CHAPTER

16

The Judiciary

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WHO GOVERNS?

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TO WHAT ENDS?

1. Why should federal courts be able to declare laws unconstitutional?
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Hardly any American cares what people are picked to be federal district court judges. Can you name even one district court judge in your city? But Congress cares deeply about who is appointed to be federal judges, especially to the Supreme Court. The reason for congressional concern is that federal courts, even at the lowest level, make important decisions that affect all of us.

And as the power of the federal government has grown, so the power of federal courts has increased. At one time there was no federal policy about the environment, welfare, abortion, gun control, or civil rights; now there are policies on all of these matters, and so there are more and more court rulings that tell us what these policies mean.

When in 1991 President George H. W. Bush nominated Clarence Thomas to the Supreme Court, he was barely confirmed by a Senate vote that was the closest in over a century. When in 1987 Ronald Reagan nominated Robert Bork to be a justice, he was not confirmed by the Senate. And when in 2003 George W. Bush nominated people to lower federal courts, some were blocked by a Democratic party filibuster.

As we saw in Chapter 13, a Senate filibuster is easy to mount and requires sixty votes to end it. In response to filibusters over court nominees, the Senate Republican majority leader threatened to impose what some observers called a "nuclear option." He suggested that the Senate revise its rules to block filibusters of judicial nominations. Since a rules change only requires a majority vote, the Republicans might have carried the day. Fourteen senators, half Democrats and half Republicans, came up with a different strategy. They agreed among themselves (the press called them the "Gang of Fourteen") that they would vote to block a filibuster on three appeals court nominees and not to filibuster any future nominees unless there were "extraordinary circumstances." As a result, several appeals court nominees and one to the Supreme Court (Samuel Alito) were approved by the Senate by majority vote even though they did not receive a filibuster-blocking sixty votes.

Only in the United States would the selection of a judge produce so dramatic and bitter a conflict. The reason is simple: only in the United States do judges play so large a role in making public policy.

One aspect of this power is **judicial review**—the right of the federal courts to declare laws of Congress and acts of the executive branch void and unenforceable if they are judged to be in conflict with the Constitution. Since 1789 the Supreme Court has declared over one hundred sixty federal laws to be unconstitutional. In Britain, by contrast, Parliament is supreme, and no court may strike down a law that it passes. As the second earl of Pembroke is supposed to have said, "A parliament can do anything but make a man a woman and a woman a man." All that prevents Parliament from acting contrary to the (unwritten) constitution of Britain are the consciences of its members

and the opinions of the citizens. About sixty nations do have something resembling judicial review, but in only a few cases does this power mean much in practice. Where it means something—in Australia, Canada, Germany, India, and some other nations—one finds a stable, federal system of government with a strong tradition of an independent judiciary.[1] (Some other nations—France, for example—have special councils, rather than courts, that can under certain circumstances decide that a law is not authorized by the constitution.)

Judicial review is the federal courts' chief weapon in the system of checks and balances on which the American government is based. Today few people would deny to the courts the right to decide that a legislative or executive act is unconstitutional, though once that right was controversial. What remains controversial is the method by which such review is conducted.

There are two competing views, each ardently pressed during the fight to confirm Clarence Thomas. The first holds that judges should only judge—that is, they should confine themselves to applying those rules that are stated in or clearly implied by the language of the Constitution. This is often called the **judicial restraint approach.** The other argues that judges should discover the general principles underlying the Constitution and its often vague language, amplify those principles on the basis of some moral or economic philosophy, and apply them to cases. This is sometimes called the **activist approach.**

Note that the difference between activist and strict-constructionist judges is not necessarily the same as the difference between liberals and conservatives. Judges can be political liberals and still believe that they are bound by the language of the Constitution. A liberal justice, Hugo Black, once voted to uphold a state law banning birth control because nothing in the Constitution prohibited such a law. Or judges can be conservative and still think that they have a duty to use their best judgment in deciding what is good public policy. Rufus Peckham, one such conservative, voted to overturn a state law setting maximum hours of work because he believed that the Fourteenth Amendment guaranteed something called "freedom of contract," even though those words are not in the amendment.

Seventy years ago judicial activists tended to be conservatives and strict-constructionist judges tended to be liberals; today the opposite is usually the case.

Table 16.1 Chief Justices of the United States

Chief Justice	Appointed By	Years of Service
John Jay	Washington	1789–1795
Oliver Ellsworth	Washington	1796–1800
John Marshall	Adams	1801–1835
Roger B. Taney	Jackson	1836–1864
Salmon P. Chase	Lincoln	1864–1873
Morrison R. Waite	Grant	1874–1888
Melville W. Fuller	Cleveland	1888–1910
Edward D. White	Taft	1910–1921
William Howard Taft	Harding	1921–1930
Charles Evans Hughes	Hoover	1930–1941
Harlan Fiske Stone	F. Roosevelt	1941–1946
Fred M. Vinson	Truman	1946–1953
Earl Warren	Eisenhower	1953–1969
Warren E. Burger	Nixon	1969–1986
William H. Rehnquist	Reagan	1986–2005
John G. Roberts, Jr.	Bush	2005–present

Note: Omitted is John Rutledge, who served for only a few months in 1795 and who was not confirmed by the Senate.

★ The Development of the Federal Courts

Most of the Founders probably expected the Supreme Court to have the power of judicial review (though they did not say that in so many words in the Constitution), but they did not expect federal courts to play so large a role in making public policy. The traditional view of civil courts was that they judged disputes between people who had direct dealings with each other—they had entered into a contract, for example, or one had dropped a load of bricks on the other's toe—and decided which of the two parties was right. The court then supplied relief to the wronged party, usually by requiring the other person to pay him or her money ("damages").

This traditional understanding was based on the belief that judges would find and apply existing law. The purpose of a court case was not to learn what the judge believes but what the law requires. The later rise of judicial activism occurred

judicial review *The power of courts to declare laws unconstitutional.*

judicial restraint approach *The view that judges should decide cases strictly on the basis of the language of the laws and the Constitution*

activist approach *The view that judges should discern the general principles underlying laws or the Constitution and apply them to modern circumstances.*

Marbury v. Madison

The story of *Marbury v. Madison* is often told, but it deserves another telling because it illustrates so many features of the role of the Supreme Court—how apparently small cases can have large results, how the power of the Court depends not simply on its constitutional authority but also on its acting in ways that avoid a clear confrontation with other branches of government, and how the climate of opinion affects how the Court goes about its task.

When President John Adams lost his bid for re-election to Thomas Jefferson in 1800, he—and all members of his party, the Federalists—feared that Jefferson and the Republicans would weaken the federal government and turn its powers to what the Federalists believed were wrong ends (states' rights, an alliance with the French, hostility to business). Feverishly, as his hours in office came to an end, Adams worked to pack the judiciary with fifty-nine loyal Federalists by giving them so-called midnight appointments before Jefferson took office.

John Marshall, as Adams's secretary of state, had the task of certifying and delivering these new judicial commissions. In the press of business he delivered all but seventeen; these he left on his desk for the incoming secretary of state, James Madison, to send out. Jefferson and Madison, however, were furious at Adams's behavior and refused to deliver the seventeen. William Marbury and three other Federalists who had been promised these commissions hired a lawyer and brought suit against Madison to force him to produce the documents. The suit requested the Supreme Court to issue a writ of mandamus (from the Latin, "we command") ordering Madison to do his duty. The right to issue such writs had been given to the Court by the Judiciary Act of 1789.

Marshall, the man who had failed to deliver the commissions to Marbury and his friends in the first place, had become the chief justice and was now in a position to decide the case. These days a justice who had been involved in an issue before it came to the Court would probably disqualify himself or herself, but Marshall had no intention of letting others decide this question. He faced, however, not simply a partisan dispute over jobs but what was nearly a constitutional crisis. If he ordered the commission delivered, Madison might still refuse, and the Court had no way—if Madison was determined to resist—to compel him. The Court had no police force, whereas Madison had the support of the president

when judges questioned this traditional view and argued instead that judges do not merely find the law, they make the law.

The view that judges interpret the law and do not make policy made it easy for the Founders to justify the power of judicial review and led them to predict that the courts would play a relatively neutral, even passive, role in public affairs. Alexander Hamilton, writing in *Federalist* No. 78, described the judiciary as the branch "least dangerous" to political rights. The president is commander in chief and thus holds the "sword of the community"; Congress appropriates money and thus "commands the purse" as well as decides what laws shall govern. But the judiciary "has no influence over either the sword or the purse" and "can take no active resolution whatever." It has "neither force nor will but merely judgment," and thus is "beyond comparison the weakest of the three departments of power." As a result "liberty can have nothing to fear from the judiciary alone." Hamilton went on to state clearly that the Constitution intended to give to the courts the right to decide whether a law is contrary to the Constitution. But this authority, he explained, was designed not to enlarge the power of the courts but to confine that of the legislature.

Obviously things have changed since Hamilton's time. The evolution of the federal courts, especially the Supreme Court, toward the present level of activism and influence has been shaped by the political, economic, and ideological forces of three historical eras. From 1787 to 1865 nation building, the legitimacy of the federal government, and slavery were the great issues; from 1865 to 1937 the great issue was the relationship between the government and the economy;

of the United States. And if the order were given, whether or not Madison complied, the Jeffersonian Republicans in Congress would probably try to impeach Marshall. On the other hand, if Marshall allowed Madison to do as he wished, the power of the Supreme Court would be seriously reduced.

Marshall's solution was ingenious. Speaking for a unanimous Court, he announced that Madison was wrong to withhold the commissions, that courts could issue writs to compel public officials to do their prescribed duty—*but* that the Supreme Court had no power to issue such writs in this case because the law (the Judiciary Act of 1789) giving it that power was unconstitutional. The law said that the Supreme Court could issue such writs as part of its "original jurisdiction"—that is, persons seeking such writs could go *directly* to the Supreme Court with their request (rather than go first to a lower federal court and then, if dissatisfied, appeal to the Supreme Court). Article III of the Constitution, Marshall pointed out, spelled out precisely the Supreme Court's original jurisdiction; it did not mention issuing writs of this sort and plainly indicated that on all matters not mentioned in the Constitution, the Court would have only appellate jurisdiction. Congress may not change what the Constitution says; hence the part of the Judiciary Act attempting to do this was null and void.

John Adams

James Madison

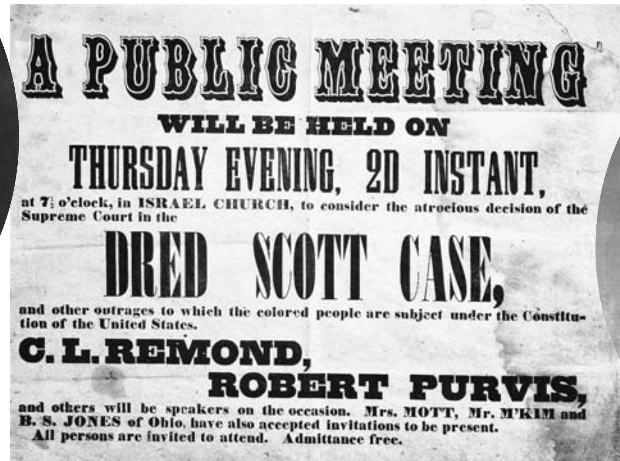
The result was that a showdown with the Jeffersonians was avoided—Madison was not ordered to deliver the commissions—but the power of the Supreme Court was unmistakably clarified and enlarged. As Marshall wrote, "It is emphatically the province and duty of the judicial department to say what the law is." Furthermore, "a law repugnant to the Constitution is void."

from 1938 to the present the major issues confronting the Court have involved personal liberty and social equality and the potential conflict between the two. In the first period the Court asserted the supremacy of the federal government; in the second it placed important restrictions on the powers of that government; and in the third it enlarged the scope of personal freedom and narrowed that of economic freedom.

National Supremacy and Slavery

"From 1789 until the Civil War, the dominant interest of the Supreme Court was in that greatest of all the questions left unresolved by the Founders—the nation-state relationship."[2] The answer that the Court gave, under the leadership of Chief Justice John Marshall, was that national law was in all instances the dominant law, with state law having to give way, and that the Supreme Court had the power to decide what the Constitution meant. In two cases of enormous importance—*Marbury v. Madison* in 1803 and *McCulloch v. Maryland* in 1819—the Court, in decisions written by Marshall, held that the Supreme Court could declare an act of Congress unconstitutional; that the power granted by the Constitution to the federal government flows from the people and thus should be generously construed (and thus any federal laws that are "necessary and proper" to the attainment of constitutional ends are permissible); and that federal law is supreme over state law, even to the point that a state may not tax an enterprise (such as a bank) created by the federal government.[3]

The supremacy of the federal government was reaffirmed by other decisions as well. In 1816 the Supreme



Roger B. Taney, chief justice from 1836 to 1864, wrote the *Dred Scott* decision, which asserted that blacks were not citizens of the United States. Dred Scott claimed that when his master brought him north to a free state, he ceased to be a slave. The public outcry against the decision was intense, at least in the North, as is evident from this poster announcing a mass meeting "to consider the atrocious decision."

Court rejected the claim of the Virginia courts that the Supreme Court could not review the decisions of state courts. The Virginia courts were ready to acknowledge the supremacy of the U.S. Constitution but believed that they had as much right as the U.S. Supreme Court to decide what the Constitution meant. The Supreme Court felt otherwise, and in this case and another like it the Court asserted its own broad powers to review any state court decision if that decision seemed to violate federal law or the federal Constitution.[4]

The power of the federal government to regulate commerce among the states was also established. When New York gave to Robert Fulton, the inventor of the steamboat, the monopoly right to operate his steamboats on the rivers of that state, the Marshall Court overturned the license because the rivers connected New York and New Jersey and thus trade on those rivers would involve *inter*state commerce, and federal law in that area was supreme. Since there was a conflicting federal law on the books, the state law was void.[5]

All of this may sound rather obvious to us today, when the supremacy of the federal government is largely unquestioned. In the early nineteenth century, however, these were almost revolutionary decisions. The Jeffersonian Republicans were in power and had become increasingly devoted to states' rights; they were aghast at the Marshall decisions. President Andrew Jackson attacked the Court bitterly for defending the right of the federal government to create a national bank and for siding with the Cherokee Indians in a dispute with Georgia. In speaking of the latter case, Jackson is supposed to have remarked, "John Marshall has made his decision; now let him enforce it!"[6]

Though Marshall seemed to have secured the supremacy of the federal government over the state governments, another even more divisive issue had arisen; that, of course, was slavery. Roger B. Taney succeeded Marshall as chief justice in 1836. He was deliberately chosen by President Jackson because he was an advocate of states' rights, and he began to chip away at federal supremacy, upholding state claims that Marshall would have set aside. But the decision for which he is famous—or infamous—came in 1857, when in the *Dred Scott* case he wrote perhaps the most disastrous judicial opinion ever issued. A slave, Dred Scott, had been taken by his owner to a territory (near what is now St. Paul, Minnesota) where slavery was illegal

under federal law. Scott claimed that since he had resided in a free territory, he was now a free man. Taney held that Negroes were not citizens of the United States and could not become so, and that the federal law—the Missouri Compromise—prohibiting slavery in northern territories was unconstitutional.[7] The public outcry against this view was enormous, and the Court and Taney were discredited in the North, at least. The Civil War was ultimately fought over what the Court mistakenly had assumed was a purely legal question.

Government and the Economy

The supremacy of the federal government may have been established by John Marshall and the Civil War, but the scope of the powers of that government or even of the state governments was still to be defined. During the period from the end of the Civil War to the early years of the New Deal, the dominant issue the Supreme Court faced was deciding when the economy would be regulated by the states and when by the nation.

The Court revealed a strong though not inflexible attachment to private property. In fact that attachment had always been there: the Founders thought that political and property rights were inextricably linked, and Marshall certainly supported the sanctity of contracts. But now, with the muting of the federal supremacy issue and the rise of a national economy with important unanticipated effects, the property question became the dominant one. In general, the Court developed the view that the Fourteenth Amendment, adopted in 1868 primarily to protect African American claims to citizenship from hostile state action, also protected private property and the corporation from unreasonable state action. The crucial phrase was this: no state shall "deprive any person of life, liberty, or property, without due process of law." Once it became clear that a "person" could be a firm or a corporation as well as an individual, business and industry began to flood the courts with cases challenging various government regulations.

The Court quickly found itself in a thicket: it began ruling on the constitutionality of virtually every effort by any government to regulate any aspect of business or labor, and its workload rose sharply. Judicial activism was born in the 1880s and 1890s as the Court set itself up as the arbiter of what kind of regulation was permissible. In the first seventy-five years of this country's history, only 2 federal laws were held to be unconstitutional; in the next seventy-five years, 71 were.[8] Of the roughly 1,300 state laws held to be in conflict with the federal Constitution since 1789, about 1,200 were overturned after 1870. In one decade alone—the 1880s—5 federal and 48 state laws were declared unconstitutional.

Many of these decisions provided clear evidence of the Court's desire to protect private property: it upheld the use of injunctions to prevent labor strikes,[9] struck down the federal income tax,[10] sharply limited the reach of the antitrust law,[11] restricted the powers of the Interstate Commerce Commission to set railroad rates,[12] prohibited the federal government from eliminating child labor,[13] and prevented the states from setting maximum hours of work.[14] In 184 cases between 1899 and 1937, the Supreme Court struck down state laws for violating the Fourteenth Amendment, usually by economic regulation.[15]

But the Court also rendered decisions that authorized various kinds of regulation. It allowed states to regulate businesses "affected with a public interest,"[16] changed its mind about the Interstate Commerce Commission and allowed it to regulate railroad rates,[17] upheld rules requiring railroads to improve their safety,[18] approved state antiliquor laws,[19] approved state mine safety laws,[20] supported state workers' compensation laws,[21] allowed states to regulate fire-insurance rates,[22] and in time upheld a number of state laws regulating wages and hours. Indeed, between 1887 and 1910, in 558 cases involving the Fourteenth Amendment, the Supreme Court upheld state regulations over 80 percent of the time.[23]

To characterize the Court as probusiness or antiregulation is both simplistic and inexact. More accurate, perhaps, is to characterize it as supportive of the rights of private property but unsure how to draw the lines that distinguish "reasonable" from "unreasonable" regulation. Nothing in the Constitution clearly differentiates reasonable from unreasonable regulation, and the Court has been able to invent no consistent principle of its own to make this determination. For example, what kinds of businesses are "affected with a public interest"? Grain elevators and railroads are, but are bakeries? Sugar refiners? Saloons? And how much of commerce is "interstate"—anything that moves? Or only something that actually crosses a state line? The Court found itself trying to make detailed

Landmark Cases

Power of the Supreme Court

- ***Marbury v. Madison* (1803):** Upheld judicial review of congressional acts.
- ***Martin V. Hunter's Lessee* (1816):** The Supreme Court can review the decisions of the highest state courts if they involve a federal law or the federal Constitution.
- ***McCulloch V. Maryland* (1819):** Said that creating a federal bank, though not mentioned in the Constitution, was a "necessary and proper" exercise of the government's right to borrow money.
- ***Ex Parte McCardle* (1869):** Allowed Congress to change the appellate jurisdiction of the Supreme Court.

To explore these landmark cases further, visit the *American Government* web site at college.hmco.com/pic/wilsonAGlle.

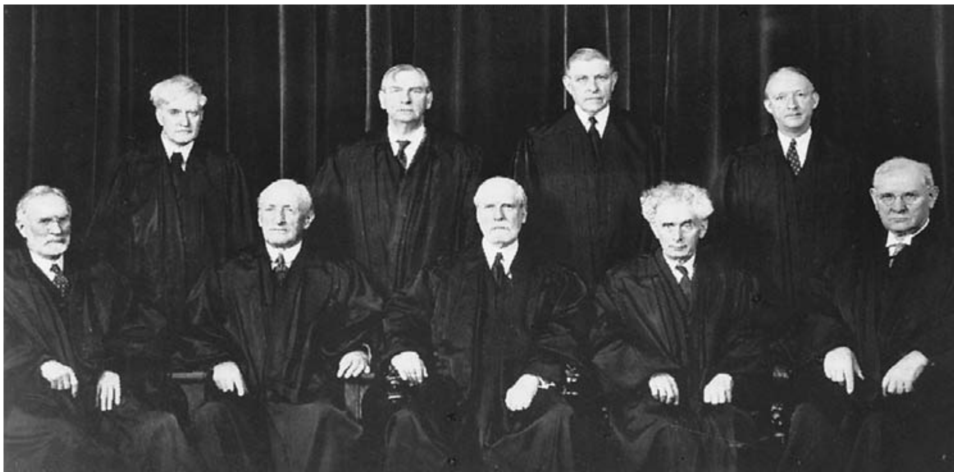
judgments that it was not always competent to make and to invent legal rules where no clear legal rules were possible.

In one area, however, the Supreme Court's judgments were clear: the Fourteenth and Fifteenth Amendments were construed so narrowly as to give African Americans only the most limited benefits of their provisions. In a long series of decisions the Court upheld segregation in schools and on railroad cars and permitted blacks to be excluded from voting in many states.

Government and Political Liberty

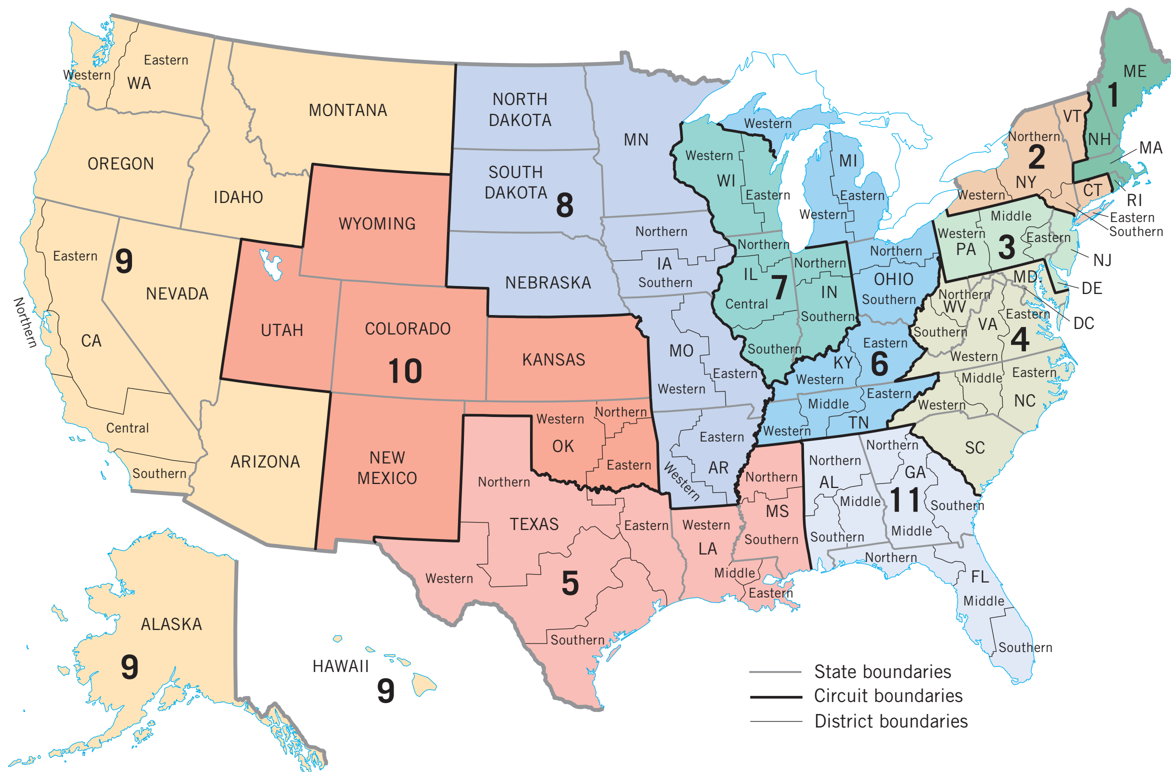
After 1936 the Supreme Court stopped imposing any serious restrictions on state or federal power to regulate the economy, leaving such matters in the hands of the legislatures. From 1937 to 1974 the Supreme Court did not overturn a single federal law designed to regulate business but did overturn thirty-six congressional enactments that violated personal political liberties. It voided as unconstitutional laws that restricted freedom of speech,[24] denied passports to communists,[25] permitted the government to revoke a person's citizenship,[26] withheld a person's mail,[27] or restricted the availability of government benefits.[28]

This new direction began when one justice changed his mind, and it continued as the composition of the



The "nine old men": The Supreme Court in 1937, not long after President Franklin D. Roosevelt tried, unsuccessfully, to "pack" it by appointing six additional justices who would have supported his New Deal legislation. Justice Owen J. Roberts (standing, second from the left) changed his vote on these matters, and the Court ceased to be a barrier to the delegation of power to the bureaucracy.

U.S. District and Appellate Courts



Note: Washington, D.C., is in a separate court. Puerto Rico is in the first circuit; the Virgin Islands are in the third; Guam and the Northern Mariana Islands are in the ninth.
Source: Administrative Office of the United States Courts (January 1983).

Court changed. At the outset of the New Deal the Court was, by a narrow margin, dominated by justices who opposed the welfare state and federal regulation based on broad grants of discretionary authority to administrative agencies. President Franklin Roosevelt, who was determined to get just such legislation implemented, found himself powerless to alter the composition of the Court during his first term (1933–1937): because no justice died or retired, he had no vacancies to fill. After his overwhelming reelection in 1936, he moved to remedy this problem by "packing" the Court.

Roosevelt proposed a bill that would have allowed him to appoint one new justice for each one over the age of seventy who refused to retire, up to a total membership of fifteen. Since there were six men in this category then on the Supreme Court, he would have been able to appoint six new justices, enough to ensure a comfortable majority supportive of his economic policies. A bitter controversy ensued, but before the bill could be voted on, the Supreme Court, perhaps reacting to Roosevelt's big win in the 1936 election, changed its mind. Whereas it had been striking down several New Deal measures by votes of five to four, now it started approving them by the same vote. One justice, Owen Roberts, had switched his position. This was called the "switch in time that saved nine," but in fact Roberts had changed his mind *before* the FDR plan was announced.

The "Court-packing" bill was not passed, but it was no longer necessary. Justice Roberts had yielded before public opinion in a way that Chief Justice Taney a century earlier had not, thus forestalling an assault on the Court by the other branches of government. Shortly thereafter several justices stepped down, and Roosevelt was able to make his own appointments (he filled seven seats during his four terms in office).

From then on the Court turned its attention to new issues—political liberties and, in time, civil rights.

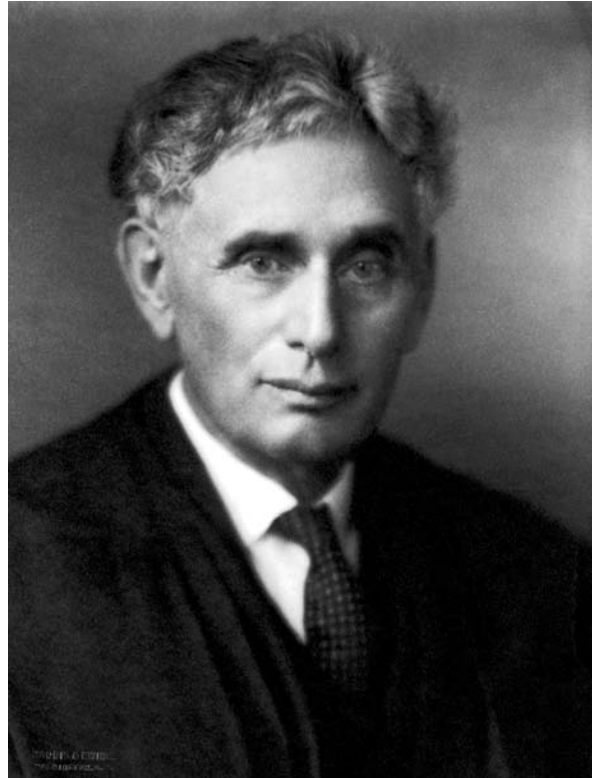
With the arrival in office of Chief Justice Earl Warren in 1953, the Court began its most active period yet. Activism now arose to redefine the relationship of citizens to the government and especially to protect the rights and liberties of citizens from governmental trespass. Although the Court has always seen itself as protecting citizens from arbitrary government, before 1937 that protection was of a sort that conservatives preferred; after 1937 it was of a kind that liberals preferred.

The Revival of State Sovereignty

For many decades the Supreme Court allowed Congress to pass almost any law authorized by the Constitution, no matter how it affected the states. As we saw in Chapter 3, the Court had long held that Congress could regulate almost any activity if it affected interstate commerce, and in the Court's opinion virtually every activity did affect it. The states were left with few rights to challenge federal power. But since around 1992 the Court has backed away from this view. By narrow majorities it has begun to restore the view that states have the right to resist some forms of federal action.

When Congress passed a bill that forbade anyone from carrying a gun near a school, the Court held that carrying guns did not affect interstate commerce, and so the law was invalid.[29] One year later it struck down a law that allowed Indian tribes to sue the states in federal courts, arguing that Congress lacks the power to ignore the "sovereign immunity" of states—that is, the right, protected by the Eleventh Amendment, not to be sued in federal court. (It has since upheld that view in two more cases.) And the next year it held that the Brady gun control law could not be used to require local law enforcement officers to do background checks on people trying to buy weapons.[30] These cases are all hints that there are some real limits to the supremacy of the federal government created by the existence and powers of the several states.

constitutional court *A federal court authorized by Article III of the Constitution that keeps judges in office during good behavior and prevents their salaries from being reduced. They are the Supreme Court (created by the Constitution) and appellate and district courts created by Congress.*



Louis Brandeis, creator of the "Brandeis Brief" that developed court cases based on economic and social more than legal arguments, became the first Jewish Supreme Court justice. He served in the Court from 1916 until 1939.

★ The Structure of the Federal Courts

The only federal court that the Constitution requires is the Supreme Court, as specified in Article III. All other federal courts and their jurisdictions are creations of Congress. Nor does the Constitution indicate how many justices shall be on the Supreme Court (there were originally six, now there are nine) or what its appellate jurisdiction shall be.

Congress has created two kinds of lower federal courts to handle cases that need not be decided by the Supreme Court: constitutional and legislative courts. A **constitutional court** is one exercising the judicial powers found in Article III of the Constitution, and therefore its judges are given constitutional protection: they may not be fired (they serve during "good behavior"), nor may their salaries be reduced while they are

in office. The most important of the constitutional courts are the **district courts** (a total of ninety-four, with at least one in each state, the District of Columbia, and the commonwealth of Puerto Rico) and the **courts of appeals** (one in each of eleven regions, plus one in the District of Columbia and one federal circuit). There are also various specialized constitutional courts, such as the Court of International Trade.

A **legislative court** is one set up by Congress for some specialized purpose and staffed with people who have fixed terms of office and can be removed or have their salaries reduced. Legislative courts include the Court of Military Appeals and the territorial courts.

Selecting Judges

Party background makes a difference in how judges behave. An analysis has been done of over eighty studies of the link between party and either liberalism or conservatism among state and federal judges in cases involving civil liberties, criminal justice, and economic regulation. It shows that judges who are Democrats are more likely to make liberal decisions and Republican judges are more likely to make conservative ones.* The party effect is not small.[31] We should not be surprised by this, since we have already seen that among political elites (and judges are certainly elites) party identification influences personal ideology.

But ideology does not entirely determine behavior. So many other things shape court decisions—the facts of the case, prior rulings by other courts, the arguments presented by lawyers—that there is no reliable way of predicting how judges will behave in all matters. Presidents often make the mistake of thinking that they know how their appointees will behave, only to be surprised by the facts. Theodore Roosevelt appointed Oliver Wendell Holmes to the Supreme Court, only to remark later, after Holmes had voted in a way that Roosevelt did not like, that "I could carve out of a banana a judge with more backbone than that!" Holmes, who had plenty of backbone, said that he did not "give a damn" what Roosevelt thought. Richard Nixon, an ardent foe of court-ordered school busing, appointed Warren Burger to be chief justice. Burger promptly sat down and wrote the opinion upholding busing. Another Nixon appointee, Harry Blackmun, wrote the opinion declaring the right to an abortion to be constitutionally protected.

Senatorial Courtesy In theory the president nominates a "qualified" person to be a judge, and the Senate approves or rejects the nomination based on those "qualifications." In fact the tradition of *senatorial courtesy* gives heavy weight to the preferences of the senators from the state where a federal district judge is to serve. Ordinarily the Senate will not confirm a district court judge if the senior senator from the state where the district is located objects (if he is of the president's party). The senator can exercise this veto power by means of the "blue slip"—a blue piece of paper on which the senator is asked to record his or her views on the nominee. A negative opinion, or even failure to return the blue slip, usually kills the nomination. This means that as a practical matter the president nominates only persons recommended to him by that key senator. Someone once suggested that, at least with respect to district judges, the Constitution has been turned on its head. To reflect reality, he said, Article II, section 2, ought to read: "The senators shall nominate, and by and with the consent of the President, shall appoint" federal judges.

The "Litmus Test" Of late, presidents have tried to exercise more influence on the selection of federal district and appellate court judges by getting the Justice Department to find candidates that not only are supported by their party's senators, but also reflect the political and judicial philosophy of the president. Presidents Carter and Clinton sought out liberal, activist judges; President Reagan sought out conservative, strict-constructionist ones. The party membership of federal judges makes a difference in how they vote.[32]

Because different courts of appeals have different combinations of judges, some will be more liberal than others. For example, there are more liberal judges in the court of appeals for the ninth circuit (which includes most of the far western states) and more

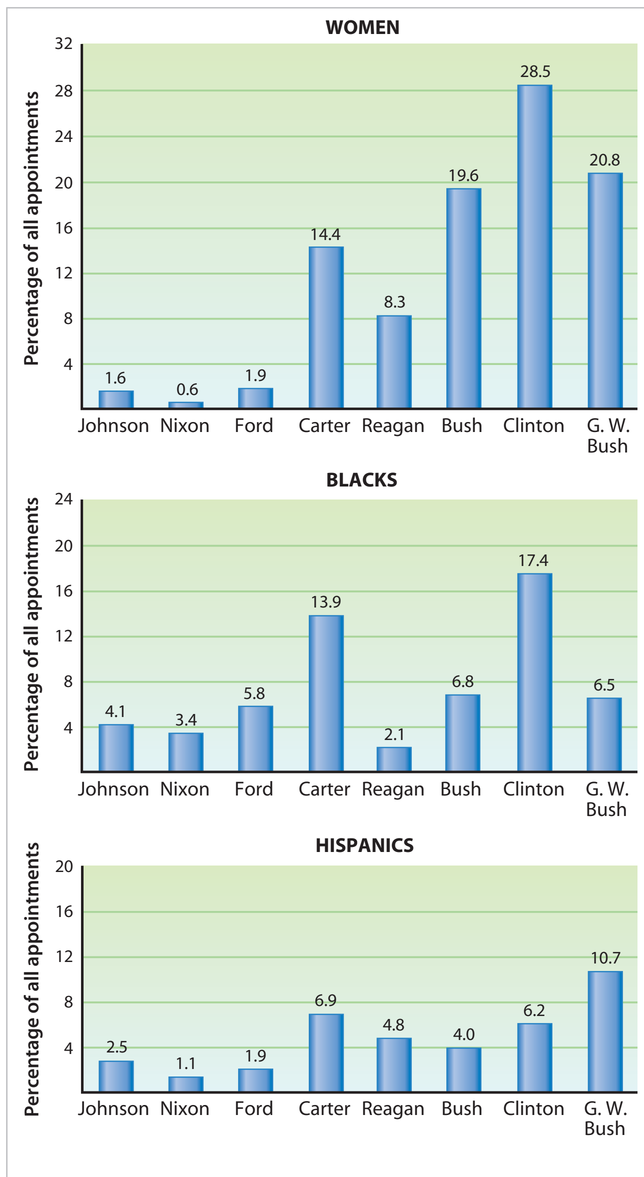
district courts *The lowest federal courts; federal trials can be held only here.*

courts of appeals *Federal courts that hear appeals from district courts; no trials.*

legislative courts *Courts created by Congress for specialized purposes whose judges do not enjoy the protections of Article III of the Constitution.*

*A "liberal" decision is one that favors a civil right, a criminal defendant, or an economic regulation; a "conservative" one opposes the right or the regulation or supports the criminal prosecutor.

Figure 16.1 Female and Minority Judicial Appointments, 1963–2004



Source: Updated from Harold W. Stanley and Richard G. Niemi, *Vital Statistics on American Politics, 2005–2006* (Washington, D.C.: Congressional Quarterly, 2006), table 7.5.

litmus test *An examination of the political ideology of a nominated judge.*

conservative ones in the fifth circuit (Texas, Louisiana, and Mississippi). The ninth circuit takes liberal positions, the fifth more conservative ones. Since the Supreme Court does not have time to settle every disagreement among appeals courts, different interpretations of the law may exist in different circuits. In the fifth, for instance, it was for a while unconstitutional for state universities to have affirmative action programs, but in the ninth circuit that was permitted.

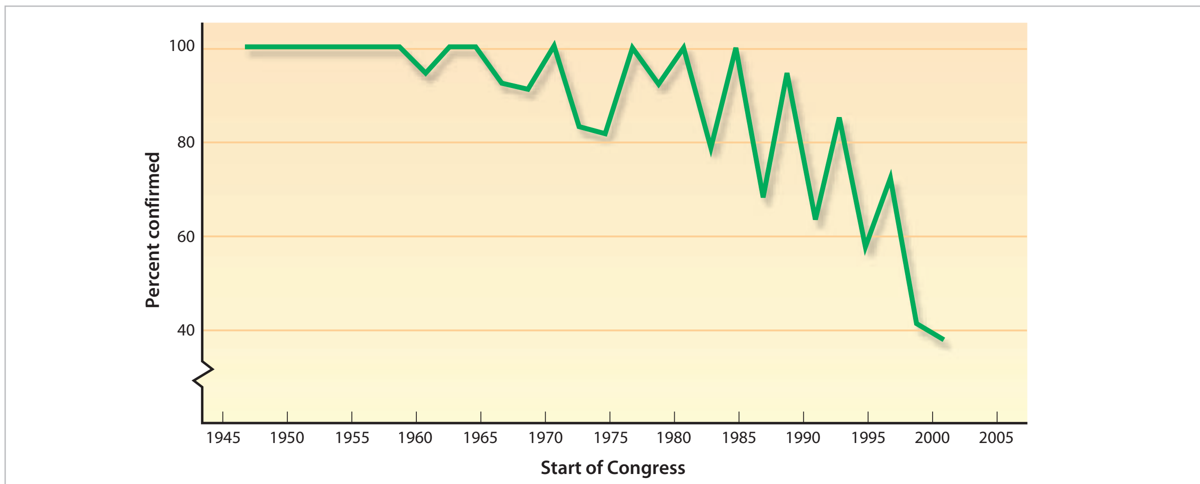
These differences make some people worry about the use of a political **litmus test**—a test of ideological purity—in selecting judges. When conservatives are out of power, they complain about how liberal presidents use such a test; when liberals are out power, they complain about how conservative presidents use it. Many people would like to see judges picked on the basis of professional qualifications, without reference to ideology, but the courts are now so deeply involved in political issues that it is hard to imagine what an ideologically neutral set of professional qualifications might be.

The litmus test has grown in importance. There has been a sharp drop in the percentage of nominees to federal appeals courts who are confirmed (see Figure 16.2). From 1945 until 1970, almost every nominee was confirmed, but by 1995 only about half got through the Senate and by 2000 it was less than 40 percent. (Nominees to the federal district court are, obviously, much less controversial because the president rarely nominates someone who is not supported by the state's senators.)

Today senators say that they want to use the litmus test because the ideology of judges, especially with regard to abortion, is politically important to them. There are two issues: whether the Judiciary Committee will report out nominees and whether the nominee can withstand a filibuster on the Senate floor. In 2005, Senate Republican leaders threatened to pass a new rule by simple majority vote that would ban filibusters on judicial nominees, but at the last moment a compromise was arranged whereby the Democrats refused to filibuster three nominees, the Republicans agreed to drop two, and future filibusters would be limited to candidates who displayed "exceptional" problems.

The litmus test issue is of greatest importance in selecting Supreme Court justices. Here there is no tradition of senatorial courtesy. The president takes a keen personal interest in the choices and, of late, has sought to find nominees who share his philosophy. In the Reagan administration there were bruising fights in the Senate over the nomination of William Rehnquist to be chief justice (he won) and Robert Bork to be an associate justice (he lost), with liberals pitted

Figure 16.2 Confirmation Rates for Nominees to the U.S. Court of Appeals (1947–2005)



Source: "The Consequences of Polarization: Congress and the Courts" by Sarah A. Binder, in David Brady and Pietro Nivola, Eds., *Red and Blue Nation?* (Vol. 2) *Consequences and Correction of America's Polarized Politics.* Brookings Institutions and Hoover Institution Presses. Reprinted with permission of the author.

against conservatives. When President George H.W. Bush nominated David Souter, there were lengthy hearings as liberal senators tried to pin down Souter's views on issues such as abortion. Souter refused to discuss matters on which he might later have to judge, however. Clarence Thomas, another Bush nominee, also tried to avoid the litmus test by saying that he had not formed an opinion on prominent abortion cases. In his case, however, the litmus test issue was overshadowed by sensational allegations from a former employee, Anita Hill, that Thomas had sexually harassed her.

In 2005 there was a tough Senate fight over confirming Samuel Alito to be a justice of the Supreme Court.

Of the 145 Supreme Court nominees presented to it, the Senate has rejected 29. Only 5 of these were in the twentieth century. The reasons for rejecting a Supreme Court nominee are complex—each senator may have a different reason—but have involved such matters as the nominee's alleged hostility to civil rights, questionable personal financial dealings, a poor record as a lower-court judge, and Senate opposition to the nominee's political or legal philosophy. Nominations of district court judges are rarely defeated, because typically no nomination is made unless the key senators approve in advance.

★ The Jurisdiction of the Federal Courts

We have a dual court system—one state, one federal—and this complicates enormously the task of describing what kinds of cases federal courts may hear and how

cases beginning in the state courts may end up before the Supreme Court. The Constitution lists the kinds of cases over which federal courts have jurisdiction (in Article III and the Eleventh Amendment); by implication all other matters are left to state courts. Federal courts (see Figure 16.3) can hear all cases "arising under the Constitution, the laws of the United States, and treaties" (these are **federal-question cases**), and cases involving citizens of different states (called **diversity cases**).

Some kinds of cases can be heard in either federal or state courts. For example, if citizens of different states wish to sue one another and the matter involves more than $75,000, they can do so in either a federal or a state court. Similarly, if someone robs a federally insured bank, he or she has broken both state and federal law and thus can be prosecuted in state or federal courts, or both. Lawyers have become quite sophisticated in deciding whether, in a given civil case, their clients will get better treatment in a state or federal court. Prosecutors often send a person who has broken both federal and state law to whichever court system is likelier to give the toughest penalty.

Sometimes defendants may be tried in both state and federal courts for the same offense. In 1992 four Los Angeles police officers accused of beating Rodney King were tried in a California state court and acquitted of assault charges. They were then prosecuted in federal court for violating King's civil rights. This time two of the four were convicted. Under the dual sovereignty doctrine, state and federal authorities can prosecute the same person for the same conduct. The Supreme Court has upheld this doctrine on two grounds: First, each level of government has the right to enact laws serving its own purposes.[33] As a result federal civil rights charges could have been brought against the officers even if they had already been convicted of assault in state court (though as a practical matter this would have been unlikely). Second, neither level of government wants the other to be able to block prosecution of an accused person who has the sympathy of the authorities at one level. For example, when certain southern state courts were in sympathy with whites who had lynched blacks, the absence of the dual sovereignty doctrine would have meant that a trumped-up acquittal in state court would have barred federal prosecution.

federal-question cases *Cases concerning the Constitution, federal laws, or treaties.*

diversity cases *Cases involving citizens of different states who can bring suit in federal courts.*

writ of certiorari *An order by a higher court directing a lower court to send up a case for review.*

Furthermore, a matter that is exclusively within the province of a state court—for example, a criminal case in which the defendant is charged with violating only a state law—can be appealed to the U.S. Supreme Court under certain circumstances (described below). Thus federal judges can overturn state court rulings even when they had no jurisdiction over the original matter. Under what circumstances this should occur has been the subject of long-standing controversy between the state and federal courts.

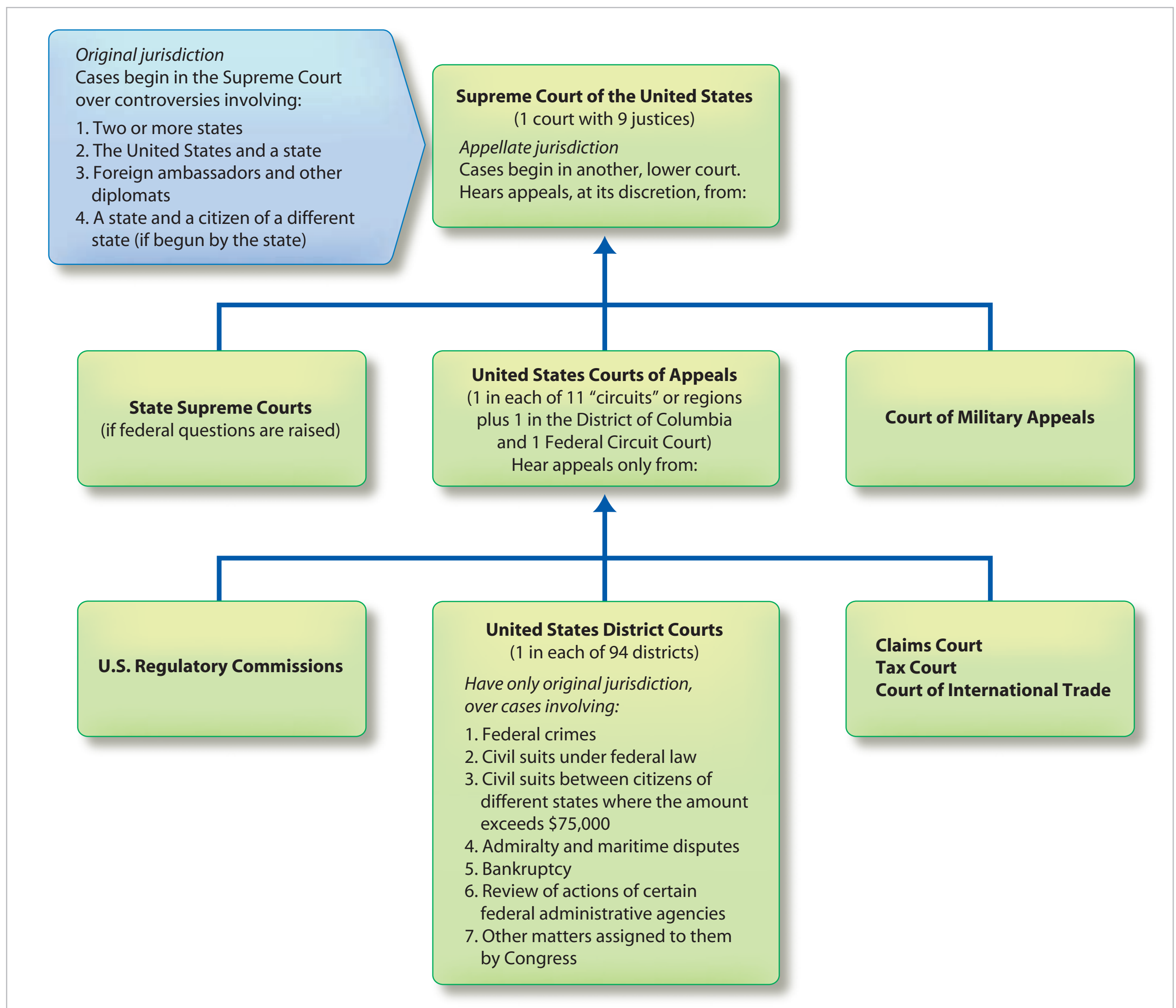
Some matters, however, are exclusively under the jurisdiction of federal courts. When a federal criminal law is broken—but not a state one—the case is heard in federal district court. If you wish to appeal the decision of a federal regulatory agency, such as the Federal Communications Commission, you can do so only before a federal court of appeals. And if you wish to declare bankruptcy, you do so in federal court. If there is a controversy between two state governments—say, California and Arizona sue each other over which state is to use how much water from the Colorado River—the case can be heard only by the Supreme Court.

The vast majority of all cases heard by federal courts begin in the district courts. The volume of business there is huge. In 2002 the 650 or so district court judges received over 300,000 cases (about 500 per judge). Most of the cases heard in federal courts involve rather straightforward applications of law; few lead to the making of new public policy. Cases that do affect how the law or the Constitution is interpreted can begin with seemingly minor events. For example, a major broadening of the Bill of Rights—requiring for the first time that all accused persons in *state* as well as federal criminal trials be supplied with a lawyer, free if necessary—began when impoverished Clarence Earl Gideon, imprisoned in Florida, wrote an appeal in pencil on prison stationery and sent it to the Supreme Court.[34]

The Supreme Court does not have to hear any appeal it does not want to hear. At one time it was required to listen to certain appeals, but Congress has changed the law so that now the Court can pick the cases it wants to consider.

It does this by issuing a **writ of certiorari.** *Certiorari* is a Latin word meaning, roughly, "made more certain"; lawyers and judges have abbreviated it to

Figure 16.3 The Jurisdiction of the Federal Courts



cert. It works this way: The Court considers all the petitions it receives to review lower-court decisions. If four justices agree to hear a case, cert is issued and the case is scheduled for a hearing.

In deciding whether to grant certiorari, the Court tries to reserve its time for cases decided by lower federal courts or by the highest state courts in which a significant federal or constitutional question has been raised. For example, the Court will often grant certiorari when one or both of the following is true:

- Two or more federal circuit courts of appeals have decided the same issue in different ways.
- The highest court in a state has held a federal or state law to be in violation of the Constitution or has upheld a state law against the claim that it is in violation of the Constitution.

Removed due to copyright permissions restrictions.

Clarence Earl Gideon studied law books while in prison so that he could write an appeal to the Supreme Court. His handwritten appeal asked that his conviction be set aside because he had not been provided with an attorney. His appeal was granted.

In a typical year the Court may consider over seven thousand petitions asking it to review decisions of lower or state courts. It rarely accepts more than about one hundred of them for full review.

In exercising its discretion in granting certiorari, the Supreme Court is on the horns of a dilemma. If it grants it frequently, it will be inundated with cases. As it is, the Court's workload has quintupled in the last fifty years. If, on the other hand, the Court grants certiorari only rarely, then the federal courts of appeals have the last word on the interpretation of the Constitution and federal laws, and since there are twelve of these, staffed by about 167 judges, they may well be in disagreement. In fact this has already happened: because the Supreme Court reviews only about 1 or 2 percent of appeals court cases, applicable federal law may be different in different parts of the country.[35] One proposal to deal with this dilemma is to devote the Supreme Court's time entirely to major questions of constitutional interpretation and to create a national court of appeals that would ensure that the twelve circuit courts of appeals are producing uniform decisions.[36]

in forma pauperis *A method whereby a poor person can have his or her case heard in federal court without charge.*

Because the Supreme Court has a heavy workload, the influence wielded by law clerks has grown. These clerks—recent graduates of law schools hired by the justices—play a big role in deciding which cases should be heard under a writ of *certiorari*. Indeed, some of the opinions written by the justices are drafted by the clerks. Since the reasons for a decision may be as important as the decision itself, and since these reasons are sometimes created by the clerks, the power of the clerks can be significant.

★ Getting to Court

In theory the courts are the great equalizer in the federal government. To use the courts to settle a question, or even to alter fundamentally the accepted interpretation of the Constitution, one need not be elected to any office, have access to the mass media, be a member of an interest group, or be otherwise powerful or rich. Once the contending parties are before the courts, they are legally equal.

It is too easy to believe this theory uncritically or to dismiss it cynically. In fact it is hard to get before the Supreme Court: it rejects over 96 percent of the applications for *certiorari* that it receives. And the costs involved in getting to the Court can be high. To apply for *certiorari* costs only $300 (plus forty copies of the petition), but if *certiorari* is granted and the case is heard, the costs—for lawyers and for copies of the lower-court records in the case—can be very high. And by then one has already paid for the cost of the first hearing in the district court and probably one appeal to the circuit court of appeals. Furthermore, the time it takes to settle a matter in federal court can be quite long.

But there are ways to make these costs lower. If you are indigent—without funds—you can file and be heard as a pauper for nothing; about half the petitions arriving before the Supreme Court are **in forma pauperis** (such as the one from Gideon, described earlier). If your case began as a criminal trial in the district courts and you are poor, the government will supply you with a lawyer at no charge. If the matter is not a criminal case and you cannot afford to hire a lawyer, interest groups representing a wide spectrum of opinion sometimes are willing to take up the cause if the issue in the case seems sufficiently important. The American Civil Liberties Union (ACLU), a liberal group, represents some people who believe that their freedom of speech has been abridged or that their constitutional rights in criminal proceed-

ings have been violated. The Center for Individual Rights, a conservative group, represents some people who feel that they have been victimized by racial quotas.

But interest groups do much more than just help people pay their bills. Many of the most important cases decided by the Court got there because an interest group organized the case, found the plaintiffs, chose the legal strategy, and mobilized legal allies. The NAACP has brought many key civil rights cases on behalf of individuals. Although in the past most such cases were brought by liberal interest groups, of late conservative interest groups have entered the courtroom on behalf of individuals. One helped sue CBS for televising a program that allegedly libeled General William Westmoreland, once the American commander in Vietnam. (Westmoreland lost the case.) And many important issues are raised by attorneys representing state and local governments. Several price-fixing cases have been won by state attorneys general on behalf of consumers in their states.

Fee Shifting

Unlike what happens in most of Europe, each party to a lawsuit in this country must pay its own way. (In England, by contrast, if you sue someone and lose, you pay the winner's costs as well as your own.) But various laws have made it easier to get someone else to pay. **Fee shifting** enables the **plaintiff** (the party that initiates the suit) to collect its costs from the defendant if the defendant loses, at least in certain kinds of cases. For example, if a corporation is found to have violated the antitrust laws, it must pay the legal fees of the winner. If an environmentalist group sues the Environmental Protection Agency, it can get the EPA to pay the group's legal costs. Even more important to individuals, Section 1983 of Chapter 42 of the *United States Code* allows a citizen to sue a state or local government official—say, a police officer or a school superintendent—who has deprived the citizen of some constitutional right or withheld some benefit to which the citizen is entitled. If the citizen wins, he or she can collect money damages and lawyers' fees from the government. Citizens, more aware of their legal rights, have become more litigious, and a flood of such "Section 1983" suits has burdened the courts. The Supreme Court has restricted fee shifting to cases authorized by statute,[37] but it is clear that the drift of policy has made it cheaper to go to court—at least for some cases.

Standing

There is, in addition, a nonfinancial restriction on getting into federal court. To sue, one must have **standing,** a legal concept that refers to who is entitled to bring a case. It is especially important in determining who can challenge the laws or actions of the government itself. A complex and changing set of rules governs standings; some of the more important ones are these:

- There must be an actual controversy between real adversaries. (You cannot bring a "friendly" suit against someone, hoping to lose in order to prove your friend right. You cannot ask a federal court for an opinion on a hypothetical or imaginary case or ask it to render an advisory opinion.)
- You must show that you have been harmed by the law or practice about which you are complaining. (It is not enough to dislike what the government or a corporation or a labor union does; you must show that you were actually harmed by that action.)
- Merely being a taxpayer does not ordinarily entitle you to challenge the constitutionality of a federal governmental action. (You may not want your tax money to be spent in certain ways, but your remedy is to vote against the politicians doing the spending; the federal courts will generally require that you show some other personal harm before you can sue.)

Congress and the courts have recently made it easier to acquire standing. It has always been the rule that a citizen could ask the courts to order federal officials to carry out some act that they were under a legal obligation to perform or to refrain from some action that was contrary to law. A citizen can also sue a government official personally in order to collect damages if the official acted contrary to law. For example, it was for long the case that if an FBI agent broke into your office without a search warrant,

fee shifting *A rule that allows a plaintiff to recover costs from the defendant if the plaintiff wins.*

plaintiff *The party that initiates a lawsuit.*

standing *A legal rule stating who is authorized to start a lawsuit.*

you could sue the agent and, if you won, collect money. However, you cannot sue the government itself without its consent. This is the doctrine of **sovereign immunity.** For instance, if the army accidentally kills your cow while testing a new cannon, you cannot sue the government to recover the cost of the cow unless the government agrees to be sued. (Since testing cannons is legal, you cannot sue the army officer who fired the cannon.) By statute Congress has given its consent for the government to be sued in many cases involving a dispute over a contract or damage done as a result of negligence (for example, the dead cow). Over the years these statutes have made it easier to take the government into court as a defendant.

Even some of the oldest rules defining standing have been liberalized. The rule that merely being a taxpayer does not entitle you to challenge in court a government decision has been relaxed where the citizen claims that a right guaranteed under the First Amendment is being violated. The Supreme Court allowed a taxpayer to challenge a federal law that would have given financial aid to parochial (or church-related) schools on the grounds that this aid violated the constitutional requirement of separation between church and state. On the other hand, another taxpayer suit to force the CIA to make public its budget failed because the Court decided that the taxpayer did not have standing in matters of this sort.[38]

Linda Brown was refused admission to a white elementary school in Topeka, Kansas. On her behalf the NAACP brought a class-action suit that resulted in the 1954 landmark Supreme Court decision *Brown v. Board of Education.*

Class-Action Suits

Under certain circumstances a citizen can benefit directly from a court decision, even though the citizen himself or herself has not gone into court. This can happen by means of a **class-action suit:** a case brought into court by a person on behalf not only of himself or herself, but of all other persons in similar circumstances. Among the most famous of these was the 1954 case in which the Supreme Court found that Linda Brown, a black girl attending the fifth grade in the Topeka, Kansas, public schools, was denied the equal protection of the laws (guaranteed under the Fourteenth Amendment) because the schools in Topeka were segregated. The Court did not limit its decision to Linda Brown's right to attend an unsegregated school but extended it—as Brown's lawyers from the NAACP had asked—to cover all "others similarly situated."[39] It was not easy to design a court order that would eliminate segregation in the schools, but the principle was clearly established in this class action.

sovereign immunity *The rule that a citizen cannot sue the government without the government's consent.*

class-action suit *A case brought by someone to help him or her and all others who are similarly situated.*

Since the *Brown* case, many other groups have been quick to take advantage of the opportunity created by class-action suits. By this means the courts could be used to give relief not simply to a particular person but to all those represented in the suit. A landmark class-action case was that which challenged the malapportionment of state legislative districts (see Chapter 13).[40] There are thousands of class-action suits in the federal courts involving civil rights, the rights of prisoners, antitrust suits against corporations, and other matters. These suits became more common partly because people were beginning to have new concerns that were not being met by Congress and partly because some class-action suits became quite profitable. The NAACP got no money from Linda Brown or from the Topeka Board of Education in compensa-

Table 16.2 Supreme Court Justices in Order of Seniority, 2006

Name (Birth Date)	Home State	Prior Experience	Appointed By (Year)
John G. Roberts, Jr., Chief Justice (1955)	Maryland	Federal judge	G. W. Bush (2005)
John Paul Stevens (1916)	Illinois	Federal judge	Ford (1975)
Antonin Scalia (1936)	Virginia	Federal judge	Reagan (1986)
Anthony Kennedy (1936)	California	Federal judge	Reagan (1988)
David Souter (1939)	New Hampshire	State judge	G. H. W. Bush (1990)
Clarence Thomas (1948)	Georgia	Federal judge	G. H. W. Bush (1991)
Ruth Bader Ginsburg (1933)	New York	Federal judge	Clinton (1993)
Stephen Breyer (1938)	Massachusetts	Federal judge	Clinton (1994)
Samuel Alito (1950)	New Jersey	Federal judge	G. W. Bush (2006)

tion for its long and expensive labors, but beginning in the 1960s court rules were changed to make it financially attractive for lawyers to bring certain kinds of class-action suits.

Suppose, for example, that you think your telephone company overcharged you by $75. You could try to hire a lawyer to get a refund, but not many lawyers would take the case, because there would be no money in it. Even if you were to win, the lawyer would stand to earn no more than perhaps one-third of the settlement, or $25. Now suppose that you bring a class action against the company on behalf of everybody who was overcharged. Millions of dollars might be at stake; lawyers would line up eagerly to take the case, because their share of the settlement, if they won, would be huge. The opportunity to win profitable class-action suits, combined with the possibility of having the loser pay the attorneys' fees, led to a proliferation of such cases.

In response to the increase in its workload, the Supreme Court decided in 1974 to tighten drastically the rules governing these suits. It held that it would no longer hear (except in certain cases defined by Congress, such as civil rights matters) class-action suits seeking monetary damages unless each and every ascertainable member of the class was individually notified of the case. To do this is often prohibitively expensive (imagine trying to find and send a letter to every customer that may have been overcharged by the telephone company!), and so the number of such cases declined and the number of lawyers seeking them out dropped.[41]

But it remains easy to bring a class-action suit in most state courts. State Farm automobile insurance company was told by a state judge in a small Illinois town that it must pay over $1 billion in damages on behalf of a "national" class, even though no one in this class had been notified. Big class-action suits powerfully affect how courts make public policy. Such suits have forced into bankruptcy companies making asbestos and silicone breast implants and have threatened to put out of business tobacco companies and gun manufacturers. (Ironically, in some of these cases, such as the one involving breast implants, there was no scientific evidence showing that the product was harmful.) Some class-action suits, such as the one ending school segregation, are good, but others are frivolous efforts to get companies to pay large fees to the lawyers who file the suits.

In sum, getting into court depends on having standing and having resources. The rules governing standing are complex and changing, but generally they have been broadened to make it easier to enter the federal courts, especially for the purpose of challenging the actions of the government. Obtaining the resources is not easy but has become easier because laws in some cases now provide for fee shifting, private interest groups are willing to finance cases, and it is sometimes possible to bring a class-action suit that lawyers find lucrative.

★ The Supreme Court in Action

If your case should find its way to the Supreme Court—and of course the odds are that it will not—you will be able to participate in one of the more impressive, sometimes dramatic ceremonies of American public life. The Court is in session in its white marble

building for thirty-six weeks out of each year, from early October until the end of June. The nine justices read briefs in their individual offices, hear oral arguments in the stately courtroom, and discuss their decisions with one another in a conference room where no outsider is ever allowed.

Most cases, as we have seen, come to the Court on a writ of *certiorari.* The lawyers for each side may then submit their briefs. A **brief** is a document that sets forth the facts of the case, summarizes the lower-court decision, gives the arguments for the side represented by the lawyer who wrote the brief, and discusses the other cases that the Court has decided bear on the issue. Then the lawyers are allowed to present their oral arguments in open court. They usually summarize their briefs or emphasize particular points in them, and they are strictly limited in time—usually to no more than a half hour. (The lawyer speaks from a lectern that has two lights on it. When the white light goes on, the attorney has five minutes remaining; when the red flashes, he or she must stop—instantly.) The oral arguments give the justices a chance to question the lawyers, sometimes searchingly.

brief *A written statement by an attorney that summarizes a case and the laws and rulings that support it.*

amicus curiae *A brief submitted by a "friend of the court."*

per curiam opinion *A brief, unsigned court opinion.*

opinion of the court *A signed opinion of a majority of the Supreme Court.*

concurring opinion *A signed opinion in which one or more members agree with the majority view but for different reasons.*

dissenting opinion *A signed opinion in which one or more justices disagree with the majority view.*

Since the federal government is a party—as either plaintiff or defendant—to about half the cases that the Supreme Court hears, the government's top trial lawyer, the solicitor general of the United States, appears frequently before the Court. The solicitor general is the third-ranking officer of the Department of Justice, right after the attorney general and deputy attorney general. The solicitor general decides what cases the government will appeal from lower courts and personally approves every case the government presents to the Supreme Court. In recent years the solicitor general has often been selected from the ranks of distinguished law school professors.

In addition to the arguments made by lawyers for the two sides in a case, written briefs and even oral arguments may also be offered by "a friend of the court," or **amicus curiae.** An amicus brief is from an interested party not directly involved in the suit. For example, when Allan Bakke complained that he had been the victim of "reverse discrimination" when he was denied admission to a University of California medical school, fifty-eight amicus briefs were filed supporting or opposing his position. Before such briefs can be filed, both parties must agree or the Court must grant permission. Though these briefs sometimes offer new arguments, they are really a kind of polite lobbying of the Court that declare which interest groups are on which side. The ACLU, the NAACP, the AFL-CIO, and the U.S. government itself have been among the leading sources of such briefs.

These briefs are not the only source of influence on the justices' views. Legal periodicals such as the *Harvard Law Review* and the *Yale Law Journal* are frequently consulted, and citations to them often appear in the Court's decisions. Thus the outside world of lawyers and law professors can help shape, or at least supply arguments for, the conclusions of the justices.

The justices retire every Friday to their conference room, where in complete secrecy they debate the cases they have heard. The chief justice speaks first, followed by the other justices in order of seniority. After the arguments they vote, traditionally in reverse order of seniority: the newest justice votes first, the chief justice last. By this process an able chief justice can exercise considerable influence—in guiding or limiting debate, in setting forth the issues, and in handling sometimes temperamental personalities. In deciding a case, a majority of the justices must be in agreement: if there is a tie, the lower-court decision is left standing. (There can be a tie among nine justices if one is ill or disqualifies himself or herself because of prior involvement in the case.)

Though the vote is what counts, by tradition the Court usually issues a written opinion explaining its decision. Sometimes the opinion is brief and unsigned (called a **per curiam opinion**); sometimes it is quite long and signed by the justices agreeing with it. If the chief justice is in the majority, he will either write the opinion or assign the task to a justice who agrees with him. If he is in the minority, the senior justice on the winning side will decide who writes the Court's opinion. There are three kinds of opinions—an **opinion of the Court** (reflecting the majority's view), a **concurring opinion** (an opinion by one or more justices who agree with the majority's conclusion but for different reasons that they wish to express), and a **dissenting opinion** (the opinion of the justices on the losing side). Each justice has three or four law clerks to help him or her

The members of the Supreme Court, clockwise from the rear left: Stephen Breyer, Clarence Thomas, Ruth Bader Ginsburg, Samuel Alito, David Souter, Antonin Scalia, Chief Justice John Roberts, John Paul Stevens, and Anthony Kennedy.

review the many petitions the Court receives, study cases, and write opinions.

People like to think of the courts as expressing "liberal" or "conservative" opinions, and in many cases they seem to do just that. But that is far from the whole story. In many cases, perhaps two-fifths of those decided by the Supreme Court, the decisions are unanimous. Even two justices as different as Antonin Scalia and Ruth Bader Ginsburg vote the same way much of the time. The most important thing to remember is not the decision but the reasons behind the decision. Many times judges will vote for a position that they don't personally like but feel obliged to support because that is how the law reads.

★ The Power of the Federal Courts

The great majority of the cases heard in the federal courts have little or nothing to do with changes in public policy: people accused of bank robbery are tried, disputes over contracts are settled, personal-injury cases are heard, and the patent law is applied. In most instances the courts are simply applying a relatively settled body of law to a specific controversy.

The Power to Make Policy

The courts make policy whenever they reinterpret the law or the Constitution in significant ways, extend the reach of existing laws to cover matters not previously thought to be covered by them, or design remedies for problems that involve the judges' acting in administrative or legislative ways. By any of these tests the courts have become exceptionally powerful.

One measure of that power is the fact that more than 160 federal laws have been declared unconstitutional. And as we shall see, on matters where Congress feels strongly, it can often get its way by passing slightly revised versions of a voided law.

Another measure, and perhaps a more revealing one, is the frequency with which the Supreme Court changes its mind. An informal rule of judicial decision-making has been **stare decisis,** meaning "let the decision stand." It is the principle of precedent: a court case today should be settled in accordance with prior decisions on similar cases. (What constitutes a similar case is not always clear; lawyers are especially gifted at finding ways of showing that two cases are different in some relevant way.) There are two reasons why precedent is important. The practical reason should be obvious: if the meaning of the law continually changes, if the decisions of judges become wholly unpredictable, then human affairs affected by those laws and decisions become chaotic. A contract signed today might be invalid tomorrow. The other reason is at least as important: if the principle of equal justice means anything, it means that similar cases should be decided in a similar manner. On the other hand, times change, and the Court can make mistakes. As Justice Felix Frankfurter once said, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."[42]

However compelling the arguments for flexibility, the pace of change can become dizzying. By one count the Court has overruled its own previous decisions in over 260 cases since 1810.[43] In fact it may have done it more often, because sometimes the Court does not say that it is abandoning a precedent, claiming instead that it is merely distinguishing the present case from a previous one.

A third measure of judicial power is the degree to which courts are willing to handle matters once left to the legislature. For example, the Court refused for a long time to hear a case about the size of congressional districts, no matter how unequal their populations.[44] The determination of congressional district boundaries was regarded as a **political question**—that

stare decisis *"Let the decision stand," or allowing prior rulings to control the current case.*

political question *An issue the Supreme Court will allow the executive and legislative branches decide.*

is, as a matter that the Constitution left entirely to another branch of government (in this case, Congress) to decide for itself. Then in 1962 the Court decided that it was competent after all to handle this matter, and the notion of a "political question" became a much less important (but by no means absent) barrier to judicial power.[45]

By all odds the most powerful indicator of judicial power can be found in the kinds of remedies that the courts will impose. A **remedy** is a judicial order setting forth what must be done to correct a situation that a judge believes to be wrong. In ordinary cases, such as when one person sues another, the remedy is straightforward: the loser must pay the winner for some injury that he or she has caused, the loser must agree to abide by the terms of a contract he or she has broken, or the loser must promise not to do some unpleasant thing (such as dumping garbage on a neighbor's lawn). Today, however, judges design remedies that go far beyond what is required to do justice to the individual parties who actually appear in court. The remedies now imposed often apply to large groups and affect the circumstances under which thousands or even millions of people work, study, or live. For example, when a federal district judge in Alabama heard a case brought by a prison inmate in that state, he issued an order not simply to improve the lot of that prisoner but to revamp the administration of the entire prison system. The result was an improvement in the living conditions of many prisoners, at a cost to the state of an estimated $40 million a year. Similarly, a person who feels entitled to welfare payments that have been denied him or her may sue in court to get the money, and the court order will in all likelihood affect all welfare recipients. In one case certain court orders made an additional one hundred thousand people eligible for welfare.[46]

The basis for sweeping court orders can sometimes be found in the Constitution; the Alabama prison decision, for example, was based on the judge's interpretation of the Eighth Amendment, which prohibits "cruel and unusual punishments."[47] Others are based on court interpretations of federal laws. The Civil Rights Act of 1964 forbids discrimination on grounds of "race, color, or national origin" in any program receiving federal financial assistance. The Supreme Court interpreted that as meaning that the San Francisco school system was obliged to teach English to Chinese students unable to speak it.[48] Since a Supreme Court decision is the law of the land, the impact of that ruling was not limited to San Francisco. Local courts and legislatures elsewhere decided that that decision meant that classes must be taught in Spanish for Hispanic children. What Congress meant by the Civil Rights Act is not clear; it may or may not have believed that teaching Hispanic children in English rather than Spanish was a form of discrimination. What is important is that it was the Court, not Congress, that decided what Congress meant.

remedy *A judicial order enforcing a right or redressing a wrong.*

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The activism of federal courts is exemplified by the sweeping orders they have issued to correct such problems as overcrowded prisons.

Views of Judicial Activism

Judicial activism has, of course, been controversial. Those who support it argue that the federal courts must correct injustices when the other branches of

the federal government, or the states, refuse to do so. The courts are the institution of last resort for those without the votes or the influence to obtain new laws, and especially for the poor and powerless. After all, Congress and the state legislatures tolerated segregated public schools for decades. If the Supreme Court had not declared segregation unconstitutional in 1954, it might still be law today.

Those who criticize judicial activism rejoin that judges usually have no special expertise in matters of school administration, prison management, environmental protection, and so on; they are lawyers, expert in defining rights and duties but not in designing and managing complex institutions. Furthermore, however desirable court-declared rights and principles may be, implementing those principles means balancing the conflicting needs of various interest groups, raising and spending tax monies, and assessing the costs and benefits of complicated alternatives. Finally, federal judges are not elected; they are appointed and are thus immune to popular control. As a result, if they depart from their traditional role of making careful and cautious interpretations of what a law or the Constitution means and instead begin formulating wholly new policies, they become unelected legislators.

Some people think that we have activist courts because we have so many lawyers. The more we take matters to courts for resolution, the more likely it is that the courts will become powerful. It is true that we have more lawyers in proportion to our population than most other nations. There is one lawyer for every 325 Americans, but only one for every 970 Britons, every 1,220 Germans, and every 8,333 Japanese.[49] But that may well be a symptom, not a cause, of court activity. As we suggested in Chapter 4, we have an adversary culture based on an emphasis on individual rights and an implicit antagonism between the people and the government. Generally speaking, lawyers do not create cases; contending interests do, thereby generating a demand for lawyers.[50] Furthermore, we had more lawyers in relation to our population in 1900 than in 1970, yet the courts at the turn of the twentieth century were far less active in public affairs. In fact, in 1932 there were more court cases per 100,000 people than there were in 1972.

A more plausible reason for activist courts has been the developments discussed earlier in this chapter that have made it easier for people to get standing in the courts, to pay for the costs of litigation, and to bring class-action suits. The courts and Congress have gone a long way toward allowing private citizens to become "private attorneys general." Making it easier to get into court increases the number of cases being heard. For example, in 1961 civil rights cases, prisoners' rights cases, and cases under the Social Security laws were relatively uncommon in federal court. Between 1961 and 1990 the increase in the number of such matters was phenomenal: civil rights cases rose over sixtyfold and prisoners' petitions over fortyfold. Such matters are the fastest-growing portion of the courts' civil workload.

Legislation and the Courts

An increase in cases will not by itself lead to sweeping remedies. For that to occur, the law must be sufficiently vague to permit judges wide latitude in interpreting it, and the judges must want to exercise that opportunity fully. The Constitution is filled with words of seemingly ambiguous meaning—"due process of law," the "equal protection of the laws," the "privileges or immunities of citizens." Such phrases may have been clear to the Framers, but to the Supreme Court they have become equivocal or elastic. How the Court has chosen to interpret such phrases has changed greatly over the last two centuries in ways that can be explained in part by the personal political beliefs of the justices.

Increasingly Congress has passed laws that also contain vague language, thereby adding immeasurably to the courts' opportunities for designing remedies. Various civil rights acts outlaw discrimination but do not say how one is to know whether discrimination has occurred or what should be done to correct it if it does occur. That is left to the courts and the bureaucracy. Various regulatory laws empower administrative agencies to do what the "public interest" requires but say little about how the public interest is to be defined. Laws intended to alleviate poverty or rebuild neighborhoods speak of "citizen participation" or "maximum feasible participation" but do not explain who the citizens are that should participate, or how much power they should have.

In addition to laws that require interpretation, other laws induce litigation. Almost every agency that regulates business will make decisions that cause the agency to be challenged in court—by business firms if the regulations go too far, by consumer or labor organizations if they do not go far enough. One study showed that the federal courts of appeals heard over

Trivia

The Supreme Court

Supreme Court justice who served the longest	**William O. Douglas: 36 years (1939–1975)**
Only Supreme Court justice to run for president	**Charles Evans Hughes (resigned from Court in 1916 to seek presidency; lost to Woodrow Wilson)**
Only president to become Supreme Court justice	**William Howard Taft (president, 1909–1913; chief justice, 1921–1930)**
First Catholic Supreme Court justice	**Roger B. Taney (1836–1864)**
First Jewish Supreme Court justice	**Louis Brandeis (1916–1939)**
First black Supreme Court justice	**Thurgood Marshall (1967–1991)**
First woman Supreme Court justice	**Sandra Day O'Connor (1981–2006)**
Only Supreme Court justice to be impeached	**Samuel Chase (impeached by House in 1804; acquitted by Senate)**
Only Supreme Court justice whose grandson also served on the Court	**John Harlan (1877–1911), whose grandson John Harlan served from 1954 to 1971**

three thousand cases in which they had to review the decision of a regulatory agency. In two-thirds of them the agency's position was supported; in the other third the agency was overruled.[51] Perhaps one-fifth of these cases arose out of agencies or programs that did not even exist in 1960. The federal government today is much more likely to be on the defensive in court than it was twenty or thirty years ago.

Finally, the attitudes of the judges powerfully affect what they will do, especially when the law gives them wide latitude. Their decisions and opinions have been extensively analyzed—well enough, at least, to know that different judges often decide the same case in different ways. Conservative southern federal judges in the 1950s, for example, often resisted plans to desegregate public schools, while judges with a different background authorized bold plans.[52] Some of the greatest disparities in judicial behavior can be found in the area of sentencing criminals.[53]

★ Checks on Judicial Power

No institution of government, including the courts, operates without restraint. The fact that judges are not elected does not make them immune to public opinion or to the views of the other branches of government. How important these restraints are varies from case to case, but in the broad course of history they have been significant.

One restraint exists because of the very nature of courts. A judge has no police force or army; decisions that he or she makes can sometimes be resisted or ignored, *if* the person or organization resisting is not highly visible and is willing to run the risk of being caught and charged with contempt of court. For example, long after the Supreme Court had decided that praying and Bible reading could not take place in public schools,[54] schools all over the country were still allowing prayers and Bible reading.[55] Years after the Court declared segregated schools to be unconstitutional, scores of school systems remained segregated. On the other hand, when a failure to comply is easily detected and punished, the courts' power is usually unchallenged. When the Supreme Court declared the income tax to be unconstitutional in 1895, income tax collections promptly ceased. When the Court in 1952 declared illegal President Truman's effort to seize the steel mills in order to stop a strike, the management of the mills was immediately returned to their owners.

Congress and the Courts

Congress has a number of ways of checking the judiciary. It can gradually alter the composition of the judiciary by the kinds of appointments that the Senate is willing to confirm, or it can impeach judges that it

Judicial Review in Canada and Europe

Courts outside the United States can declare laws to be unconstitutional, but most can do so in ways that are very different from that in the United States.

Canada: The highest court can declare a law unconstitutional, but not if the legislature has passed it with a special provision that says the law will survive judicial scrutiny notwithstanding the country's Charter of Rights. Such laws must be renewed every five years.

Europe: The European Court of Human Rights in Strasbourg can decide human rights cases that begin in any of the nations that make up the European Community.

France: Its Constitutional Council can declare a law unconstitutional, but only if asked to do so by government officials and only before (not after) the law goes into effect.

Germany: The Federal Constitutional Court can declare in an advisory opinion, before a case has emerged, that a law is unconstitutional, and it can judge the constitutionality of laws when asked to do so by a lower court (which itself cannot rule a law unconstitutional). The Federal Constitutional Court may hold an administrative or judicial action to be unjustified when a citizen, having exhausted all other remedies, files a petition.

does not like. Fifteen federal judges have been the object of impeachment proceedings in our history, and nine others have resigned when such proceedings seemed likely. Of the fifteen who were impeached, seven were acquitted, four were convicted, and one resigned. The most recent convictions were those of Alcee Hastings of Florida and Walter Nixon of Mississippi, both in 1989.[56] In practice, however, confirmation and impeachment proceedings do not make much of an impact on the federal courts because simple policy disagreements are not generally regarded as adequate grounds for voting against a judicial nominee or for starting an impeachment effort.

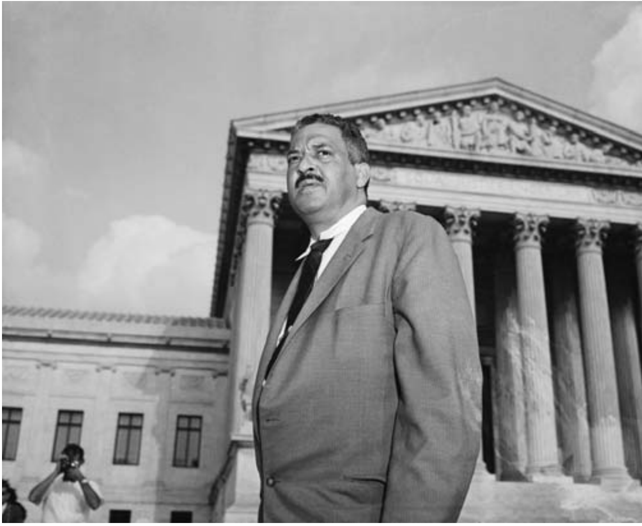
Congress can alter the number of judges, though, and by increasing the number sharply, it can give a president a chance to appoint judges to his liking. As described above, a "Court-packing" plan was proposed (unsuccessfully) by Franklin Roosevelt in 1937 specifically to change the political persuasion of the Supreme Court. In 1978 Congress passed a bill creating 152 new federal district and appellate judges to help ease the workload of the federal judiciary. This bill gave President Carter a chance to appoint over 40 percent of the federal bench. In 1984 an additional eighty-four judgeships were created; by 1988 President Reagan had appointed about half of all federal judges. In 1990 an additional seventy-two judges were authorized.

During and after the Civil War, Congress may have been trying to influence Supreme Court decisions when it changed the size of the Court three times in six years (raising it from nine to ten in 1863, lowering it again from ten to seven in 1866, and raising it again from seven to nine in 1869).

Congress and the states can also undo a Supreme Court decision interpreting the Constitution by amending that document. This happens, but rarely: the Eleventh Amendment was ratified to prevent a citizen from suing a state in federal court; the Thirteenth, Fourteenth, and Fifteenth were ratified to undo the *Dred Scott* decision regarding slavery; the Sixteenth was added to make it constitutional for Congress to pass an income tax; and the Twenty-sixth was added to give the vote to eighteen-year-olds in state elections.

On over thirty occasions Congress has merely repassed a law that the Court has declared unconstitutional. In one case a bill to aid farmers, voided in 1936, was accepted by the Court in slightly revised form three years later.[57] (In the meantime, of course, the Court had changed its collective mind about the New Deal.)

One of the most powerful potential sources of control over the federal courts, however, is the authority of Congress, given by the Constitution, to decide what the entire jurisdiction of the lower courts and the appellate jurisdiction of the Supreme Court shall be. In theory Congress could prevent matters on which it did not want federal courts to act from ever coming before the courts. This happened in 1868. A Mississippi newspaper editor named McCardle was jailed



Thurgood Marshall became the first black Supreme Court justice. As chief counsel for the NAACP, Marshall argued the 1954 *Brown v. Board of Education* case in front of the Supreme Court. He was appointed to the Court in 1967 and served until 1991.

by federal military authorities who occupied the defeated South. McCardle asked the federal district court for a writ of habeas corpus to get him out of custody; when the district court rejected his plea, he appealed to the Supreme Court. Congress at that time was fearful that the Court might find the laws on which its Reconstruction policy was based (and under which McCardle was in jail) unconstitutional. To prevent that from happening, it passed a bill withdrawing from the Supreme Court appellate jurisdiction in cases of this sort. The Court conceded that Congress could do this and thus dismissed the case because it no longer had jurisdiction.[58]

Congress has threatened to withdraw jurisdiction on other occasions, and the mere existence of the threat may have influenced the nature of Court decisions. In the 1950s, for example, congressional opinion was hostile to Court decisions in the field of civil liberties and civil rights, and legislation was proposed that would have curtailed the Court's jurisdiction in these areas. It did not pass, but the Court may have allowed the threat to temper its decisions.[59] On the other hand, as congressional resistance to the Roosevelt Court-packing plan shows, the Supreme Court enjoys a good deal of prestige in the nation, even among people who disagree with some of its decisions, and so passing laws that would frontally attack it would not be easy except perhaps in times of national crisis.

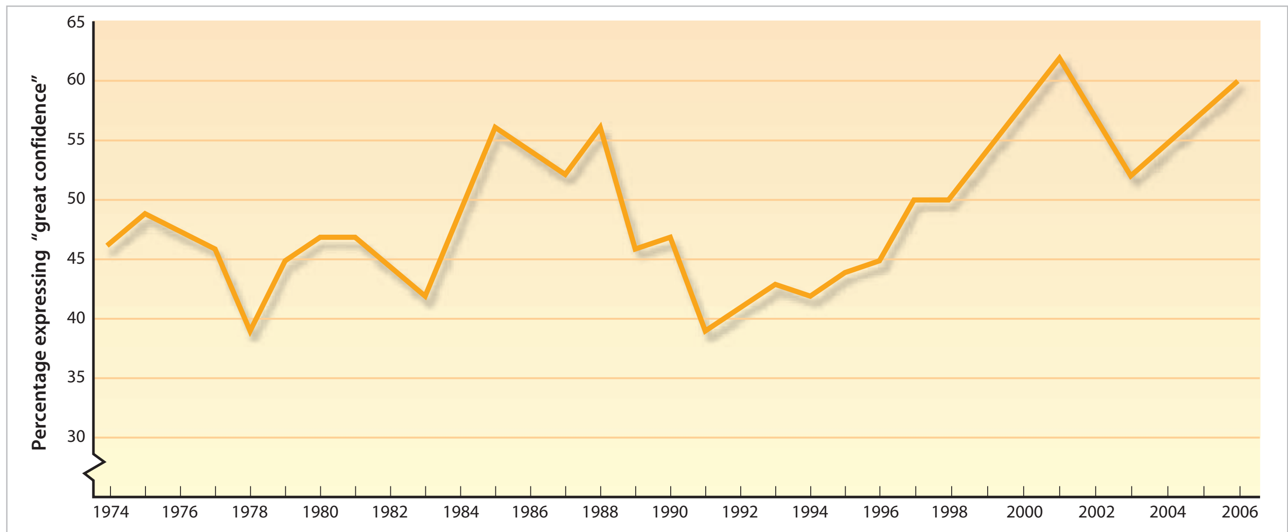
Furthermore, laws narrowing jurisdiction or restricting the kinds of remedies that a court can impose are often blunt instruments that might not achieve the purposes of their proponents. Suppose that you, as a member of Congress, would like to prevent the federal courts from ordering schoolchildren to be bused for the purpose of achieving racial balance in the schools. If you denied the Supreme Court appellate jurisdiction in this matter, you would leave the lower federal courts and all state courts free to do as they wished, and many of them would go on ordering busing. If you wanted to attack that problem, you could propose a law that would deny to all federal courts the right to order busing as a remedy for racial imbalance. But the courts would still be free to order busing (and of course a lot of busing goes on even without court orders), provided that they did not say that it was for the purpose of achieving racial balance. (It could be for the purpose of "facilitating desegregation" or making possible "redistricting.") Naturally you could always make it illegal for children to enter a school bus for any reason, but then many children would not be able to get to school at all. Finally, the Supreme Court might well decide that if busing were essential to achieve a constitutional right, then any congressional law prohibiting such busing would itself be unconstitutional. Trying to think through how *that* dilemma would be resolved is like trying to visualize two kangaroos simultaneously jumping into each other's pouches.

Public Opinion and the Courts

Though they are not elected, judges read the same newspapers as members of Congress, and thus they, too, are aware of public opinion, especially elite opinion. Though it may be going too far to say that the Supreme Court follows the election returns, it is nonetheless true that the Court is sensitive to certain bodies of opinion, especially of those elites—liberal or conservative—to which its members happen to be attuned. The justices will keep in mind historical cases in which their predecessors, by blatantly disregarding public opinion, very nearly destroyed the legitimacy of the Court itself. This was the case with the *Dred Scott* decision, which infuriated the North and was widely disobeyed. No such crisis exists today, but it is altogether possible that changing political moods affect the kinds of remedies that judges will think appropriate.

Opinion not only restrains the courts; it may also energize them. The most activist periods in Supreme

Figure 16.4 Patterns of Public Confidence in the Court, 1974–2006



Source: The Gallup Poll.

Court history have coincided with times when the political system was undergoing profound and lasting changes. The assertion by the Supreme Court, under John Marshall's leadership, of the principles of national supremacy and judicial review occurred at the time when the Jeffersonian Republicans were coming to power and their opponents, the Federalists, were collapsing as an organized party. The proslavery decisions of the Taney Court came when the nation was so divided along sectional and ideological lines as to make almost any Court decision on this matter unpopular. Supreme Court review of economic regulation in the 1890s and 1900s came at a time when the political parties were realigning and the Republicans were acquiring dominance that would last for several decades. The Court decisions of the 1930s corresponded to another period of partisan realignment. (The meaning of a realigning election was discussed in Chapter 10.)

Pollsters have been measuring how much confidence the public has in the Supreme Court. The results are shown in Figure 16.4. The percentage of people saying that they had a "great deal of confidence" in the Court rose sharply from 1971 to 1974, fell again until 1976, seesawed up and down until 1989, took a sharp dip and then recovered from 1989 to 1991, and again seesawed before rising in 1996. These movements seem to reflect the public's reaction not only to what the Court does but also to what the government as a whole is doing. The upturn in the early 1970s was probably caused by the Watergate scandal, an episode that simultaneously discredited the presidency and boosted the stock of those institutions (such as the courts) that seemed to be checking the abuses of the White House. The gradual upturn in the 1980s may have reflected a general restoration of public confidence in government during that decade.[60]

Though popular support is now relatively low for the Supreme Court, this decline has so far not resulted in any legal checks being placed on it. In the 1970s and 1980s several bills were introduced in Congress that would have restricted the jurisdiction of federal courts over busing for purposes of racial integration or altered the Supreme Court's decisions regarding school prayer and abortion. None passed.

The changes that have occurred in the Court have been caused by changes in its personnel. Presidents Nixon and Reagan attempted to produce a less activist Court by appointing justices who were more inclined to be strict constructionists and conservatives. To some extent they succeeded: Justices Kennedy, O'Connor, Rehnquist, and Scalia were certainly less inclined than Justice Thurgood Marshall to find new rights in the Constitution or to overturn the decisions of state legislatures. But as of yet there has been no wholesale retreat from the positions staked out by the Warren Court. As noted above, a Nixon

WHAT WOULD YOU DO?

Legalizing Assisted Suicide

February 24 WASHINGTON, D.C.

Congress is discussing a federal law that would allow physicians to administer drugs that will lead to the death of patients who request them. Oregon already has a "Death With Dignity" statute and now some legislators wish . . .

MEMORANDUM

To: *Senator Ann Gilbert*

From: *Amy Wilson, legislative assistant*

The Supreme Court has held that the attorney general cannot use his authority over federally controlled drugs to block the implementation of the Oregon "Death With Dignity" law. Now some of your colleagues want to enact a federal equivalent of that law that would allow physicians to prescribe deadly drugs to patients who request them.

Arguments for:

1. The law respects the people's rights to choose the time and place of their own death.
2. It is already permissible to post "Do Not Resuscitate" orders on the charts of terminally ill patients.
3. Physicians can be held to high standards in implementing the law.

Arguments against:

1. The law will corrupt the role of doctors as many think has happened in Holland, where a similar law has led some physicians to kill patients prematurely or without justification.
2. Such a law will lead some physicians to neglect or ignore the desires of the patient.
3. This law will undermine the more important goal of helping patients overcome pain and depression.

Your decision:

Support the law ________ Oppose the law ________

appointee, Justice Blackmun, wrote the decision making antiabortion laws unconstitutional; and another Nixon appointee, Chief Justice Burger, wrote the opinion upholding court-ordered school busing to achieve racial integration. A Reagan appointee, Justice O'Connor, voted to uphold a right to an abortion. The Supreme Court has become somewhat less willing to impose restraints on police practices, and it has not blocked the use of the death penalty. But in general the major features of Court activism and liberalism during the Warren years—school integration, sharper limits on police practice, greater freedom of expression—have remained intact.

The reasons for the growth in court activism are clear. One is the sheer growth in the size and scope of the government as a whole. The courts have come to play a larger role in our lives because Congress, the bureaucracy, and the president have come to play larger ones. In 1890 hardly anybody would have thought of asking Congress—much less the courts—to make rules governing the participation of women in college sports or the district boundaries of state legislatures. Today such rules are commonplace, and the courts are inevitably drawn into interpreting them. And when the Court decided how the vote in Florida would be counted during the 2000 presidential election, it created an opportunity in the future for scores of new lawsuits challenging election results.

The other reason for increased activism is the acceptance by a large number of judges, conservative as well as liberal, of the activist view of the function of the courts. If courts once existed solely to "settle disputes," today they also exist in the eyes of their members to "solve problems."

★ SUMMARY ★

An independent judiciary with the power of judicial review—the right to decide the constitutionality of acts of Congress, the executive branch, and state governments—can be a potent political force in American life. That influence has been realized from the earliest days of the nation, when Marshall and Taney put the Supreme Court at the center of the most important issues of the time. From 1787 to 1865 the Supreme Court was preoccupied with the establishment of national supremacy. From 1865 to 1937 it struggled with defining the scope of political power over the economy. In the present era it has sought to expand personal liberties.

The scope of the courts' political influence has increasingly widened as various groups and interests have acquired access to the courts, as the judges serving on them have developed a more activist stance, and as Congress has passed more laws containing vague or equivocal language. Whereas in other political arenas (the electorate, Congress, the bureaucracy) the influence of contending groups is largely dependent on their size, intensity, prestige, and political resources, the influence of contending groups before the courts depends chiefly on their arguments and the attitudes of the judges.

Though the Supreme Court is the pinnacle of the federal judiciary, most decisions, including many important ones, are made by the several courts of appeals and the ninety-four district courts. The Supreme Court can control its own workload by deciding when to grant *certiorari.* It has become easier for citizens and groups to gain access to the federal courts (through class-action suits, by *amicus curiae* briefs, by laws that require government agencies to pay legal fees, and because of the activities of private groups such as the NAACP and the ACLU).

At the same time, the courts have widened the reach of their decisions by issuing orders that cover whole classes of citizens or affect the management of major public and private institutions. However, the courts can overstep the bounds of their authority and bring upon themselves a counterattack from both the public and Congress. Congress has the right to control much of the courts' jurisdiction, but it rarely does so. As a result the ability of judges to make law is only infrequently challenged directly.

RECONSIDERING WHO GOVERNS?

1. ***Why should federal judges serve for life?***

   Strictly speaking, they serve during "good behavior," but that means they would have to be impeached and convicted in order to remove them. The reason for this protection is clear: The judiciary cannot be independent of the other two branches of government if judges could be easily removed by the president or Congress, and this independence ensures that they are a separate branch of government.

RECONSIDERING TO WHAT ENDS?

1. ***Why should federal courts be able to declare laws unconstitutional?***

   Though the Constitution does not explicitly give them that power, they have acquired it on the reasonable assumption that the Constitution would become meaningless if the president and Congress could ignore its provisions. The Constitution, after all, states that it shall be the "supreme law of the land."

2. ***Should federal judges only interpret existing laws or should they be able to create new laws?***

   The federal courts rarely think that their decisions create entirely new laws, but in fact their interpretations sometimes come close to just that. One reason is that many provisions of the Constitution are vague. What does the Constitution mean by "respecting an establishment of religion," the "equal protection of the law," or a "cruel and unusual punishment"? The courts must give concrete meaning to these phrases. But another reason is the personal ideology of judges. Some think that a free press is more important than laws governing campaign finance, while others think that a free press must give way to such laws. Some believe that the courts ought to use federal law to strike down discrimination, but others think that affirmative action programs must be put in place.

WORLD WIDE WEB RESOURCES

Federal Judicial Center: **www.fjc.gov**
Federal courts: **www.uscourts.gov**
Supreme Court decisions: **www.law.cornell.edu**
Finding laws and reports: **www.findlaw.com**

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