorized to hear only those cases that fall within their limited jurisdiction.

Defining Jurisdiction Article III includes the power to consider all cases arising under the Constitution, federal law or treaty, and admiralty or maritime jurisdiction. It also addresses the types of cases that the judicial branch and specifically the "Supreme Court shall have . . . under such Regulations as the Congress shall make."

Since the initial Judiciary Act of 1789, Congress has periodically defined and reshaped the courts' jurisdiction. The most convenient and unquestioned power involves the legislature's power to define what types of cases are heard by which federal courts and which types of cases are left to the state courts. Article III also empowers Congress to define the types of parties that can go to the various courts, thereby defining **standing**, the requirements for bringing a

case to court. Congress cannot create state courts, but it can endow them with concurrent power to hear certain cases concerning federal law.

Congress occasionally delves into "court-stripping," or jurisdiction stripping, when it wants to limit the judicial branch's power in hearing cases on particular topics. For example, in the 108th Congress of 2003–2005, in an effort to protect the Pledge of Allegiance which was under fire for its "under God" phrase, the House voted to take away the courts' power to hear such cases. It also voted to deny funds in order to implement any such decisions. The same House voted to prevent federal courts from hearing cases regarding the Defense of Marriage Act. Conservative representatives were reacting to court filings, lower federal court decisions, or the coming strategy of using the courts to legalize same-sex marriage. The Senate failed to vote for the law, and thus courts have ruled on these matters.

Legislating after Unfavorable Decisions Many people believe the Supreme Court's decision is final, but sometimes it is not. In many precedent-setting decisions, the High Court is interpreting language in the Constitution. That language can be changed through constitutional amendments. Among Congress's earliest reactions to unfavorable judicial decisions was the passage and ratification of the obscure Eleventh Amendment in response to the 1794 ruling in *Chisolm v. Georgia*.

Anti-Federalists and states' rights advocates had warned that the new federal courts might overpower the state courts, and they saw the decision in *Chisolm v. Georgia* as such an encroachment. The case involved South Carolina residents seeking to recoup war debts from Georgia's government. Georgia denied that such a suit could take place in federal court and refused to show up. The Supreme Court ruled in *Chisolm* that federal courts had jurisdiction over such cases and opened the door for additional pending suits against other states. In response, Congress members, especially from the states involved in the lawsuits, proposed the Eleventh Amendment. The Amendment prohibits the federal courts from considering certain lawsuits against states. It is also understood to mean that state courts do not have to hear certain suits against the state, if they are based on federal law. The Eleventh Amendment altered the judicial branch's jurisdiction at the highest level and is the only amendment to do so.

However, additional amendments that addressed the substance of law have been proposed and ratified as reactions to unfavorable Supreme Court decisions. For example, following the Civil War, the passage of the Fourteenth Amendment effectively overturned the decision in the Dred Scott case by guaranteeing citizenship to those born in the United State and requiring states to afford their citizens "equal protection."

In the late 1800s, on the basis of the Fourteenth Amendment, the National Women's Suffrage Association brought suit looking to give women the right to vote. The Supreme Court ruled in *Minor v. Happersett* (1875) that citizenship

conferred "membership of a nation and nothing more," thus declaring states did not have to give women the franchise even though they were citizens. Progressive-minded officials were outraged and began attempts to change the Constitution. It took some time, but eventually Congress proposed and the states ratified the Nineteenth Amendment to override the decision.

Also in the late 1800s, Congress passed a national tax on individual incomes. Because the language in Article I, Section 8 is unclear on the types of taxes Congress can create and the manner in which these are to be applied, the Court struck down the law. However, later in the Progressive Era, enough support for such a tax enabled Congress to propose and the states to ratify the Sixteenth Amendment (1913) to assure this power to create the national income tax.

Amending the Constitution is the surest way to trump a Supreme Court decision, but it is a high hurdle to clear. In recent years, movements have surfaced to amend the document to stop abortions, to prevent same-sex marriage, and to enable legislatures to criminalize flag burning—all reactions to unpopular Supreme Court decisions, and all failed attempts.

A more practical path is for Congress or state legislatures to pass laws that the Supreme Court has declared unconstitutional in a slightly different form.

Implementation Courts decide principles and order citizens or government entities to take action or refrain from action. The executive branch enforces the law. In the same way, on a basic, local level, a state judge may issue a restraining order, but the police must do any necessary restraining.

When a court orders, decrees, or enjoins a party, it can do so only from the courtroom. Putting a decision into effect is another matter. Judges alone cannot implement the verdicts and opinions made in their courts. Nine robed justices in Washington simply cannot put their own decisions into effect. They require at least one of several other potential governing authorities— the president, U.S. marshals, regulatory agencies, or other government agencies—to carry out their decisions. Legislatures may have to rewrite or pass new laws or finance the enforcement endeavor. The implementing population, those charged with putting a court's decision into effect, doesn't always cooperate with or follow court orders.

When the Supreme Court makes decisions it assesses potential enforcement and cooperation. When John Marshall's Court deemed that Georgia could not regulate Cherokee Indian lands in its state because such regulation was exclusive to the federal government, President Andrew Jackson strongly disagreed and allegedly said, "John Marshall has made his decision, now let him enforce it." In the late 1950s, after the Court ruled that a Little Rock high school had to integrate, the executive branch sent federal troops to escort the claimants into the formerly all-white school.

REFLECT ON THE ESSENTIAL QUESTION

Essential Question: *How do the nation's courts compete and cooperate with the other branches to settle legal controversies and to shape public policy?* On separate paper, complete a chart like the one below to gather details to answer that question.

Interactions with Executive Branch	Interactions with Legislative Branch

KEY TERMS AND NAMES

amicus curiae brief/218
appellate jurisdiction/190
attorney general/194
binding precedent/197
certiorari/195
class action suit/194
common law/196
concurring opinion/212
defendant/193
dissenting opinion/212
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judicial activism/209
judicial review/197
judicial self-restraint/209
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Marbury v. Madison (1803)/199
Marshall, John/197
original jurisdiction/190
per curium opinion/212
persuasive precedent/197
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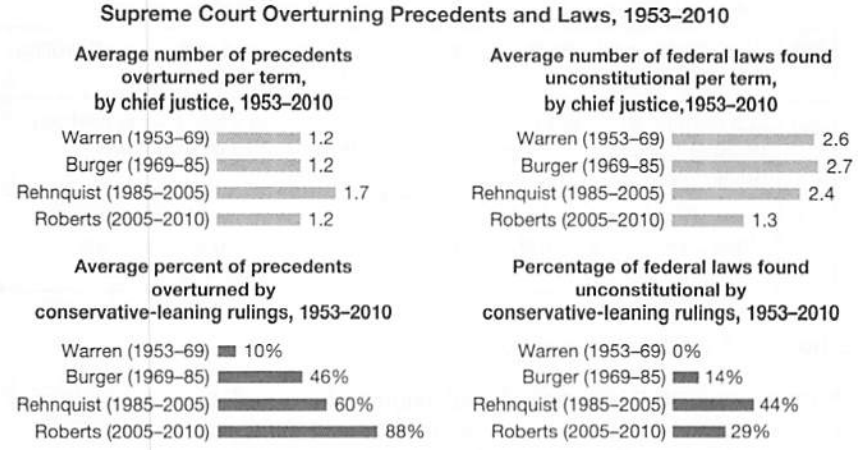
strict constructionist/202
Supreme Court/189
U.S. Circuit Court of Appeals/189
U.S. District Courts/189
Warren, Earl/203
writ of certiorari/211

MULTIPLE-CHOICE QUESTIONS

Questions 1 and 2 refer to the graphs.



1. Which of the following accurately describes the data in these graphs?
   (A) The Warren Court tended to act conservatively when it overturned prior Court precedents.
   (B) The Supreme Court overturns more federal laws each year than it overturns prior Supreme Court precedents.
   (C) The Burger Court struck down a greater number of precedents annually than the Rehnquist Court did.
   (D) The Roberts Court struck down more laws than its predecessors.

2. Based on the information in the charts, which of the following conclusions can you draw?
   (A) The Court by its actions is creating more law than the Congress.
   (B) The results in the graphs stem from the Senate's reluctance to confirm judicial nominees.
   (C) The Court overturns laws more often than it follows stare decisis.
   (D) The Court has issued more conservative rulings when it overturns prior Court precedents.

3. Which of the following is an accurate comparison of judicial activism and judicial restraint?

	JUDICIAL ACTIVISM	JUDICIAL RESTRAINT
(A)	Can result in shaping federal, but not state, policies	Is practiced when an appeals court agrees to grant an appeal
(B)	Was established with the Judiciary Act of 1789	Was practiced in the Court's ruling in *Roe v. Wade*
(C)	Is a democratic way to assure popular polices in a representative government	Is practiced when courts restrain the legislative or executive branches
(D)	Is practiced when courts overrule legislative acts or shape policy	Is exercised when courts refrain from interfering with policies created by elected bodies

Questions 4–5 refer to the passage below.

> If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.
>
> —Alexander Hamilton, *Federalist No. 80, 1788*

4. Which of the following statements best summarizes Hamilton's argument?
   (A) The thirteen states should retain their courts and have independence from national law.
   (B) The proposed federal courts and the Supreme Court will provide national consistency in law.
   (C) Because the national court system will have multiple judges, differing decisions will cause confusion.
   (D) The judicial branch should be the superior branch of government.

5. Which of the following principles does Hamilton suggest the new federal judiciary will establish?
   (A) Advice and consent
   (B) Judicial activism
   (C) Stability in the law
   (D) Freedom and liberty

6. A U.S. district judge in Alabama has a dispute in his court in which an employee is suing her employer over improper termination. The Ninth Circuit Court of Appeals and the U.S. District Court of Kansas have both ruled on highly similar cases under the same law and sided with the employee. Which of the following is the likely action this federal judge will take?
   (A) The judge must rule in the same way because of binding precedent.
   (B) The judge will read the other two courts' opinions and consider them before making a ruling.
   (C) The judge will ask the Justice Department for guidance.
   (D) The judge will refuse to hear the case because the federal courts have no jurisdiction in this matter.

7. Which of the following methods is the most certain way to override a Supreme Court decision?
   (A) Passing legislation the Court declared unconstitutional in a slightly different form
   (B) Appealing the decision
   (C) Proposing and ratifying a constitutional amendment that counters the decision
   (D) Convincing the president to veto the decision

Questions 8 and 9 refer to the cartoon below.

Source: *Jimmy Margulies, Politicalcartoons.com*

8. Which of the following best describes the message of the cartoon?
   (A) One judge shows judicial restraint; one shows judicial activism.
   (B) There are too many applicants for the Supreme Court.
   (C) The Court is tied up in bureaucratic matters.
   (D) One president's appointment was replaced by another president's.

9. Which of the following constitutional principles allowed the events shown in the cartoon?
   (A) The legislative process
   (B) The Senate's advice and consent role
   (C) Congress's role in determining the number of justices
   (D) Original jurisdiction

10. Which of the following statements is true regarding the Court's decision in *Marbury v. Madison* (1803)?
   (A) It resolved a dispute about Congress's commerce power.
   (B) It estabished the principle of stare decisis.
   (C) It overturned part of an act of Congress.
   (D) It established the supremacy of federal law.

FREE-RESPONSE QUESTIONS

1. "The Supreme Court closed out its 2011–12 term today in dramatic fashion, upholding the Affordable Care Act by a sharply divided vote [in *National Federation of Independent Business v. Sebelius*]. The Court's bottom line, reasoning and lineup of justices all came as a shock to many. . . . I don't think anyone predicted that the law would be upheld *without* the support of Justice Anthony Kennedy, almost always the Court's crucial swing vote. And while most of the legal debate focused on Congress's power under the Commerce Clause, the Court ultimately upheld the law as an exercise of the taxing power . . . .The most surprising thing of all, though, is that in the end, this ultraconservative Court decided the case, much as it did in many other cases this term, by siding with the liberals."

   —David Cole, *The Nation*, June 28, 2012

   After reading the scenario above, respond to A, B, and C below.
   (A) Describe the process that led to the Supreme Court's ruling on the challenge to the Affordable Care Act.
   (B) In the context of this scenario, explain how the process described in part A can be affected by the executive branch.
   (C) In the context of this scenario, explain how the ruling relates to enumerated powers.

Supreme Court Justices' Voting Relationships, 2017

Justice Agreement in full, in part, or in judgment

	AMK	CT	RBG	SGB	SAA	SMS	EK	NMG
JGR	87.5%	75%	81.25%	81.25%	75%	81.25%	85.71%	93.75%
AMK		87.5%	68.75%	68.75%	87.5%	68.75%	71.43%	93.75%
CT			68.75%	68.75%	100%	68.75%	71.43%	81.25%
RBG				100%	68.75%	100%	100%	81.25%
SGB					68.75%	100%	100%	75%
SAA						68.75%	71.43%	81.25%
SMS							100%	75%
EK								78.57%
NMG								

Justices' Initials, Full Names, and President Who Appointed Them

JGR: Chief Justice John G. Roberts, appointed by Republican George W. Bush
AMK: Anthony Kennedy, appointed by Republican Ronald Reagan
CT: Clarence Thomas, appointed by Republican George H.W. Bush
RBG: Ruth Bader Ginsburg, appointed by Democrat Bill Clinton
SGB: Stephen G. Breyer, appointed by Democrat Bill Clinton
SAA: Samuel Anthony Alito Jr., appointed by Republican George W. Bush
SMS: Sonia Sotomayor, appointed by Democrat Barack Obama
EK: Elena Kagan, appointed by Democrat Barack Obama
NMG: Neil Gorsuch, appointed by Republican Donald Trump

Source: *SCOTUSblog*

2. Use the information in the graphic to answer the questions below.
   (A) Describe the data presented in the table.
   (B) Identify the justices with the highest percentage of agreement with one another, and draw a conclusion about why they agree so often.
   (C) Explain how the information in the table demonstrates the independence of the justices from the ideology of the executives who appointed them.

3. During the Watergate investigation in the early 1970s, the special prosecutor wanted information discussed on President Nixon's White House audio tapes as evidence in the investigation. When the lower court issued a subpoena for the tapes, the president refused to hand them over, claiming executive privilege (his right to keep his discussions confidential) as part of the separation of powers, because some were of delicate national security interests and not the business of the court. Only by guaranteeing confidentiality, he argued, could he preserve the candor of advisors. In *United States v. Nixon* (1974), the Supreme Court ruled in a unanimous decision that, in the fair administration of justice, a court could compel even the president with its power of subpoena during an investigation. Nixon had to comply by handing over the tapes as evidence in the investigation.

(A) Identify a similarity or difference between the rulings in *United States v. Nixon* (1974) and *Marbury v. Madison* (1803).

(B) Based on the similarity or difference identified in A, explain how *United States v. Nixon* relates to the interactions between branches.

(C) Describe an action the executive branch might take to limit the impact of *United States v. Nixon.*

4. Develop an argument that explains whether the Supreme Court should take seriously the public's concerns about its legitimacy.

In your essay, you must:

- Articulate a defensible claim or thesis that responds to the prompt and establishes a line of reasoning
- Support your claim with at least TWO pieces of accurate and relevant information:
  - At least ONE piece of evidence must be from one of the following foundational documents
    - *Federalist No. 78*
    - Article III of the Constitution
  - Use a second piece of evidence from another foundational document from the list above or from your study of the federal judiciary
- Use reasoning to explain why your evidence supports your claim/thesis
- Respond to an opposing or alternative perspective using refutation, concession, or rebuttal

WRITING: *ORGANIZE YOUR ESSAY*

A well-organized essay will help get your points across clearly.

- In your introduction, assert your claim and let the reader know what line of reasoning you will use.
- In the body of your essay, present your evidence, taking care to clearly connect each piece of evidence to your claim. What about the evidence supports your claim?
- Respond to other viewpoints after you have developed your own.
- Be sure to keep each paragraph in the body focused on one main idea.
- Write a conclusion that follows from your claim and evidence.